

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis  
Bankruptcy Judge  
Sacramento, California

October 9, 2014 at 10:30 a.m.

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1. <a href="#"><u>13-29803-E-7</u></a> SPENCER ROBBINS AND HCS-5            MONICA IBARRA-ROBBINS Holly S. Burgess	MOTION FOR COMPENSATION BY THE LAW OFFICE OF HERUM/CRABTREE/SUNTAG FOR DANA A. SUNTAG, TRUSTEE'S ATTORNEY(S) 9-11-14 [ <a href="#"><u>101</u></a> ]
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**Final    Ruling: No appearance at the October 9, 2014 hearing is required.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on September 11, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees 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). 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 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.

<p><b>The Motion for Allowance of Professional Fees is granted in the amount of \$20,000.00.</b></p>
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**FEES REQUESTED**

Herum\Crabtree\Suntag ("HCS"), the Attorney ("Applicant") for Kimberly J. Husted the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period November 25, 2013 through September 30, 2014. The order of the court approving employment of Applicant was entered on December 4, 2013, Dckt. 44.

October 9, 2014 at 10:30 a.m.

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## VERIFIED APPLICATION FOR FEES

Recently the court has noticed a trend by which non-attorneys are "verifying" motions or application, stating that the information therein is true and correct under penalty of perjury. Generally, these "verified" motions contain all but fatal defects. First, the person verifying fails to show that he or she has personal knowledge of the facts asserted therein. Second, the person providing the verification attempts to "verify" legal allegations or conclusions. Third, the person providing the verification purports to have personal knowledge of how the attorney or law firm runs its business or maintains its books and records. The court has become concerned that clients, including bankruptcy trustees, are merely signing whatever documents are put in front of them by attorneys - regardless of whether the person providing the verification has any personal knowledge and without any good faith personal knowledge that what is being stated under penalty of perjury is true.

Here, the Motion for fees is "verified" by Kimberly Husted, the Chapter 7 Trustee. Taken at face value, Ms. Husted testifies under penalty of perjury that the following is true based on her personal knowledge (Fed. R. Evid. 601, 602):

- A. On February 1, 2014, the Suntag Law Firm merged with Herum\Crabtree, and the merged firm is Herum\Crabtree\Suntag ("HCS").
- B. HCS spend 13.8 hours on general case administration, and then states under penalty of perjury what HCS did. FN.1.

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FN.1. The Trustee purports to have personal knowledge of what HCS did, not merely repeat what is on billing statements provided by HCS. This appears to show that the Trustee is either affiliated with or part of said law firm to have such personal knowledge.  
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- C. States under penalty of perjury what is in the Schedules.
- D. That on December 19, 2014, HCS (not any specific attorney) spoke with a Ms. Feurtado. (Trustee does not show how she has personal knowledge of such a conversation occurring.)
- E. Ms. Feurtado told HCS (not any specific attorney at HCS) that proof of the Debtors' bankruptcy was required. (Trustee does not show how she has personal knowledge of what Ms. Feurtado told HCS.)
- F. States under penalty of perjury that HCS (not any specific attorney at HCS) made several attempts to contact Ms. Feurtado.
- G. HCS had multiple phone conversations with Debtors' counsel.
- H. That Debtors' counsel failed to provide information to HCS.
- I. HCS provided copies of sale agreements to Debtors, but Debtors refused to sign the agreements.

J. On June 19, 2014, HCS (not any specific attorney) appeared at a hearing in this court.

K. That HCS spent 55.3 hours in connection with selling assets of the bankruptcy estate.

First and Final Application, Dckt. 101.

In signing the verification, the Trustee has stated under penalty of perjury that everything in the Application for Fees is true and correct. But the Trustee has no basis for having personal knowledge of many of the alleged facts. From its face, it is clear that Trustee does not have personal knowledge, but is merely parroting what some unidentified attorney at HCS has told her.

The Trustee and Counsel may argue, "really, these are just general statements, and there are declarations and exhibits which provide the detail, don't worry about what this Trustee is willing to say under penalty of perjury." Such a response would demonstrate a cavalier attitude toward testimony under penalty of perjury and either (1) a declarant who is an inactive participant in the case, just doing whatever he or she is told by the attorneys, (2) a declarant who will sign whatever is put in front of him or her, without review, so long as the desired result is obtained, or (3) a declarant who is being advised that making such statements for which the declarant has no personal knowledge is ok, because the attorney says it is ok.

The Trustee and HCS need to review their procedures, the law, and what it means to make statements under penalty of perjury. Such "verifications" which on their face demonstrate no personal knowledge not only put at peril the matter then before the court, but diminish the credibility of the declarant and attorneys.

#### **Declaration in Support of Motion**

Dana Suntag, a partner in HCS, has provided his declaration under penalty of perjury in support of the Motion. In it he authenticates the exhibits and provides personal knowledge testimony relating to the legal services provided by attorneys at HCS to the Trustee. It appears that he may actually be the person with the personal knowledge of the facts which the Trustee attempted to state under penalty of perjury by verifying the Application.

#### **TASK BILLING ANALYSIS**

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

General Case Administration: Applicant spent 13.8 hours in this category.

1. Applicant assisted Client with preparing the employment application, preparing stipulations extending Trustee's deadlines to object to exemptions and to file a complaint objecting to the Debtors' discharge, and preparing the present

motion for compensation.

Efforts to Assess and Recover Property of the Estate: Applicant spent 55.3 hours in this category.

1. Applicant made efforts to obtain information from Gemini REA who the Trustee was attempting to contact to sell Debtors' Membership Interests.
2. Applicant spoke with Rachael Feurtado of Gemini REA who required proof of Debtors' bankruptcy and that Ms. Husted was the appointed trustee.
3. Applicant sent these required documents but was unable to get in contact Ms. Feurtado afterwards.
4. Contacted Debtors' counsel in attempting to obtain information about the membership interests, however, Debtors' counsel failed to provide the information.
5. Applicant reviewed offers from Partnership Liquidity Investors LLC ("PLI") for the Membership Interests in the amounts of \$125,000 and \$65,000, respectively.
6. Upon Trustee's conclusion that the offers were reasonable, Applicant prepared purchase and sale agreements for the Membership Interests.
7. After Debtors' refusal to sign the sale agreements, Applicant revised the agreements to exclude Debtors as parties and sent the agreements to PLI for signing.
8. Applicant prepared and filed a reply to Debtors' opposition to the Motion to Sell.
9. Applicant appeared in person at the hearing on June 19, 2014 where the court granted the motion and conducted an auction of the Membership Interests. The order was entered on June 21, 2014 granting the motion to sell the Membership Interests for \$248,000.00.

Significant Motions and Other Contested Matters: Applicant spent 8.9 hours in this category.

1. Applicant reviewed the Debtors' request to convert to a Chapter 13.
2. Applicant prepared and filed an opposition to the conversion.
3. On June 19, 2014 Applicant appeared in person on the hearing to convert which this Court entered an order denying Debtors' motion.

#### **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). 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.

### **Benefit to the Estate**

Even if the court finds that the services billed by attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for

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

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

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

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

*Id.* at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including \$248,000 for the sale of the Membership Interests of Gemini 305 West 39th Street 5, LLC; and Gemini Parkway Plaza 19, LLC. The estate has \$244,989.07 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

#### **FEES ALLOWED**

The fees request 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:

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
Dana Suntag (1986)	10.6	\$315.00	\$3,339.00
Loris Bakken (2001)	62.0	\$295.00	\$18,290.00
Wendy Locke (2012)	2.5	\$225.00	<u>\$562.50</u>
<b>Total Fees For Period of Application</b>			\$22,191.50

The Applicant requests a reduced total amount of \$20,000. The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$20,000 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$829.24 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Copying Cost	\$0.10	\$616.00
Postage		\$213.24
Total Costs Requested in Application		\$829.24

The First and Final Costs in the amount of \$829.24 subject to final review pursuant to 11 U.S.C. § 330] and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Applicant has requested a reduced amount of \$20,000.00 from the actual total fees and costs of \$23,281.74. Applicant is allowed, and the Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees and Costs                      \$20,000.00

pursuant to this Application 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 [name of applicant] ("Applicant"), Attorney for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that HCS is allowed the following fees and expenses as a professional of the Estate:

HCS, Professional Employed by Trustee

Fees and Expenses in the amount of \$ 20,000.00,

**IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

2. [13-29803](#)-E-7 SPENCER ROBBINS AND MOTION FOR COMPENSATION FOR  
KJH-2 MONICA IBARRA-ROBBINS GABRIELSON & COMPANY,  
Holly S. Burgess ACCOUNTANT(S)  
8-26-14 [[95](#)]

**Final Ruling: No appearance at the October 9, 2014 hearing is required.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on August 26, 2014. By the court's calculation, 44 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees 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). 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 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.

<p><b>The Motion for Allowance of Professional Fees is granted in the amount of \$3,714.48.</b></p>
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#### **FEES REQUESTED**

Gabrielson & Company, the Accountant ("Applicant") for Kimberly Husted the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period December 3, 2013 through August 10, 2014. The order of the court approving employment of Applicant was entered on December 10, 2013, Dckt. 50.

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

Prepared Federal and California Estate Income Tax Returns: Applicant spent 8.9 (1.7 in 2013, 7.2 in 2014) hours in this category. Applicant assisted Client with preparing the first and final 2014 federal and California estate income tax returns for the separate taxable estates of Spencer Robbins and Monica Ibarra-Robbins, including analysis of tax basis and tax impact of sale of two LLC business interests in real property assets.

Administrative Functions: Applicant spent 1.6 hours in this category.



Applicant prepared accountant declaration and related employment documents for trustee review. Applicant also prepared first and final fee application, including detailed description of tax services. A total of 1.0 hours of this time relates to preparation of this first and final fee application.

#### **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). 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.

#### **Benefit to the Estate**

Even if the court finds that the services billed by professional are "actual," meaning that the fee application reflects time entries properly

charged for services, the professional must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). A professional must exercise good billing judgment with regard to the services provided as the court's authorization to employ a professional to work in a bankruptcy case does not give that professional "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

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

*Id.* at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including accounting and tax services. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

#### **FEES ALLOWED**

The fees request 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:

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
Michael Gabrielson (2013)	2.3	\$325.00	\$747.50
Michael Gabrielson (2014)	8.2	\$345.00	<u>\$2,829.00</u>
<b>Total Fees For Period of Application</b>			\$3,576.50

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$3,576.50 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$137.98 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Copies	\$0.10 [FN. 1]	\$106.20
Postage		\$31.78
Total Costs Requested in Application		\$137.98

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FN.1. The Applicant indicated copying costs of \$.20 per copy in Exhibit 2 (Dckt. 99), but the calculations are based on a rate of \$.10 per copy.  
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The First and Final Costs in the amount of \$137.98 subject to final review pursuant to 11 U.S.C. § 330 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case under the confirmed Plan.

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

Fees	\$3,576.50
Costs and Expenses	\$ 137.98

pursuant to this Application 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 Gabrielson & Company ("Applicant"), Accountant for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Gabrielson & Company is allowed the following fees and expenses as a professional of the Estate:

Gabrielson & Company, Professional Employed by Trustee

Fees in the amount of \$ 3,576.50  
Expenses in the amount of \$ 137.98,

**IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

3. [13-20051](#)-E-7 TYRONE BARBER  
HSM-6 Cory A. Birnberg

MOTION TO APPROVE STIPULATION  
AND EXTENDING TIME TO FILE  
OBJECTIONS TO DEBTOR'S CLAIMS  
OF EXEMPTIONS  
8-15-14 [[284](#)]

**Final Ruling:** No appearance at the October 9, 2014 hearing is required.  
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on August 15, 2014. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion for Order Approving Stipulation and Extending Time to File Objections to Debtor's Claims of Exemptions 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion for Order Approving Stipulation is granted.**

Gary Farrar, the Chapter 7 Trustee ("Trustee") seeks an Order Approving Stipulation and Extending Time to File Objections to the Debtor's Claims of Exemptions. The deadline to file objections to the Debtor's claims of exemptions is presently set for August 15, 2014. The Debtor and the Trustee have entered into a stipulation to extend the deadline for the Trustee to object to the Debtor's claims of exemptions until August 29, 2014. Exhibit A, Dckt. 287.

Pursuant to Federal Rule of Bankruptcy Procedure 4003(b)(1), the court may, for cause, extend the time to file an objection, if before the time to object expires, a party in interest files a request for an extension.

Here, the Trustee has filed the request before the time to file objections to exemptions has expired. Further, the Trustee provides cause exists for requesting the extension, as the Trustee and the Debtor have reached

an agreement pursuant to which the Debtor will buy back assets from the estate. The Trustee has attached the stipulation agreeing to extend the time to file an objection to Debtors' exemptions.

Based on the foregoing, the court finds sufficient cause to grant the stipulation and extend the deadline to file objections to Debtor's claims of exemption to and including August 29, 2014.

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 Stipulation filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted and the deadline for the Trustee to file objections to Debtor's claims of exemption is extended to and including August 29, 2014.

4. [13-20051](#)-E-7 TYRONE BARBER  
HSM-7 Cory A. Birnberg

MOTION TO EXTEND DEADLINE TO  
FILE A COMPLAINT OBJECTING TO  
DISCHARGE OF THE DEBTOR  
8-15-14 [[288](#)]

**Final Ruling:** No appearance at the October 9, 2014 hearing is required.  
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on August 15, 2014. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion for Order Approving Stipulation and Extending Time to File Objections to Debtor's Claims of Exemptions 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). 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.

<b>The Motion for Order Approving Stipulation is granted.</b>
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Gary Farrar, the Chapter 7 Trustee ("Trustee") seeks an Order Approving Stipulation and Extending Time to File Objections to the Discharge of Debtor. The deadline to file objections to the Debtor's discharge is presently set for August 15, 2014. The Debtor and the Trustee have entered into a stipulation to extend the deadline for the Trustee to object to the Debtor's claims of exemptions until August 29, 2014. Exhibit A, Dckt. 291.

Pursuant to Federal Rule of Bankruptcy Procedure 4003(b)(1), the court may, for cause, extend the time to file an objection, if before the time to object expires, a party in interest files a request for an extension.

Here, the Trustee has filed the request before the time to file objections to discharge has expired. Further, the Trustee provides cause exists for requesting the extension, as the Trustee and the Debtor have reached an agreement pursuant to which the Debtor will buy back assets from the estate. The Trustee has attached the stipulation agreeing to extend the time to file an objection to Debtors' exemptions.

Based on the foregoing, the court finds sufficient cause to grant the stipulation and extend the deadline to file objections to Debtor's claims of exemption to and including August 29, 2014.

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 Stipulation filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted and the deadline for the Trustee to file objections to discharge of the debtor is extended to and including August 29, 2014.

5. [13-20051](#)-E-7 TYRONE BARBER MOTION TO SELL  
HSM-8 Cory A. Birnberg 9-10-14 [[293](#)]

**No Tentative Ruling:** The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

**Below is the court's tentative ruling.**  
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Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 10, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

<b>The Motion to Sell Property is <del>XXXXXXXXXXXX</del>.</b>
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The Bankruptcy Code permits Gary Farrar, the Chapter 7 Trustee ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363. Here, Movant proposes to sell the "Property" described as follows:

- a. Tadyaw Beach Resort & Spa (Real and Personal Property)
- b. 2006 Hummer H2 (nonexempt equity of \$2,362.00 based on a \$18,000.00 valuation)
- c. 2006 Lincoln Mark LT (nonexempt equity of \$5,623.00)
- d. 2007 Chevy Silverado 1500 (nonexempt equity of \$2,150.00)



- e. 2008 Ford Ranger (nonexempt equity of \$0.00)
- f. Ford F250 (nonexempt equity of \$1,863.00)
- g. 3 Labradors (nonexempt equity of \$500.00)
- h. Tools (nonexempt equity of \$800.00)
- i. Accounts Receivable (nonexempt equity of \$106,312.10)

The proposed purchaser of the Property is Tyrone Barber ("Debtor") and the terms of the sale are that Debtor will purchase all of the above properties for a single sum of \$30,000.00. The Trustee states in his Declaration that he believes that this price is fair, because the Tadyaw Resort assets are valued at approximately \$14,502.00. Additionally, the Trustee states that the value assigned to the accounts receivable by Debtor are unsupportable, given that the accounts either cannot be collected or are subject to significant defenses. The sale is also subject to overbidding, where interested parties will have a limited ability to test the market for these assets to protect the interests of the estate. All of the assets will be sold "as is" and shall be subject to any and all liens.

The Trustee and the Debtor have been in negotiations for this sale since August and the court finds that it is in the best interest of the estate, based on the representations by the Trustee and Debtor as well as the facts around the property.

#### **IDENTIFICATION OF ASSETS SOLD**

The Motion specifically identifies the various assets, with the exception of one - the "Tadyaw Beach Resort & Spa (Real and Personal Property." Though the parties may believe they know what this asset consists of, from the Motion the court cannot identify whether it consists of a lease of a pool, three lounge chairs, two umbrellas, five glasses, an ice chest, and one bottle opener, or it is a 15,000 square foot spa, health club, gym with equipment, sauna, steam room, and pool side restaurant and equipment. Motion, Dckt. 293. The Purchase and Sale Agreement is equally non-specific. Exhibit A, Dckt. 297. Neither the Motion nor Purchase Agreement provide any dollar limitation to the real or personal property being sold.

On Amended Schedule A the Debtor lists this asset as "Tadyaw Beach Resort & Spa Tolosa, Leyte, Philippines, as having a value of \$14,502.00 Dckt. 297 at 6. Amended Schedule A contains the following additional information about this asset, "Property destroyed in a super typhoon. No structures or personal property exists. Clean up costs estimated at \$75,000. There is no value now to the property and no ongoing business." Schedule B is consistent, stating that with respect to the Resort & Spa, "Due to Super Typhoon everything was destroyed, damaged, or looted." *Id.* at 9.

In his declaration, the Chapter 7 Trustee provides his analysis on valuing the assets being sold. Declaration, Dckt. 295. With respect to the scheduled \$106,312.10 in accounts receivable, the Trustee has concluded that most are uncollectable or subject to significant defenses.

The Trustee further testifies that the proposed sale is as a "package,"

due to the complicated nature of the Estate's interests in the Resort and underlying Resort Assets. The Trustee does not explain the "complicated nature" of the Estate's interest in these assets.

The court is faced with the dilemma of being asked to approve the sale of assets, the real and personal property of the Resort, without being able to identify the real and personal property of the resort. Compounding this situation is the Debtor stating under penalty of perjury that there is no personal property (or possibly real property) - "There I no value now to the property and no ongoing business," and "No structures or personal property exists," and "Due to Super Typhoon everything was destroyed, damaged, or looted." Amended Schedules A and B, Exhibits to Purchase Agreement, Dckt. 297.

For Amended Schedule A, while stating that the estate is a "fee owner," there is no description of the real property which is owned. There is merely a business name - "Tadyaw Beach Resort & Spa Tolosa."

With such evidence presented to the court, it appears that the court can only approve the sale of assets identified as,

The Business Name and right to operate the Business identified as "Tadyaw Beach Resort & Spa Tolosa" and the business name "Tadyaw Beach Resort & Spa Tolosa" in Leyte, Philippines.

#### **OCTOBER 9, 2014 HEARING**

At the October 9, 2014 hearing.....

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate.

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

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

The Motion to Sell Property filed by Gary Farrar, the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Gary Farrar, the Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Tyrone Barber ("Buyer"), ~~the Property commonly known as Tadyaw Resort and Spa~~, 2006 Hummer H2, 2006 Lincoln Mark LT, 2007 Chevy Silverado 1500, 2008 Ford Ranger, Ford F250, 3 labradors, tools, and accounts receivable, on the following terms:

1. The Property shall be sold to Buyer for \$30,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 297, and as further provided in this Order.

October 9, 2014 at 10:30 a.m.

2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
4. The Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.

6. [12-28879](#)-E-11 ANNETTE HORNSBY  
HC-1 Sunita Kapoor

MOTION TO DISMISS CASE AND/OR  
MOTION TO CONVERT CASE TO  
CHAPTER 7  
9-10-14 [[278](#)]

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

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

**Below is the court's tentative ruling.**  
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on September 10, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss or Convert Chapter 11 Case has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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.

<b>The Motion to Dismiss or Convert Chapter 11 Case is granted and the case is dismissed.</b>
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Stan Shore ("Creditor") filed the instant Motion to Dismiss or Convert Chapter 11 Case on September 10, 2014. Dckt. 278.

#### **MOTION**

Creditor seeks to have the case dismissed or converted because Annette Hornsby ("Debtor") has failed to prosecute this case with reasonable diligence,

has acted in bad faith, has failed to comply with court orders, and has failed to file a disclosure statement and confirm a plan within a reasonable time. Specifically, Creditor makes the instant motion because:

1. The bankruptcy case is already over two years old.
2. The Debtor has filed four plans and disclosure statements, none of which were confirmable. The proposed plans and disclosure statements suffered service issues and Debtor keeps referencing a possible contingent claim on a condominium in San Francisco.
3. The most recent plan that Debtor has filed is unconformable as Debtor is seeking to impermissibly modify a claim secured by Debtor's primary residence.
4. Debtor has filed 16 bankruptcy cases in the last seven years. The instant case was the Debtor's seventh bankruptcy filing since 2007 in her individual name and the sixteenth bankruptcy filing related to her. Every single one of Debtor's cases except for one (No. 0835711) was dismissed for Debtor's failure to adequately prosecute.
5. Debtor has repeatedly failed to serve her motions and disclosure statements in a proper manner. For example, Debtor's first two motions to value were denied because of procedural defects by the Debtor.
6. Debtor failed to comply with an order of the court to file an amended disclosure statement on or before September 2, 2014. Dckt. 252. Debtor did not file a disclosure until September 5, 2014 and is an example of her repeated abuse.

Creditor argues that a dismissal, rather than a conversion, of the case is appropriate because there are no assets to liquidate and the Debtor has mismanaged the estate. Furthermore, the Creditor argues that since the Debtor has already received a discharge, no discharge may be issued in this case. Creditor argues there are no assets worth selling for the benefit of the creditors.

Creditor argues that there are no compelling circumstances that justify deviating from the time frames required by 11 U.S.C. § 1112(b)(3).

#### **NO OPPOSITION**

No opposition or pleading has been filed by any party.

#### **CREDITOR'S REPLY**

On October 1, 2014, Creditor filed a Reply to the Motion to Dismiss. Dckt. 291. In the reply, Creditor argues that pursuant to Local Rule 9014-1(f)(1)(ii), "failure of the responding party to timely file written opposition may be deemed a waiver of any opposition to the granting of the motion." Creditor states that since no party has filed an opposition, the instant motion should be granted.

# **OCTOBER 7, 2014 PLAN AND DISCLOSURE STATEMENT**

On October 7, 2014, the Debtor in Possession filed her proposed fifth amended plan and disclosure statement. Dckt. 305, 306. The court has reviewed these in considering this Motion. The secured portion of Movant's Claim, \$115,000.00 is to be amortized over twenty years with a 5.5% interest rate, with the balance due in full in ten years. This amount is consistent with the Movant's Proof of Claim, No. 10, which states a \$113,095.68 secured claim. The plan provides for the claim secured by a senior lien on the collateral for Movant's claim to be paid pursuant to the terms of a loan modification. Fifth Amended Plan, Dckt. 305. The court approved the Loan Modification, order filed on June 12, 2013, Dckt. 130.

In the fifth Amended Disclosure Statement Debtor identifies the following income sources and expenses. Dckt. 306 at 9-10.

Income Source		Related Expenses		Net Income
2319 Bennington Dr. Rental Income	\$1,500.00	Senior lien - P, I, T, I, and HOD	(\$3,093.14)	
		Landscaping & Repairs	(\$881.86)	
		Stan Shore Trust Secured Claim	(\$791.07)	(\$3,266.07)
324 Moonraker Dr	\$2,200.00	Lien P,I,T,I	(\$1,683.00)	
		Repairs	(\$842.43)	
		Maintenance & Vacancy Factor	(\$195.00)	(\$520.43)
Retirement	\$5,605.23	Living Expenses	(\$2,775.00)	\$2,830.23
Social Security	\$1,301.00			
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Total Income	\$10,606.23	Total Expenses	(\$10,261.50)	

For living expenses, in the fifth Amended Disclosure Statement Debtor lists the following:

- A. Electricity/Heating.....\$420.00
- B. Sewer & Garbage.....\$ 95.00
- C. Cable/Internet.....\$220.00
- D. Home Maintenance.....\$180.00

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E.	Food.....	\$577.00
F.	Clothing.....	\$200.00
G.	Laundry.....	\$100.00
H.	Medical and Dental.....	\$ 50.00
I.	Transportation.....	\$230.00
J.	Car Insurance.....	\$111.00
K.	Life Insurance.....	\$ 60.00
L.	Prescriptions.....	\$ 75.00
M.	Supplies.....	\$ 50.00
N.	AAA.....	\$ 15.00
O.	ADT Alarm.....	\$ 44.00
P.	Costco Dues.....	\$ 17.00
Q.	Recreations/Dining Out.....	\$200.00
R.	Long Term Insurance.....	\$ 61.00

No provision is made for payment of any income taxes. It may be that the Debtor believes that with the losses from operating two rental properties there will be no income tax owing.

Under the Loan Modification with Wells Fargo Bank, N.A., the principal balance of the senior secured claim is \$467,807.28 (\$110,597.56 in arrearage having been forgiven). \$5,807.28 of the principal balance will be non-interest bearing, with payment deferred. Interest at the rate of 4.125% will accrue on the \$462,000.00 remaining principal balance, to be paid over 480 equal installments, with the \$5,807.28 deferred principal due in one balloon payment in the 480<sup>th</sup> month. Loan Modification Agreement, Exhibit A, Dckt. 113.

A support document provided with the fifth Amended Disclosure Statement are Bid Proposals for repairs to be made to the two real properties. For the Bennington Drive Property the price is stated to be \$53,937.00 and for the Moonraker Property the price is stated to be \$62,245.62. It appears that the budget may have a monthly expense for these items, but is not clear on how the Debtor in Possession will obtain \$116,182.62 in financing to pay for the repairs.

## DISCUSSION

A Chapter 11 case may only be dismissed or converted for cause. 11 U.S.C. § 1112(b)(1). The Bankruptcy Code provides a list of causes, which are sufficient to support dismissal or conversion. *Id.* at § 1112(b)(4). Generally, such lists are viewed as illustrative rather than exhaustive; the court should "consider other factors as they arise, and use its equitable powers to reach the appropriate result in individual cases." *Pioneer Liquidating Corp. V. U.S. Trustee (In re Consol. Pioneer Mortg. Entities)*, 248 B.R. 368, 375 (B.A.P. 9th Cir. 2000) (citation omitted).

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

[O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).

Here, the Creditor believes that because Debtor has failed to prosecute this case with reasonable diligence, has acted in bad faith, has failed to comply with court ordered deadlines, and has failed to file a disclosure statement and confirm a plan within the two and a half years this case has been pending, the motion should be granted. The court is inclined to agree with the Creditor. The court finds sufficient cause for relief to be granted under 11 U.S.C. § 1112.

There are numerous discrepancies and inconsistencies that remain on Debtor's plans and disclosures statements that have not been corrected in the two years this case has been pending. Debtor has failed time and time again to properly serve parties or to abide by the simplest court ordered deadline, most notably failing to file an amended plan and disclosure statement by September 2, 2014. A debtor's "unexcused failure to satisfy timely any filing or reporting requirement established under this title or by any rule applicable to this case under this chapter ..." constitutes "cause" to convert or dismiss a Chapter 11 case. See 11 U.S.C. § 1112(b)(4)(F). Debtor has also grossly mismanaged her estate, wasting the resources of the estate and the creditors by the Debtor dragging her feet for the past two and a half years with no plan confirmed.

Additionally, this is Debtor's seventh individual bankruptcy case, but continues to be remiss in her responsibilities as a Debtor. FN.1. The Debtor's previous bankruptcy cases are:

1. 07-44398 (N.D. Ca., Oakland; dismissed for failure to file the schedules and other documents);
2. 08-40528 (N.D. Ca., Oakland; dismissed for failure to file the schedules and other documents);
3. 08-41908 (N.D. Ca., Oakland; dismissed for failure to file documents);
4. 08-29857 (E.D. Ca., Sacramento; dismissed for failure to file documents);
5. 08-35711 (E.D. Ca., Sacramento; Chapter 7 discharge)
6. 12-21050 (E.D. Ca., Sacramento; dismissed for failure to file documents)
7. 12-28879 (E.D. Ca., Sacramento; instant case)



FN.1. For the sake of argument, the court is not including the additional eight bankruptcies that the Creditor argues were related to the Debtor due to the interrelated properties in those cases. Seven bankruptcies in Debtor's individual name since 2007 suffices for purposes of the present Motion.

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These cases were filed within the last eight years. Local Rule 1015-1 requires the Debtor to file a Notice of Related Cases. See LBR 1015-1 (Bankr. E.D. Cal., May 1, 2012). The Debtor failed to file a Notice of Related Cases.

A Chapter 11 Debtor's inability to effectuate plan of reorganization and that a prejudicial delay to creditors warranted conversion of the Debtor's case to one under Chapter 7 and even dismissal. 11 U.S.C. § 1112(b), (b)(1). *In re Johnston*, 149 B.R. 158 (B.A.P. 9th Cir. 1992). The Debtor has been unable to have a plan confirmed since the filing of this case. Due to the numerous bankruptcies Debtor has filed in the past seven years, the multiple failed attempts at filing a confirmable plan, and Debtor's inability to abide by Local Rules or court orders, there are multiple grounds of cause to dismiss the case. Furthermore, it appears that the continuation of the case will result in more detriment to creditors than keeping the case open because of the administrative expenses that are depleting the estate and the lack of any assets that would benefit the interests of the creditors.

Even considering the Debtor's fifth Amended Plan, it is premised on the Debtor pouring income into overencumbered, negative cash flowing properties. While one could argue that making such payments on a residence, rather than renting, is at least cash neutral, there does not appear to be such business rationale for the Bennington Property. The fair market value for the Bennington property is stated to be \$476,063.00. It is encumbered by the Wells Fargo Bank, N.A. modified loan with the principal balance of \$476,063.00, and the Stan Shore Trust lien securing a \$115,000.00 claim. Thus, the property is overencumbered by 25% and is losing money at the rate of (\$3,266.07) a month. Losing over (\$36,000.00) from renting the property, it does not appear that gambling on a reasonable rise in the real estate market ever provides the Debtor with a positive recovery. FN.2.

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FN.2. If one were to assume a 3% increase in value per year and ignoring costs of sale, the following ten year chart is generated, to show the economic value of this property when the ten-year balloon payment on Movant's claim comes due in year ten.

Value		3% Annual Increase, compounded		Annual Loss (\$3,266.07 x 12 months)		Net Increase/(Decrease) of Appreciation over Operational Loss
Beginning Value	\$476,063.00	\$14,281.89		(\$39,192.84)		(\$24,910.95)
End Year 1	\$490,344.89	\$14,710.35		(\$39,192.84)		(\$24,482.49)
End Year 2	\$505,055.24	\$15,151.66		(\$39,192.84)		(\$24,041.18)

End Year 3	\$520,206.89	\$15,606.21		(\$39,192.84)		(\$23,586.63)
End Year 4	\$535,813.10	\$16,074.39		(\$39,192.84)		(\$23,118.45)
End Year 5	\$551,887.49	\$16,556.62		(\$39,192.84)		(\$22,636.22)
End Year 6	\$568,444.12	\$17,053.32		(\$39,192.84)		(\$22,139.52)
End Year 7	\$585,497.44	\$17,564.92		(\$39,192.84)		(\$21,627.92)
End Year 8	\$603,062.37	\$18,091.87		(\$39,192.84)		(\$21,100.97)
End Year 9	\$621,154.24	\$18,634.63		(\$39,192.84)		(\$20,558.21)
End Year 10	\$639,788.86	\$19,193.67		(\$39,192.84)		(\$19,999.17)
	Total Appreciation over Ten Year Period	\$168,637.64	Losses Over Ten Year Period	(\$431,121.24)	Net Loss Over Ten Year Period	(\$223,290.76)

Thus, it appears that even with a modest, annual increase in value, compounded, the Debtor would still lose almost a quarter of a million dollars. Even with an annual appreciation in value of 6% compounded, at the end of ten years the gross appreciation in value would almost equal, still a (\$4,140.27) loss, the annual losses from operation. The 6% compounded appreciated value would be \$828,427. If one assumes 8% for sales commissions and costs of sale, that would generate sales costs of (\$66,274.16). Thus, even with an aggressive, compounded appreciation in value, the Debtor still loses (\$70,000.00) after spending ten years paying Wells Fargo Bank, N.A. on the claim secured by the senior lien and the Stan Shore Trust on the claim secured by the junior lien.

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The Debtor has now been in this Chapter 11 case for two and one-half years, unable to prosecute a plan. The fifth Amended Chapter 11 Plan does not appear to be based on economic reality.

Cause exists to dismiss the Chapter 11 case, and appears to be in the best interests of creditors and the estate. The court will dismiss the case.

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 Dismiss filed by the United States Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause

appearing,

**IT IS ORDERED** that the Motion to Dismiss is granted and the Chapter 11 case is dismissed.