

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Modesto, California

October 10, 2013 at 10:30 a.m.

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1. [13-90806-E-7](#) DAVID/MAELENA SMITH MOTION TO CONVERT CASE FROM
GFG-7 Guillermo F. Geisse CHAPTER 7 TO CHAPTER 13
9-13-13 [[18](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, and Office of the United States Trustee on September 13, 2013. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Convert has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's decision is to continue the hearing on the Motion to Convert and Order the Filing of Supplemental Pleadings. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Debtors seek to convert this case from Chapter 7 to Chapter 13. The Bankruptcy Code authorizes a one-time, near absolute right of conversion from Chapter 7 to Chapter 13. 11 U.S.C. § 706(a); see also *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007).

TRUSTEE'S OPPOSITION

Trustee Michael D. McGranahan, Chapter 7 Trustee opposes Debtor's attempt to convert the present case. Trustee argues that under 11 U.S.C. § 1307(c)(2) Debtor does not qualify for conversion because:

- A. Debtors have engaged in a pattern and practice of bad faith through amendments of their schedules;

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- B. Debtors' declaration (for Mr. Smith) and their supporting documents filed for conversion do not demonstrate they will be able to have a viable or confirmable Chapter 13 Plan based on the nonexempt assets which must be distributed to creditors;
- C. Debtors' notice of conversion is ambiguous and confusing in that it purports to both require and not require a response to the supporting motion by creditors and other parties in interest.

In presenting his analysis of the bankruptcy case to date, the Trustee directs the court's attention to the following specific acts and conduct of the Debtors.

First, when the case was filed the Debtor was unemployed, receiving unemployment insurance income of \$1,948.50 a month and the Co-Debtor was employed and receiving income of \$3,233.98 a month. Schedule I, Dckt. 1. The court's review of Schedule identifies that the Co-Debtor's gross income is \$4,659.22 a month, from which there are extensive deductions, including \$216.67 for "Hartford def comp," \$88.12 for COLA contribution, and \$1,133.58 for "Hartford loan."

Schedule B filed by the Debtors lists a "Pension Account with The Hartford" having a value fo \$112,112.83. On Schedule C this is listed as exempt pursuant to California Code of Civil Procedure § 703.140(b)(10)(E), which applies to a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor or any dependant of the debtor. Dckt. 1 at 14 and 17. No debt is listed on Schedule F for a loan taken out from "The Hartford."

The Trustee points out that based on Schedules I and J, filed by the Debtors under penalty of perjury, their expenses so exceed their income that they are currently running a negative (\$2,062.02) a month cash flow. Dckt. 1 at 28-29 and 30. Though it is stated in the Motion, the Debtors have offered no evidence as to what employment the Debtor may have obtained and have not provided declarations stating the post-petition changes in their income and expenses. FN.1

FN.1. On Schedule I the Debtor list 5 dependants, consisting of 3 minor children (ages 10, 17, and 17), an adult son (age 20), and the Co-Debtor's mother (age 79). Though listed as dependants, the Debtors fail to disclose what income or benefits that either the adult son or the mother receive and have available to contribute to this family unit if they are being claimed as dependants. On Form 22A the Debtors state that their debts are primarily non-consumer. Dckt. 1 at 51. In response to Question 18 of the Statement of Financial Affairs, the Debtors state that their business was "Santa Fe Investments & Improvements," which was to "fix & flip business that turned into landlord" which operated from 2005 to 2011. Dckt. 1 at 38.

Second, and this may well be the impetus of the conversion, the Trustee states that he has been actively administering this case, assembling

assets of the estate consisting of at least three vehicles with nonexempt equity totaling \$13,675.00 and nonexempt equity in the Debtors' home which the Trustee values at \$83,000.00. Based on these values, the Trustee projects that a Chapter 13 Plan would need to be funded by the Debtors with monthly plan payments of \$1,611.25 to \$2,361.25 a month, exclusive of Chapter 13 Trustee administrative expenses.

The Trustee asserts that the Debtors misrepresented the value of the Chiburis Court property in their schedules, stating that it had a value of \$247,500.00 and was subject to a lien of \$267,911.00. Then, the Debtors amended the schedules to restate the value to be \$247,500.00 to \$260,000.00. They then decreased the amount of the secured claim from \$267,911.00 to \$132,911.00. This decrease in the secured debt was identified as a decrease in the secured debt owed to the Debtors' son.

Each of the times the Debtors states, and then restated, without explanation, the increases and decreases, they did so under penalty of perjury. The Trustee asserts that the Debtors' valuation of the Chiburis Court property is "misleading," asserting that his investigation that the property has a value of at least \$340,000.00 (being a 3,340 square foot home, and projecting a value of \$100.00 a square foot).

DISCUSSION

A "bankruptcy judge may override a Chapter 7 debtor's conversion right based on a finding of bad faith." *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 379 (2007). The authority to convert is left to the discretion of the bankruptcy court. *Id.* at 377. In determining whether the debtor's conversion involved bad faith, "a bankruptcy judge must review the totality of the circumstances." *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994). Under the "totality of the circumstances" test, the court examines whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or filed his Chapter 13 petition or plan in an inequitable manner. *Id.* Debtor's history of filings and dismissals is relevant in determination of "bad faith." *Id.*

The Trustee is correct, when parties make statements under penalty of perjury they have significance. When parties recant such statements with new, different fact statements, the court is left unsure as to when the person is telling the truth and when they are saying whatever "helps win the case," unless a plausible explanation is provided for the change. It is troubling when values of assets bob about. It is even more troubling when a debt "owed" to a family member insider is stated at one amount (which coincidentally allows the debtor to make it appear property is over encumbered), and then when the Trustee begins looking about, it changes.

The statements under penalty of perjury by the Debtors include the following, in chronological order.

Document and Date Filed	Value of the Property	Claims Secured by the Property	Exemption Claimed in the Property	Andrew Smith Claim Secured by 2 nd Deed of Trust
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April 26, 2013 Schedule A	\$247,500	(\$267,911)		
April 26, 2013 Schedule D				(\$175,000)
April 26, 2013 Schedule C			\$0	
August 14, 2013 Schedule A	\$260,000	(\$132,911)		
August 14, 2013 Schedule C C.C.P. § 704.950 (declared homestead)			(\$100,000)	
August 19, 2013 Schedule D				(\$40,000)

On August 21, 2013, the Chapter 7 Trustee filed his Notice of Assets and the Clerk's Office issued a Notice to File Claims (Dckt. 16).

In September 13, 2013, the present motion was filed. Dckt. 18. The Debtors provided their declaration in support of the Motion. Dckt. 21. However, in the Declaration the Debtors fail to provide their testimony under penalty of perjury. Rather, they (intentionally or unintentionally) merely state that they make their statements only "respectfully submitted." Their signature block (for which there are "/s/ signatures") is orphaned on a page separate and apart from any of the respectfully stated comments made by the Debtors.

As addressed by the Supreme Court the rights of a debtor to convert or dismiss a Chapter 13 case are almost absolute. However, the overriding factor goes to the core of bankruptcy proceedings. With the ability to get great benefits from bankruptcy, debtors must proceed in good faith, providing candid, honest information. The Ninth Circuit Court of Appeals most recently review this concept in *Danielson v. Flores (In re Flores)*, ___ F.4th ___, 2013 U.S. App. LEXIS 18413 (9th Cir. 2013), stating,

"Finally, our interpretation of § 1325(b)(1)(B) is consistent with the policies that underlie the Bankruptcy Code and the BAPCPA amendments. "The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama v. Citizens Bank*, 549 U.S. 365, 367, 127 S. Ct. 1105, 166 L. Ed. 2d 956 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286, 287, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991))."

The Collier on Bankruptcy discussion of Marrama notes there being a simple, practical reason for the conversion right to 13 being "almost absolute," if converted it is the bankruptcy judge who will consider whether it should be reconverted to a Chapter 7 due to the debtor's conduct. 6 COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 706.02.

At this juncture, the conduct of the Debtors raises significant credibility and truthfulness issues. The court has to question, "what is the value of the property?," "what are the liens against the property?," "how do the Debtors not know and misstate the amount of the debt owed to their son?," and "how are the Debtors going to fund a plan without any positive

income?" Possibly *bona fide*, good faith answers exist to these questions, but the Debtors have mutely failed to provide them.

The court would be well justified to maintain this as a Chapter 7 case and provide the Debtors and their counsel with exactly what they sought - the extraordinary relief of a Chapter 7 case and the bankruptcy trustee proceeding with an orderly liquidation of their assets. Such would be of no surprise to the Debtors.

However, the court will afford the Debtors the opportunity to prove their good faith and ability to prosecute a Chapter 13 case. The court continues the hearing to 10:30 a.m. **on -----, 2013**, and requires the following,

- A. On or before November 7, 2013, the Debtors shall file and serve on the Chapter 7 Trustee, counsel for the Chapter 7 Trustee, and the U.S. Trustee, an independent third party valuation of the 3700 Chiburis Court, Modesto California property.
- B. On or before November 7, 2013 the Debtors shall file and serve on the Chapter 7 Trustee, counsel for the Chapter 7 Trustee, and the U.S. Trustee, an accounting for the loan made by their son Andrew Smith, copies of all loan documents (including deed of trust), documentation of the monies paid to or for the Debtors which comprise the loan, and statement of when the monies were loaned, interest computation, and payments made by or for the benefit of the Debtors.
- C. That the Debtors shall, as a condition of converting the case, pay through their Chapter 13 Plan the full amount of the Chapter 7 Trustee's fees and expenses and the fees and expenses of counsel for the Chapter 7 Trustee based on the assets which would have been administered by the Chapter 7 Trustee. These administrative expenses shall be in addition to the amount which the Debtors are otherwise required to pay to creditors and Chapter 13 Trustee administrative expenses in the Chapter 13 case.

2. [13-90608-E-11](#) **MODESTO SELF STORAGE
DCJ-2 INVESTORS, LLC
David C. Johnston**

**MOTION TO DISMISS CASE
9-19-13 [[103](#)]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors holding the 20 largest unsecured claims, all creditors, parties requesting special notice, and Office of the United States Trustee on September 19, 2013. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Dismiss Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Dismiss Case. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtor moves to voluntarily dismiss this Chapter 11 case pursuant to 11 U.S.C. § 1112(b). Debtor argues that there is no reason for the Debtor to remain in Chapter 11 case and incur legal fees required through plan confirmation when the Debtor's primary asset, the real property 1305 10th Street, Modesto, California, has been lost to judicial foreclosure (after obtaining relief from the automatic stay).

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 court finds sufficient cause to dismiss the Chapter 11 case, as the remaining obligations are a guarantee or minimal. The dismissal of the case will be in the best interest of creditors.

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 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the case is dismissed.

3. [13-91209-E-7](#) THOMAS LITTLE
Pro Se

MOTION TO CONVERT CASE FROM
CHAPTER 7 TO CHAPTER 13
8-29-13 [40]

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

Incorrect Notice Provided. No proof of service was submitted in support of this motion. Proof of Service is required pursuant to Local Rule 9014-1(e).

Tentative Ruling: The Motion to Convert has not 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 court's tentative decision is to deny the Motion to Convert. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Debtors seek to convert this case from Chapter 7 to Chapter 13.

However, pursuant to Federal Rule of Bankruptcy Procedure 2002(a)(4), 21 days notice is required in a motion to convert from a chapter 7 to a chapter 13 case. Further, Federal Rule of Bankruptcy Procedure 9034 requires that the United States Trustee be served. Here, as no proof of service has been provided the court is unable to determine if proper notice was given or the proper parties have been served.

In addition, the moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here the moving party reused a Docket Control Number. This is not correct. Counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

If the Debtors can provide proper notice and service at the hearing, the court will issue the following alternative ruling:

The Debtors seek to convert this case from Chapter 7 to Chapter 13. The Bankruptcy Code authorizes a one-time, near absolute right of conversion from Chapter 7 to Chapter 13. 11 U.S.C. § 706(a); *see also Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007). Debtor testifies that he is converting the case in good faith, that he is eligible for Chapter 13 relief, and that his case has not been previously converted.

However, the motion just provides these statements as conclusions. No detail is provided as to what and how the Chapter 13 case will be prosecuted, what has occurred that makes a Chapter

13 case appropriate (in light of the Debtor choosing Chapter 7 previously), and no evidence is provided of the court.

The Chapter 7 Trustee has filed a no asset report, which indicates that the Debtor is not attempting to save assets from liquidation by the Trustee. The Statement of Financial Affairs indicates that the Debtor has received \$1,060.00 in income in 2013, \$23,950.00 income in 2012, and \$24,493.00 income in 2011. Questions 1 and 2, Statement of Financial Affairs, Dckt. 1. The Statement of Current Monthly Income and Means Test, Form 22A, states that the Debtor had no monthly income from wages/salary/commission and \$280.00 a month rent during the six month period preceding the filing of this bankruptcy case. Dckt. 1 at 18-20.

Schedule I lists the Debtor's only income being \$280.00 a month for rent. He also discloses receiving \$300.00 a month loan from family. Dckt. 18 at 16. On Schedule J the Debtor shows that his expenses exceed his income by (\$1,805.00) a month. *Id.* at 17.

Schedule A lists one real property asset, the Pine Street Property, stated to have a value of \$190,000 and subject to liens of \$249,000. Dckt. 18 at 2. Schedules B and C lists no assets of significant value. *Id.* at 3-6. Schedule D lists the Pine Street Property being subject to the claim of Maxwell in the amount of \$240,000. *Id.* at 7.

On August 28, 2013, the court granted Maxwell relief from the stay to proceed with a non-judicial foreclosure sale. Order, Dckt. 38. In waiving the 14-day stay of enforcement of an order granting relief from the automatic stay, the court noted that the evidence presented was that the Debtor had not maintained insurance on the property. Civil Minutes, Dckt. 36.

The Debtor has filed an Amended Chapter 7 Debtor Statement of Intention. Dckt. 35. In it he states that he seeks to retain the Pine Street Property by either (1) redeeming the property, (2) reaffirming the debt, or (3) modifying the loan terms. The first requires the Debtor to pay the full current value in cash to the creditor (unless the creditor were to agree to terms). The other two require the creditor agreeing to reaffirmation terms or modified loan terms. None of these require a Chapter 13 case.

Based on the evidence submitted by the Debtor, there does not appear to be any good faith, bona fide reason for converting the case to one under Chapter 13. Rather, it appears that the Debtor, with relief from the automatic stay having been granted, believes that by converting the case it would somehow thwart Maxwell from exercising the power to conduct a nonjudicial foreclosure sale. If the Debtor wants to redeem the property, then he could do so in the Chapter 7 case. For a reaffirmation or modification, he can do that outside the bankruptcy case.

Conversion of this case to one under Chapter 13 is improper and would be an abuse of the Bankruptcy Code.

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 Convert 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 Convert is denied.

4. [11-94410-E-11](#) **SAWTANTRA/ARUNA CHOPRA** **MOTION FOR ORDER APPROVING**
HSM-12 **Evan D. Smiley** **STIPULATION AND/OR MOTION TO**
EXTEND TIME
9-9-13 [588]

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 Debtors', Debtors' Attorney, creditors holding the 20 largest unsecured claims, all creditors, parties requesting special notice, and Office of the United States Trustee on September 9, 2013. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Approve Stipulation or Extend Time 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 respondent 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 and Extending Time to File Objections to Debtor's Claim of Exemptions is granted. No appearance required.

Gary Farrar, the Chapter 11 Trustee, states the Debtors and the Trustee have entered into a stipulation to extend the deadline for the Trustee to object to the Debtors' amended claims of exemptions until November 11, 2013.

The Trustee states the Debtors agree that cause exists for the extension requested as the Trustee is continuing to evaluate the Debtors' recently amended schedules, including newly asserted claims of exemptions. The Trustee has also requested documentation from the Debtors concerning the profit sharing plan they have claimed as exemption, including pre-petition investments and transactions related to the plan which may bear on the Debtors' claimed exemptions and seeks to extend the deadline to file an objection to all claimed exemptions.

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 is continuing to evaluate the Debtors' recently amended schedules, including newly asserted claims of exemptions. 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 Debtors' amended claims of exemption to and including November 11, 2013.

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

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

The Motion for Order Approving Stipulation and Extending Time to File Objections to Debtor's Claim of Exemptions filed by 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 Motion is granted and the deadline for the Trustee to file objections to the Debtors' amended claims of exemption is extended through and including November 11, 2013.

5. [13-91315-E-7](#) **APPLEGATE JOHNSTON, INC.** **MOTION TO AMEND**
MDM-1 **George C. Hollister** **9-26-13 [153]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on September 26, 2013. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Amend was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Amend. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Chapter 7 Trustee moves for an Amended Order Authorizing Trustee to Employ Auctioneer. The Trustee filed an application to employ auctioneer on September 5, 2013, to employ David Huisman, C.A.I. of Huisman Auctions, Inc. to act as auctioneer in this matter. The court issued an order authorizing the Trustee to employ Huisman and also addressed the terms of his employment.

The Order provides, in part, that Huisman can retain the 10% Buyer's Premium on the first \$20,000 in aggregate sales proceeds from the sale of property of the estate. The Order further provides that Huisman shall file a motion for allowance of fees relating to the 10% Buyer's Premium on proceeds in excess of \$20,000.

The Trustee interprets this language to say that Huisman may only retain the first \$2,000 of the Buyer's Premium collected (10% of the first \$20,000 in sales), and has to file a motion for allowance of any additional fees relating to the Buyer's Premium. Trustee is asking for clarification on this point, and if Trustee's interpretation is correct, he requests that the Court amend the Order to permit Huisman to retain the 10% Buyer's Premium as follows:

Huisman may collect and retain a 10% Buyer's Premium on individual items that sell for less than \$20,000. If any item sells for more than \$20,000, Huisman will not charge or collect a Buyer's Premium.

Trustee states Huisman has already performed a substantial amount of work gathering and securing property of the estate and has informed the Trustee he will not proceed with the auction unless his compensation is modified to permit him to retain the 10% Buyer's Premium for items less than \$20,000.00.

While this will result in higher compensation to Huisman, Trustee believes it is in the best interests of the estate to proceed with the auction and liquidate the estate property. Trustee believes the compensation requested is reasonable and has been the compensation requested and approved for Huisman in prior cases and is Huisman's standard compensation for auctions.

The court finds this added compensation to the auctioneer is reasonable under the circumstances. Based on the foregoing, the court grants the Motion to Amend and will permit Huisman to retain a 10% Buyer's Premium on the sale of all items that sell for less than \$20,000.00.

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 Amend filed by the Trustee having been presented to the court, the Trustee having filed a Motion to Employment David Huisman, C.A.I. of Huisman Auctions, Inc. (Dckt. 98), the court having entered an order authorizing the employment (Dckt. 138), that order containing a clerical error, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the Order Authorizing Trustee to Employ Auctioneer, Dckt. 138, is amended by this Order, which replaces the prior order in its entirety, to correct a typographical error in the prior order pursuant to Federal Rule of Civil Procedure 60(a) and Federal Rule of Bankruptcy Procedure 9024.

IT IS FURTHER ORDERED that Michael D. McGranahan, the Chapter 7 Trustee, is authorized to employ the services of DAVID HUISMAN of HUISMAN AUCTIONS, INC. for the purpose of conducting a public auction sale of the personal property described in the application (Dckt. 98).

IT IS FURTHER ORDERED that the Trustee is authorized to pay compensation to DAVID HUISMAN of HUISMAN AUCTIONS, INC. for conducting said public auction sale, under the

terms set forth in the Trustee's application, subject to the provisions of this order and 11 U.S.C. § 328.

IT IS FURTHER ORDERED that DAVID HUISMAN of HUISMAN AUCTIONS, INC. may collect and retain a 10% Buyer's Premium on individual item sold for the first \$20,000 in proceeds for that item. If any item sells for more than \$20,000, Huisman will either not charge or collect a Buyer's Premium, or if charged, collect such amount and pay it to the Chapter 7 Trustee, or to Huisman to the extent as allowed by the court as additional fees for the services provided pursuant to further order of the court.

6. [13-91315-E-7](#) **APPLEGATE JOHNSTON, INC.** **MOTION TO SELL**
WFH-4 **George C. Hollister** **9-12-13 [125]**

Local Rule 9014-1(f) (1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on September 12, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (1) and Federal Rule of Bankruptcy Procedure 2002(a) (2). 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 court's tentative decision is to grant the Motion to Permit Debtor to Sell Property. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Michael D. McGranahan, Chapter 7 Trustee, moves for an order authorizing the Trustee to sell assets of Applegate Johnson, Inc. (Debtor) free and clear of liens pursuant to 11 U.S.C. §§ 363(b) and 363(f). The assets to be sold are specifically identified in Exhibits A, B, and C (comprising 39 pages) filed in support of the Motion. Dckt. 130.

The Trustee proposes to sell a number of Debtor's titled vehicles and trailers (some of which are completely unencumbered and some of which are subject to liens), equipment, machinery and inventory. The sale will be in the form of a public auction to be conducted by Huisman Auctions, Inc.

("Huisman Auctions"). All assets to be sold at auction shall be sold on an "as is, where is" basis, without warranty or representation of any kind.

The Trustee has identified several unencumbered assets and proposes to auction them pursuant to 11 U.S.C. § 363(b)(1).

The Trustee has also identified several assets for which the Trustee does not have the certificates of title, in which there are creditors listed on Debtor's Schedule D that may assert liens for what appear to be purchase money loans made to Debtor relating to specific vehicles/trailers. Trustee asserts these creditors include American Honda Finance Corp., County Bank, Ford Motor Credit, GMAC, Toyota Motor Credit Corp., Valley Rental Centers, Inc. and Westamerica Bank. The Trustee also requests authority to sell these titled Encumbered Assets at public auction free and clear of liens pursuant to Section 363(f)(3). Huisman Auctions will only sell those Titled Encumbered Assets for which he receives a bid that exceeds the known lien amount on each vehicle/trailer. In essence, there will be a reserve minimum bid that exceeds the lien amount. If no such bid is received, that particular vehicle/trailer will not be sold and the Trustee will likely abandon it.

Lastly, Westamerica Bank is asserting a lien on the Debtor's equipment and machinery pursuant to a security agreement. Westamerica Bank has consented to the sale of the Westamerica Encumbered Assets free and clear of its liens; therefore, the Trustee is requesting authority to sell those assets at public auction pursuant to Bankruptcy Code section 363(f)(2).

The Trustee also seeks authority to deposit the unencumbered proceeds into the general account for the estate, and to pay lienholders from the proceeds of encumbered assets. Trustee seeks authority to pay from the auction proceeds (1) the lienholders of the encumbered assets and (2) Westamerica Bank pursuant to the surcharge agreement (in a separate motion below).

The assets are listed in Exhibit A, Dckt. 130.

CREDITOR AFCO ACCEPTANCE CORPORATION'S OPPOSITION

Creditor AFCO Acceptance Corporation ("Creditor") filed a limited opposition to the motion questioning the lien by Creditor Westamerica Bank, as no evidence was presented by the Trustee. The Creditor states that it supports the Trustee's efforts in conducting the auction sale but asserts the following limited objections:

(1) AFCO posits that any distribution should be made at a time when the Trustee has confirmed such lienholder's alleged lien interest and the amount outstanding that is secured by such lien;

(2) In regard to Westamerica Bank's alleged lien, its lien should likewise transfer to the sale proceeds, but no distribution should be made to the Bank absent a further court order;

(3) The Trustee should retain sufficient funds from the auction sale, including amounts that may be surcharged under 11 U.S.C. § 506(c) to pay for the reasonable and necessary expenses and costs of protecting preserving and disposing of the assets including, without limitation, the premiums for the insurance policies financed by AFCO from the petition date until the date such policies have been cancelled.

The court denies the evidentiary objections filed by Creditor against the Chapter 7 Trustee, as they are all made on the Chapter 7 Trustee's personal knowledge.

WESTAMERICA BANK'S RESPONSE

Creditor Westamerica Bank states it has filed a Proof of Claim No. 35-7 detailing the description of the claim and it is deemed allowed as filed.

Westamerica Bank states the court should reject the strange suggestion, as it does not provide any legal authority for its contention to stop the distribution to the bank until further court order.

Westamerica Bank also argues that AFCO, without any legal standing, wants the Bank to pay its unsecured claim, despite the facts that the bank and the Trustee have a separate agreement for the Bank to pay for replacement insurance to cover the estate's assets in light of AFCO's decision to terminate coverage. Westamerica states that AFCO does not have standing to assert such a right.

TRUSTEE'S REPLY

The Trustee filed a reply to the one creditor's opposition. Trustee states that he will review Proofs of Claim filed by these lienholders, and demand evidence of the payoff balance for each of the Titled Encumbered assets. To the extent the Trustee is satisfied that the lien is valid and the payoff balance is correct, he requests authority to pay those lienholders without further order of the Court. Should any of these lienholders fail to file proofs of claim, the Trustee will retain the proceeds pending further order of the Court.

The Trustee disagrees that no distribution should be made to Creditor Westamerica Bank, as it has filed a valid Proof of Claim No. 35-1 and Creditor AFCO has not provided legal authority for such argument.

Lastly, the Trustee disagrees with the request that the Court order the Trustee to retain sufficient funds from the sale of assets to pay AFCO amounts that it claims may be surcharged against Westamerica Bank for insurance policies financed by AFCO. Trustee states AFCO has not filed a motion for allowance of an administrative expense, so the Trustee is not in a position to surcharge Westamerica Bank for the benefit of AFCO.

The Trustee argues he exercised his business judgment, and decided it was more prudent to negotiate with Westamerica Bank than file a contested surcharge motion for AFCO's benefit, especially without the benefit of an order allowing AFCO an administrative expense claim. Trustee states the

surcharge agreement with Westamerica Bank will result in a carve-out which will benefit the estate.

DISCUSSION

The Bankruptcy Code permits the Trustee to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b).

The Trustee also requests that the sale of the assets be free and clear of specified liens pursuant to 11 U.S.C. § 363(f)(3) - when the sales price is greater than the aggregate value of all of the liens against the property being sold.

Pursuant to 11 U.S.C. § 363(f)(2), the Trustee may sell property of the estate free and clear of any interest in such property if such entity consents.

There is no dispute that the Trustee should sell the assets. There is no dispute that the Trustee should pay the creditors who have secured claims from the proceeds. However, AFCO objects to any proceeds being paid to WestAmerica Bank, asserting (1) there is no basis (on the evidence presented) that Westamerica Bank has a lien on the assets being sold and (2) it is unfair, if WestAmerica Bank has a lien, that it be paid its collateral because the Debtor failed to pay AFCO for the financing it provided for the premiums on insurance policies the Debtor obtained for the alleged WestAmerica Bank collateral.

First, AFCO provides the court with the following grounds and authorities challenging the Trustee's assertion that WestAmerica Bank has a secured claim:

- A. "Little can be said about the validity and enforceability of Westamerica Bank's alleged secured claim,..."
- B. "[t]here is nothing in the record in the record that addresses [the alleged Westamerica Bank lien]."
- C. "[t]he Distribution Motion makes a conclusory statement that the identified funds 'constitute Westamerica [sic] Bank cash collateral.'"
- D. "The supporting declaration of the Trustee provides no additional help, stating:
 1. 'I have been informed that the process in the WAB Acct NO. 7470 were accounts receivable that constitute Westamerica Bank [sic] cash collateral.'"

Opposition, Dckt. 147.

At this juncture, it appears necessary for the court to make something clear to all counsel and parties. The court expects the attorneys to present clear, supported legal arguments for their positions - not merely slop around arguments and put rhetorical questions to the court. See AFCO

"Objection," pages 5-6. The court expects parties and their counsel to conduct the due diligence and investigation necessary to present arguments and positions in good faith. See Federal Rule of Bankruptcy Procedure 9011(b). The court also expects that counsel and parties will present the court with clear evidence, including declarations, which clearly show that the witness has personal knowledge testimony to provide the court. See Fed. R. Evid. 601, 602, 701, 702. If the parties and counsel are not up to meeting these minimum requirements for appearing and practicing in federal court, the attorneys should substitute out of the case sooner rather than later. Federal court is not the place for whining, poking, sniping, and "well I should get just because" arguments. Nor is it the place to throw up non-credible testimony hoping to either mislead the court or not get caught.

Beginning with AFCO, Westamerica Bank responds that it filed its proof of claim before AFCO filed the opposition to the Trustee's Motion. The AFCO Opposition was filed on September 26, 2013. Westamerica Bank has filed four proofs of claim.

- A. Proof of Claim No. 6, filed on August 20, 2013. This proof of claim provides the following information.
 - 1. Claim is for \$198,603.66.
 - 2. It is unsecured.

- B. Proof of Claim No. 35-1, filed on September 25, 2013. This proof of claim provides the following information.
 - 1. Claim is for \$977,790.09.
 - 2. It is secured by "All assets inc accounts & equipment."
 - 3. Attached to the proof of claim are the following documents.
 - a. Commercial Security Agreement, County Bank as Secured Party, for which describes the collateral as "All Inventory, Chattel Paper, Accounts, Equipment, and General Intangibles," plus the common proceeds, replacements, insurance, related items and records additional language.
 - b. Forbearance and Security Agreement and Release, Westamerica Bank, as lender. This references assets of County Bank having been assigned to Westamerica Bank, including the claims that are the subject matter of the forbearance agreement.
 - c. UCC Financing Continuation Statement, electronic filing date of February 28, 2008, County Bank secured party.

- d. UCC Financing Statement filed August 21, 2003, with description of collateral consistent with Security Agreement, County Bank secured party.
 - e. UCC Financing Statement, electronic filing date January 26, 2007, identifying specific leased equipment. County Bank identified as secured party.
- C. Proof of Claim No. 36-1, filed on September 25, 2013. This proof of claim provides the following information.
- 1. Claim is for \$299,838.83
 - 2. Unsecured.
- D. Proof of Claim No. 43, filed October 2, 2013.
- 1. Claim is for \$10,000.00.
 - 2. Unsecured.
 - 3. Asserted as a priority claim. The box for "Other - Specify applicable paragraph of 11 U.S.C. § 507(a) (___)" is checked, but no applicable paragraph is identified on the proof of claim.

Westamerica Bank's sniping back at AFCO begins with the opening in its Reply,

Before the Court is the Trustee's motion to distribute to Westamerica Bank its accrued pre-petition cash collateral, less a stipulated hold-back for the Trustee and funds needed to pay for insurance for all of the estate's assets pending a Court-approved auction. AFCO, as part of its strategy to run up the expenses in this case for no proper purpose, in its trilogy of legal authority-free papers, urges without evidence or authority, that the Court deny the Trustee's motion. AFCO's objection is empty and it is meritless.

Westamerica Bank has a blanket lien. Its lien encompasses accounts receivable and contract rights and proceeds. Its lien is duly perfected. Westamerica Bank filed its proof of secured claim before AFCO filed its latest attack."

Response, Dckt. 173. While technically correct that Westamerica Bank got around to filing its proof of claim for its secured claim on September 25, 2013, and that is before the September 26, 2013, it is mere hours before. Westamerica Bank offers no explanation as to how AFCO was to know what would be in the Proof of Claim being filed mere hours before its opposition had to

be filed. This bankruptcy case was filed on July 16, 2013. Westamerica Bank offers no explanation as to why it waited until September 25, 2013, more than two months latter, to file the proof of claim.

The Chapter 11 Trustee provides little concrete information in his declaration as to his investigation or position with respect to any lien being asserted by Westamerica Bank. He states he may believe and that the Bank asserts the existence of a lien. The Trustee's declaration is clear that he has not accepted this claim as secured. Declaration, ¶ 7, Dckt. 128. However, the Trustee further states that he is seeking to sell the property free and clear of the lien, have Westamerica Bank's lien, to the extent it exists, attach to the proceeds, and hold the money in a segregated account pending further order of the court.

The Trustee further testifies that he has negotiated a surcharge agreement with Westamerica Bank regarding the proceeds from the sale of the assets in which Westamerica Bank assert its lien, and he is filing a separate motion for approval of that agreement.

First, addressing Creditor AFCO Acceptance Corporation's Objection, the court finds the additional language without merit. There is no language in 11 U.S.C. § 363(f) that requires that a distribution to a creditor holding the secured claim on the collateral being sold should not be made to that creditor absent a further court order. Payment of secured claims from the sale of proceeds is common in bankruptcy cases. There is no reason to allow further interest to accrue or "put the hurt on" a creditor smart enough to have collateral until some later date. In bringing the motion, the Trustee has clearly identified the claims which he believes have been sufficiently documented as secured and those which have not been documents. For Westamerica Bank, the Trustee requests that the proceeds subject to its lien be held in a segregated account pending further order of the court.

AFCO, though provided with the Trustee's exhibits and title documents, offers no explanation as to which liens it asserts are not sufficiently documented. Rather, the opposition reads more like an attempt to cause other creditors to incur otherwise unnecessary cost and expense just so "they can hurt as much as AFCO" for the financial decisions it has made in dealing with the Debtor.

Second, the court also declines to include a request by AFCO that it be vaulted over other creditors and have money earmarked for payment to AFCO for payments not made by the Debtor for the financing provided by AFCO.

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 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 Trustee's proposed sale of the business and the equipment, described in Exhibit A, Dckt. 160, is granted.

IT IS FURTHER ORDERED that the Trustee is authorized to sell the unencumbered assets pursuant to section 363(f);

IT IS FURTHER ORDERED that the Trustee is authorized to sell the titled encumbered assets pursuant to section 363(f) (2);

IT IS FURTHER ORDERED that the Trustee is authorized to sell the business assets secured by liens of Westamerica Bank pursuant to section 363(f) (3);

IT IS FURTHER ORDERED that the Trustee is authorized to pay each of the lienholders on the titled encumbered assets from the sale, if any, of their collateral;

IT IS FURTHER ORDERED that the Trustee shall segregate and hold, with the monies not to be disbursed except on further order of the court, the proceeds of any items in which Westamerica Bank asserts a security interest pursuant to Proof of Claim No. 35-1 filed in this case on September 25, 2013.

IT IS FURTHER ORDERED that the Trustee is authorized to pay Huisman Auctions, Inc., the auctioneer authorized to be employed by the Trustee, the fees and expenses as authorized by the order for employment.

Motion, Dckt. 120. This Motion is supported by the Chapter 7 Trustee's declaration. The Trustee testifies,

- A. "Upon my appointment and pursuant to my trustee duties, I froze all of Debtor's bank accounts, including bank account ending in No. 7470 at Westamerica Bank ('WAB Acct No. 7470')."
- B. "I transferred all of the monies in WAB Acct No. 7470 into my own account at Associated Bank ending in 8074. I estimate the balance of the account to be \$91,575.85 ('Associated Acct No. 8074')."
- C. "I have been informed that the proceeds in the WAB Acct No. 7470 were accounts receivables that constitute Westamerica Bank cash collateral."

Declaration, Dckt. 122.

CREDITOR AFCO ACCEPTANCE CORPORATION

Creditor AFCO Acceptance Corporation opposes the motion on the grounds that it is not being paid the premiums for insurance policies that protected the estate, estate assets, and the Bank's collateral. Creditor asks how much the premiums for the policies that will be in place; how much unencumbered cash the Trustee is holding; why the cash is unencumbered; how much does the Trustee expect to receive under the surcharge agreement; how much does the Trustee expect in administrative expenses; what evidence does not Trustee have that the funds are the Bank's cash collateral; and that the hold back language will not work.

The court denies the evidentiary objections filed by Creditor against the Chapter 7 Trustee, as they are all made on the Chapter 7 Trustee's personal knowledge. However, denying the objection does not make the testimony credible.

CREDITOR WESTAMERICA BANK'S RESPONSE

Creditor Westamerica Bank filed a response stating that their valid proof of claim notes that it applies to the funds in question - that to date no party has objected to. Westamerica Bank argues that the funds constitute proceeds from pre-petition account and that the evidence the Trustee has as to the source of funds includes a verified claim, a signed forbearance agreement by the Debtor, a fiduciary to all creditors, confirming the point, conformed copies of financing statements, and signed written agreements.

Westamerica Bank also states that AFCO has not security interest in any of the funds that constitute the subject matter of this motion and that AFCO has not provided any legal authority (in this or any of its other motions). Westamerica Bank argues the laundry list of questions provided by AFCO do not provide a valid basis to attack the competency of the Trustee. The Trustee cannot use cash collateral without the consent of the lienholder, which it has given in this instance.

DISCUSSION

Section 363(b)(1) provides that "the trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of the business, property of the estate...."

Here, Trustee seeks Court authority to turnover monies to Westamerica. The cash constitutes property of the estate but also constitutes Westamerica's cash collateral, which it demanded turnover of the account.

In considering the Objection the court starts with AFCO. It provides the court with the following grounds and authorities challenging the Trustee's assertion that Westamerica Bank has a secured claim:

- A. "Little can be said about the validity and enforceability of Westamerica Bank's alleged secured claim,..."
- B. "[t]here is nothing in the record in the record that addresses [the alleged Westamerica Bank lien]."
- C. "[t]he Distribution Motion makes a conclusory statement that the identified funds 'constitute Westamerica [sic] Bank cash collateral.'"
- D. "The supporting declaration of the Trustee provides no additional help, stating:
 1. 'I have been informed that the process in the WAB Acct NO. 7470 were accounts receivable that constitute Westamerica Bank [sic] cash collateral.'"

Opposition, Dckt. 147.

At this juncture, it appears necessary for the court to make something clear to all counsel and parties. The court expects the attorneys to present clear, supported legal arguments for their positions - not merely slop around arguments and put rhetorical questions to the court. See AFCO "Objection," pages 5-6. The court expects parties and their counsel to conduct the due diligence and investigation necessary to present arguments and positions in good faith. See Federal Rule of Bankruptcy Procedure 9011(b). The court also expects that counsel and parties will present the court with clear evidence, including declarations, which clearly show that the witness has personal knowledge testimony to provide the court. See Fed. R. Evid. 601, 602, 701, 702. If the parties and counsel are not up to meeting these minimum requirements for appearing and practicing in federal court, the attorneys are should substitute out of the case sooner rather than later. Federal court is not the place for whining, poking, sniping, and "well I should get just because" arguments. Nor is it the place to throw up non-credible testimony hoping to either mislead the court or not get caught.

Beginning with AFCO, Westamerica Bank responds that it filed its proof of claim before AFCO filed the opposition to the Trustee's Motion. The AFCO Opposition was filed on September 26, 2013. Westamerica Bank has filed four proofs of claim.

- A. Proof of Claim No. 6, filed on August 20, 2013. This proof of claim provides the following information.
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 - 1. Claim is for \$977,790.09.
 - 2. It is secured by "All assets inc accounts & equipment."
 - 3. Attached to the proof of claim are the following documents.
 - a. Commercial Security Agreement, County Bank as Secured Party, for which describes the collateral as "All Inventory, Chattel Paper, Accounts, Equipment, and General Intangibles," plus the common proceeds, replacements, insurance, related items and records additional language.
 - b. Forbearance and Security Agreement and Release, Westamerica Bank, as lender. This references assets of County Bank having been assigned to Westamerica Bank, including the claims that are the subject matter of the forbearance agreement.
 - c. UCC Financing Continuation Statement, electronic filing date of February 28, 2008, County Bank secured party.
 - d. UCC Financing Statement filed August 21, 2003, with description of collateral consistent with Security Agreement, County Bank secured party.
 - e. UCC Financing Statement, electronic filing date January 26, 2007, identifying specific leased equipment. County Bank identified as secured party.

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1. Claim is for \$299,838.83
 2. Unsecured.
- D. Proof of Claim No. 43, filed October 2, 2013.
1. Claim is for \$10,000.00.
 2. Unsecured.
 3. Asserted as a priority claim. The box for "Other - Specify applicable paragraph of 11 U.S.C. § 507(a) (___)" is checked, but no applicable paragraph is identified on the proof of claim.

Westamerica Bank's sniping back at AFCO begins with the opening in its Reply,

Before the Court is the Trustee's motion to distribute to Westamerica Bank its accrued pre-petition cash collateral, less a stipulated hold-back for the Trustee and funds needed to pay for insurance for all of the estate's assets pending a Court-approved auction. AFCO, as part of its strategy to run up the expenses in this case for no proper purpose, in its trilogy of legal authority-free papers, urges without evidence or authority, that the Court deny the Trustee's motion. AFCO's objection is empty and it is meritless.

Westamerica Bank has a blanket lien. Its lien encompasses accounts receivable and contract rights and proceeds. Its lien is duly perfected. Westamerica Bank filed its proof of secured claim before AFCO filed its latest attack."

Response, Dckt. 173. While technically correct that Westamerica Bank got around to filing its proof of claim for its secured claim on September 25, 2013, and that is before the September 26, 2013, it is mere hours before. Westamerica Bank offers no explanation as to how AFCO was to know what would be in the Proof of Claim being filed mere hours before its opposition had to be filed. This bankruptcy case was filed on July 16, 2013. Westamerica Bank offers no explanation as to why it waited until September 25, 2013, more than two months latter, to file the proof of claim. (Which normally would not be unusual, but in the developing toxic environment in this case has led to AFCO's objection.)

In light of the Trustee's non-specific testimony and the September 25, 2013 filing of the Proof of Claim, the court continues the Motion for further briefing and hearing. The court sets the following schedule:

- A. On or before -----, **2013**, the Trustee and Westamerica Bank shall file and serve supplemental pleadings and evidence in support of the Motion, including,

1. How the monies in the bank account are identified as collateral for Westamerica Bank; and
 2. The documents (with copies provided as an exhibit) relied upon by the Trustee in concluding that Westamerica Bank has a perfected security interest in the monies.
- B. On or before -----, **2013**, AFCO shall file and serve supplemental pleadings and evidence in support of the opposition, which shall include,
1. Copies of UCC search reports and an explanation of the reasonable investigation conducted by AFCO and its representatives with respect to any lien or security interest being asserted by Westamerica Bank.
 2. Legal authorities and evidence for any basis being asserted in opposition to the Motion, as appropriate.
- C. On or before -----, **2013**, the Trustee and Westamerica Bank file and serve Replies, if any, to supplemental pleadings filed by AFCO.
- D. Final hearing on the Motion shall be conducted at 10:30 a.m. on -----, **2013**.

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

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

The Motion for Authority to Distribute Collateral to Secured Creditor filed by 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 hearing is continued to 10:30 a.m. on -----, 2013.

IT IS FURTHER ORDERED that,

- A. On or before -----, **2013**, the Trustee and Westamerica Bank shall file and serve supplemental pleadings and evidence in support of the Motion, including,
1. How the monies in the bank account are identified as collateral for Westamerica Bank; and

2. The documents (with copies provided as an exhibit) relied upon by the Trustee in concluding that Westamerica Bank has a perfected security interest in the monies.
- B. On or before -----, **2013**, AFCO shall file and serve supplemental pleadings and evidence in support of the opposition, which shall include,
1. Copies of UCC search reports and an explanation of the reasonable investigation conducted by AFCO and its representatives with respect to any lien or security interest being asserted by Westamerica Bank.
 2. Legal authorities and evidence for any basis being asserted in opposition to the Motion, as appropriate.
- C. On or before -----, **2013**, the Trustee and Westamerica Bank file and serve Replies, if any, to supplemental pleadings filed by AFCO.
- D. Final hearing on the Motion shall be conducted at 10:30 a.m. on -----, **2013**.

Hoffelt Gould & Birney, LLP for services related to the equipment and the sale.

CREDITOR AFCO ACCEPTANCE CORPORATION

Creditor AFCO Acceptance Corporation opposes the motion on the grounds that the Trustee has not shown evidence of Westamerica Bank's claim against the property and that the motion and declaration do not address the secured claim or that a surcharge agreement was not attached to the motion.

Creditor argues that the Bank, the attorneys and the auctioneer should not be paid before it, as Creditor provided insurance policies that remained in place, at its expense, from the petition date. Creditor argues that it should not be excluded from being reimbursed for the premiums associated with the policies it financed.

The court denies the evidentiary objections filed by Creditor against the Chapter 7 Trustee, as they are all made on the Chapter 7 Trustee's personal knowledge.

WESTAMERICA BANK'S RESPONSE

Westamerica Bank responds to AFCO's objection, stating it has not stated any legal authority to suggest that the Court should disturb the Trustee's reasoned and reasonable business judgment in requesting authority to enter into a proper surcharge agreement with the Bank to confer benefits to the bankruptcy estate.

TRUSTEE'S REPLY

The Trustee filed a reply, stating that none of the issues raised by Creditor AFCO provide a basis to deny the motion to enter into a surcharge agreement related to the sale of a secured creditor's collateral.

Trustee also states that on September 25, 2013, Westamerica Bank filed Proof of Claim No. 35-1, which is supported by a commercial security agreement, UCC Financing Statement and continuation statements, all which establish their first-priority security interest in the accounts, equipment, machinery and tools. The Trustee stated he received some of these documents during negotiations and is satisfied that Westamerica Bank has a valid security interest in the assets being sold that will generate the sales proceeds at issue in the surcharge agreement.

Trustee states that if AFCO is asserting an administrative claim, it must file a proper motion and obtain a court order allowing such administrative claim.

Trustee also argues that even if the court allowed such administrative expense of AFCO, it does not have authority to pay such an expense with Westamerica's collateral because in order to use such cash collateral, the Trustee needs the secured creditor's consent or a court order. 11 U.S.C. § 363(c)(2). Trustee states that Westamerica indicated it will not consent to any surcharge relating to AFCO's claim.

The Trustee believes that the surcharge agreement benefits the estate.

DISCUSSION

11 U.S.C. § 506(c) provides that a creditor's collateral shall be surcharged reasonable and necessary "costs and expenses of preserving, or disposing of, [property securing a claim] to the extent of any benefit to the holder of such claim,..." Three conditions must be satisfied: (I) the expenses are "necessary" to preserve or dispose of the collateral, (ii) they are "reasonable," and (iii) the incurrence of the expenses provided a "benefit" to the secured creditor. 4-506 COLLIER ON BANKRUPTCY ¶ 506.05 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.)

Furthermore, an administrative claimant does not have an independent right to seek payment of its claim under section 506(c) from property encumbered by a secured creditor's lien since the statute reserves that right to the trustee. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000).

Here, Creditor AFCO does not appear to have standing to seek payment of its claim from property encumbered by a secured creditor's lien. The creditor Westamerica Bank and the Chapter 7 Trustee have monetized the benefit for the estate incurring the cost and expense related to maintaining and selling the Property. Only those expenses that preserve, or are incurred in disposing of, the collateral fall within the purview of section 506(c), and then only to the extent that they are necessary and provide a benefit to the secured party.

However, the court must first determine that the costs and expenses sought to be surcharged are necessary, reasonable and provided a benefit to the estate. Absent from the pleadings is what has been by the parties for the court to determine whether it was necessary, reasonable and provided a benefit to the estate. Simply stating the legal conclusion for the court does not satisfy the requirements under the law.

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 Surcharge Agreement with Westamerica Bank for Costs and Expenses Incurred in Selling Debtor's Assets filed by 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 20% of the net sales proceeds from the sale of any property of the estate which is collateral for the secured claims of Westamerica Bank, shall be paid to the Estate, free and clear of any lien or interest of WestAmerica Bank. The net

business, there is no need for this commercial lease and it is burdensome to the estate.

DISCUSSION

11 U.S.C. § 365(a) provides that the trustee, subject to court approval, may assume any unexpired lease of the debtor. The court uses the business judgment standard to determine whether to approve assumption of a unexpired lease. *G.I. Industries*, 204 F.3d 1276 (9th Cir. 2000). *In re Pomona Valley Medical Group*, adopted the nonbankruptcy form of the business judgment rule: In reviewing a rejection motion, the bankruptcy court should presume that the debtor "acted prudently, on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the bankruptcy estate." 476 F.3d 665, 670 (9th Cir. 2007).

Here, as this is a Chapter 7 case and the Debtor is no longer operating the business, the lease of the premises is no longer needed and is burdensome to the estate. No party objection, the court grants the motion.

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 Reject Lease filed by 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 rejection of the unexpired lease at 233 Tully Road, Modesto, California is approved, effective October 31, 2013.

10. [11-94427-E-7](#) BIEN BANH AND UT QUACH
Drew Henwood

MOTION TO AVOID LIEN OF
DAIMLERCHRYSLER FINANCIAL
SERVICES AMERICAS, LLC
8-9-13 [[32](#)]

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

Incorrect Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor's Attorney and Office of the United States Trustee on August 23, 2013. By the court's calculation, 48 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Avoid a Judicial Lien has not been correctly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (2).

The court's tentative decision is to deny the Motion to Avoid a Judicial Lien. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

A judgment was entered against the Debtor in favor of Daimler Chrysler Financial Services Americas LLC for the sum of \$24,721.50. The abstract of judgment was recorded with Alameda County on January 7, 2009. That lien attached to the Debtor's residential real property commonly known as 3013 Poppypatch Drive, Modesto, California.

However, there are several fatal deficiencies in the motion. First, Debtor has not executed proper service of the Motion and supporting pleadings. The Debtor did not serve the Creditor as required by Federal Rules of Bankruptcy Procedure 7004. The only entity served was Donald G. Nelson, Nelson & Kennard at a P.O. Box in Sacramento. No attempt was made to serve the creditor - Daimler Chrysler Financial Services Americas LLC with the motion and supporting pleadings.

Furthermore, the Local Rules require that movant's notice of the hearing disclose whether or not written opposition to the motion is required. See Local Bankr. R. 9014-1(d) (3). The notice provided here did not so specify. This is improper.

Additionally, the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here the moving party failed to use a Docket Control Number. This is not correct. Failing to comply with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

Lastly, the moving party filed the declaration and exhibits in this matter as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits,

other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." *Revised Guidelines for the Preparation of Documents*, ¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the *Revised Guidelines for the Preparation of Documents* in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). This failure is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

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 Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) 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 denied without prejudice.

11. [12-92036-E-7](#) REYNOL GARCIA AND ENEDINA MOTION TO RECONVERT CASE FROM
TOG-10 GARICA CHAPTER 7 TO CHAPTER 11
Thomas O. Gillis 8-15-13 [[102](#)]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 15, 2013. By the court's calculation, 56 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to deny the Motion to Reconvert Case.

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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Debtors move the court to convert their Chapter 7 case to Chapter 11 pursuant to 11 U.S.C. § 706(a). Debtors argue this conversion is in good faith and their plan is to negotiate lower interest rates on the real estate loans and will pay 100% to all unsecured creditors.

Debtors state they have excellent income, about \$6,830 monthly for Debtor and \$3,586 for co-debtor. Debtors state their home is debt free, one rental is debt free and another has \$75,000.00 in equity. The remaining two rentals have mortgage arrears.

Debtors argue Chapter 7 is not right for them because the unsecured creditors are only \$5,900.00. Debtors argue that the problems in the previous chapter 11 was due to Debtor's sister being kidnaped in Mexico and caused Debtor to have a stroke and stomach problems. Debtors state these health problems have been resolved and Debtors can address their duties as Debtor-in-Possession.

TRUSTEE'S OPPOSITION

The United State Trustee ("UST") filed an objection stating that this is the Debtor's fourth bankruptcy since 2011, each of the prior cases being dismissed for failure to prosecute the case. This case was also filed as a Chapter 11 but the court converted the case, as the Debtors failed to file monthly operating reports, had incomplete or inconsistent Statement of Financial Affairs and Schedules.

The Trustee states that since the conversion, Debtors have failed to appear at the Chapter 7 meeting of creditors on December 14, 2012, January 11, 2013, and February 28, 2013.

The Trustee argues that the court must consider the interest of creditors, which the Debtor does not address. The Trustee states he is already hold sufficient funds to pay the unsecured creditors in full and the motion does not address why unsecured creditors would have to wait to see whether the Debtors will be successful in a reconverted case. The trustee also argues that the Debtors do not provide the dates of the Debtor's illness and it is difficult to assess the effect of the illnesses on the case. The Trustee also states the Debtors do not address the prior cases or why they waited 10 months to try and reconvert the case.

DISCUSSION

Reconversion back to Chapter 11 is governed by 11 U.S.C. § 706(b). However, section 706(b) does not provide any specific requirements for converting a case to Chapter 11. These decisions to convert are within the discretionary powers of the bankruptcy court based on the court's determination of what will most inure to the benefit of all parties in interest. *In re Texas Extrusion Corp.*, 844 F.2d 1142, 1161 (5th Cir. Tex. 1988).

Here, the court finds that Debtors have not shown sufficient good faith to reconvert to Chapter 11. First, the Debtors have not prosecuted this basic Chapter 7 case properly. As the Trustee testifies, Debtors have failed to appear at the Chapter 7 meeting of creditors on December 14, 2012, January 11, 2013, and February 28, 2013. If the Debtors cannot prosecute this case properly, then the court does not believe that they could prosecute a more complicated Chapter 11, in which monthly operating reports and other fiduciary responsibilities are required by the Debtors-in-Possession.

Second, the court does not have sufficient information regarding the illness of the Debtor, such as the dates, and how it effected the prosecution of the case. Debtors have been in this Chapter 7 for over 10 months and are only know seeking a conversion to Chapter 11. It appears health concerns also effected the prior cases, but the court does not have evidence as to what illnesses and to what extent.

Based on the foregoing, the court is not convinced that the Debtors will be successful in a Chapter 11 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 Reconvert filed by Debtors 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 denied.

12. [11-94146-E-11](#) DOMINIC/MARIA DEPALMA
Naresh Channaveerappa

CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
12-2-11 [[1](#)]

CONT. FROM 9-26-13

Notes:

Continued from 8/1/13

Operating Report filed: 8/15/13

[TJS-1] Motion for Relief from Automatic Stay filed by JPMorgan Chase Bank, N.A. 7/1/13 [Dckt 340]; Stipulation filed 9/3/13 [Dckt 361]; Order approving stipulation filed 9/18/13 [Dckt 373]

[DJP-1] Farmers & Merchant Bank of Central California's Motion for Order Dismissing Chapter 11 Case filed 9/12/13 [Dckt 366], set for hearing 10/10/13 at 10:30 a.m.

Consent Order Granting Substitution of Attorney filed by the Debtors 9/17/13 [Dckt 375]

[Dckt 376] filed 9/20/13: Stipulation to Continue Status Conference to 10/10/13 at 10:30 a.m. to be heard in conjunction with motion to dismiss; order pending

13. [11-94146-E-11](#) DOMINIC/MARIA DEPALMA MOTION TO DISMISS CASE
DJP-1 Naresh Channaveerappa 9-12-13 [[366](#)]

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 Debtors', creditors holding the 20 largest unsecured claims], parties requesting special notice, and Office of the United States Trustee on September 12, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Dismiss 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 respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Dismiss case is continued to 10:30 a.m. on October 31, 2013 pursuant to order of the court. No appearance required.

Creditor Farmers & Merchant Bank of Central California moves the court for an order dismissing the Chapter 11 case.

However, the parties filed a Stipulation to Continue Farmers & Merchant Bank of Central California's Motion for Order Dismissing Chapter 11 Case on September 26, 2013. Dckt. 377. The court approved the continuance of the motion to October 31, 2013, in the order dated September 28, 2013. Dckt. 378.

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 Case filed by Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion is continued to 10:30 a.m. on October 31, 2013.

14. [12-92950-E-7](#) EDUARDO SANCHEZ AND RUTH MOTION FOR COMPENSATION BY THE
HSM-6 SERRANO LAW OFFICE OF HEFNER, STARK &
Pro Se MARIOS, LLP FOR AARON A. AVERY,
TRUSTEE'S ATTORNEY(S), FEES:
\$15,431.50, EXPENSES: \$246.59
9-9-13 [[81](#)]

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 Debtors', Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 9, 2013. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

Final Ruling: The Final Application for 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 respondent 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 Final Application for Fees is granted. No appearance required.

FEES REQUESTED

Hefner, Stark & Marois, LLP, Counsel for the Gary Farrar, Chapter 7 Trustee, makes a Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period January 22, 2013 through October 10, 2013. The order of the court approving employment of counsel was entered on February 5, 2013.

Description of Services for Which Fees Are Requested

Improper Claim Exemption: Counsel spent 5.9 hours in this category. Counsel describe services as advising the Trustee and analyzing issues related to improper claims of exemption.

Motion to Sell and Motion to Compromise: Counsel spent 38.9 hours in this category. Counsel tasks performed as advising and representing the Trustee in Connection with sale of the Reno real property including

researching issues related to encumbrances. Counsel also drafted Motion to Sell and Motion to Compromise.

General Case Matters: Counsel spent .4 hours in this category. Counsel describe serviced as advising and representing the Trustee in connection with general case matters.

Case Initiation: Counsel spent 3.5 hours in this category. Counsel describes the tasks performed as initiating the case, completing conflict analysis, filing employment application for Trustee's Counsel, CPA, and Real Estate Broker.

Motion for Compensation: Counsel spent 8.1 hours in this category. Counsel describes the tasks performed as drafting and filing Motion for Compensation.

DISCUSSION

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).

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal 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 legal services undertaken 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 [legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

- (a) Is the burden of the probable cost of legal 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 Counsel's services allowed for efficient administration of the estate, successful sale of the Reno property and resolve of complex legal and factual issues related to the sale of the real property. Counsel states that the estate will not produce a distribution to holders of allowed general unsecured claims, as had originally been anticipated, but Counsel's services supported the orderly administration of estate assets and were commensurate with the complexity of legal issues presented.

FEES ALLOWED

The average hourly rates for the fees billed in this case are \$271.68/hour for counsel with hourly rate ranging from \$295/hour to \$380/hour. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$15,431.50 are approved 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.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of \$246.59 for copies, and postage.

However, Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of \$37.00 for telephonic court appearance costs. This court does not generally allow the recovery of court call expenses on the theory that generally counsel use the Court Call service to make themselves more competitive in a larger geographic area. For those counsel, the Court Call service is akin to having phones in the office, legal resources, a desk and chair. The total costs in the amount of \$209.59 are approved 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.

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

Attorneys' Fees	\$15,431.50
Costs and Expenses	\$ 209.59

For a total final allowance of \$15,641.09 in Attorneys' Fees and Costs in this 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 for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Hefner, Stark & Marois, LLP is allowed the following fees and expenses as a professional of the Estate:

Hefner, Stark & Marois, LLP, Counsel for Chapter 7 Trustee

Applicant's Fees Allowed in the amount of \$15,431.50
Applicants Expenses Allowed in the amount of \$ 209.59,

IT IS FURTHER ORDERED that the Application is denied as to \$37.00 in expenses, with without prejudice.

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

15. [13-90950-E-7](#) **FEDERICO/ILENE RUEZGA**
ADJ-3 **James P. Mootz**

MOTION FOR TURNOVER OF PROPERTY
9-25-13 [[60](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, parties requesting special notice, and Office of the United States Trustee on September 25, 2013. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion for Turnover of Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion for Turnover of Property. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Michael D. McGranahan, the Chapter 7 Trustee moves the Court for an order which compels Debtors Federico Ruezga and Ilene G. Ruezga, to turn over property of the estate. Trustee states on July 24, 2013, the Debtors filed an *ex parte* motion to convert the case from Chapter 7 to Chapter 13, but the Debtors did not serve the motion on anyone, including the Trustee. The court entered the Order Converting Case Under Chapter 7 to Case Under Chapter 13, Dckt. 18.

Trustee states that on September 11, 2013, the Court entered the Order Vacating Order Converting Case Under Chapter 7 to Case Under Chapter 13 (Dckt. 57). Pursuant to vacating the conversion order, the Court made the following findings: (a) Proper service was not given for the motion to convert the case; (b) In light of the Trustee's evidence, the Debtors provided inaccurate and misleading information on their Schedule A, and they therefore forfeited their right to proceed under Chapter 13. *Marrama v. Citizens Bank*, 549 U.S. 365, 371 (2007) (on Schedule A, the Debtors failed to disclose that their primary residence includes 30 acres of farm land);

and (c) Because the debtors failed to timely file a chapter 13 plan, the Court concluded they did not intend to proceed with the case in Chapter 13.

Trustee states the Debtors own an undivided $\frac{1}{2}$ interest in real property commonly known as 11243 Merced Court, Turlock, California (the "Property"). The Property is comprised of a 30-acre parcel. The Property includes, inter alia, the following: (I) a 24 acre almond orchard (with eight year old trees); and (ii) a small vineyard. Trustee states the almond and grape crops on the property are property of the estate and Debtors have not claimed an exemption on them.

Trustee states that on September 10, 2013, Anthony Johnston, counsel for the Trustee, wrote an email to James Mootz, counsel for the Debtors, advising Mr. Mootz that the Almond Crop is property of the estate. Mr. Johnston asked Mr. Mootz to provide instructions to the Almond Crop's buyer to have the proceeds delivered to the Trustee. Mr. Johnston also asked Mr. Mootz to provide information about the buyer, and to provide confirmatory evidence that the Debtors had complied with the Trustee's payment request.

In Amended Schedule B, the Debtors claim ownership of a 2006 PT Cruiser (the "PT Cruiser"), a horse trailer (the "Horse Trailer"), a 33% interest in 9 horses and a 50% interest in 3 horses (collectively, the "Horses"). The PT Cruiser, the Horse Trailer, and the Horses are property of the estate pursuant to 11 U.S.C. § 541. The Debtors have not claimed an exemption in any of the PT Cruiser, the Horse Trailer, or the Horses.

Trustee states that the almond crop, grape crop, PT Cruiser, Horse Trailer and Horses are property of the estate and the Debtors should immediately turn over the same to the Trustee.

DISCUSSION

The Trustee is entitled to such turnover of property under 11 U.S.C. §§ 521, 541, 542 and Federal Rule of Bankruptcy Procedure 7001. Section 542(a) requires one in possession of property of the estate to deliver such property to the Trustee. Federal Rule of Bankruptcy Procedure 7001 allows a trustee to obtain turnover from the Debtor without filing an adversary proceeding. Most importantly, pursuant to 11 U.S.C. § 521(a)(4), the Debtor is required to deliver all of the property of the estate and documentation related to the property of the estate to the Chapter 7 Trustee.

Here, the Trustee testifies that he has repeatedly attempted to obtain the property of the estate, without success. As Debtor is statutorily required to turnover all property of the estate, the court grants the motion to compel turnover of property 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 for Turnover filed by 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 Debtors shall turnover on or before October 21, 2013, the following property to Michael McGranahan, Chapter 7 Trustee:

1. Almond crop (or any proceeds therefrom);
2. Grape crop (or any proceeds therefrom);
3. 2006 PT Cruiser;
4. a horse trailer; and
5. Twelve (12) horses.

16. [13-90857-E-7](#) **RYAN/MONSERRAT JACKSON** **MOTION TO AVOID LIEN OF FIA**
MLP-2 **Martha Lynn Passalacqua** **CARD SERVICES, N.A.**
9-25-13 [43]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on September 25, 2013. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Avoid a Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Avoid a Judicial Lien. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

A judgment was entered against Debtor Ryan Edward Jackson ("Debtor") in favor of FIA Card Services, N.A. ("Creditor") in the monetary amount of \$24,674.48. An abstract of judgment was recorded with Sacramento County on

September 24, 2012. That lien attached to the residential real property of Debtor commonly known as 224 Eagle Court, Modesto, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). On Schedule A Debtor listed the Property as having a value of \$116,395.00 as of the date of the bankruptcy petition. Unavoidable consensual liens senior to Creditor's judgment lien total \$152,856.10 are listed on Schedule C by Debtor. An exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of \$1.00 has been asserted by Debtor and is listed on Schedule C filed in this case. Creditor holds a judicial lien which was perfected by recording the abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity in the Property for Creditor's judicial lien. Therefore, the judicial lien impairs Debtor's exemption claimed in the Property and it is avoided pursuant to 11 U.S.C. § 522(f)(1)(A), subject to the provisions of 11 U.S.C. § 349(b)(1)(B) if this case is dismissed.

ISSUANCE OF A COURT DRAFTED ORDER

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Ryan Edward Jackson having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the judgment lien of FIA Card Services, N.A. , Superior Court of California for Stanislaus County Case No. 676310, recorded on September 24, 2012, with the Stanislaus County Recorder, Document No. 2012-0084700-00, against the real property commonly known as 224 Eagle Court, Modesto, California, APN 120-002-021-000, and legally described as:

LOT 10 IN BLOCK 6925 OF VILLAGE MANOR NO. 2, AS PER MAP FILED JANUARY 3, 1962 IN VOLUME 19 OF MAPS, AT PAGE 94, STANISLAUS COUNTY RECORDS.

is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

17. [11-93660-E-7](#) PHILLIP/MARTHA LOUGH
SSA-6 Ann Marie Friend

MOTION FOR COMPENSATION FOR
STEVEN S. ALTMAN, TRUSTEE'S
ATTORNEY(S), FEES: \$7,637.50,
EXPENSES: \$107.29
9-10-13 [[73](#)]

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 Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on September 10, 2013. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

Final Ruling: The Final Application for 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 respondent 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 Final Application for Fees is granted. No appearance required.

FEES REQUESTED

Steven S. Altman, of Steven Altman, PC, Counsel for Irma C. Edmonds, Chapter 7 Trustee, makes a Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period April 15, 2012 through September 9, 2013. The order of the court approving employment of counsel was entered on August 31, 2012.

Description of Services for Which Fees Are Requested

Asset Analysis & Recovery: Counsel spent .3 hours in this category for total fees of \$75.00. Counsel describes services as drafting a turnover letter to personal injury counsel concerning estate's interest in Debtor's personal injury proceeds for administration of estate matters.

Case Administration: Counsel spent .3 hours in this category for total fees of \$75.00. Counsel describes services as initial conference with the Trustee and review of the schedules and Statement of Affairs.

Claims Administration & Objection: Counsel spent 9.75 hours in this category for total fees of \$2,437.50. Counsel describes tasks performed as

review of scope of the assignment, performing conflict checks, reviewing Debtor's exemptions and document review in the bankruptcy and personal injury case.

Fee Applications: Counsel spent 14 hours in this category for total fees of \$3,500.00. Counsel describes tasks performed as preparing employment and fee application for Counsel and others.

Litigation: Counsel spent 6.2 hours in this category for total fees of \$1,550.00. Counsel described services as reviewing documents from the personal injury case, correspondence related to bankruptcy and personal injury case matter and preparation of Motion for Approval of Compromise.

DISCUSSION

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.

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal 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 legal services undertaken 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 [legal fee] tab 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 is obligated to consider:

- (a) Is the burden of the probable cost of legal 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 Counsel's services rendered allowed the Trustee to settle the estate's interest in the medical/pharmacy claim which was approved by Motion to Compromise Controversy/Approve Settlement Agreement. The estate has \$33,313.69 to be administered as of the filing of the application. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$250.00/hour for counsel for 30.55 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$7,637.50 are approved 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.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of \$107.29 for copies and postage. The total costs in the amount of \$107.29 are approved 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.

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

Attorneys' Fees	\$7,637.50
Costs and Expenses	\$ 107.29

For a total final allowance of \$7,637.50 in Attorneys' Fees and Costs in this 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 for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Steven S. Altman is allowed the following fees and expenses as a professional of the Estate:

Steven S. Altman, Counsel for the Chapter 7 Trustee
Applicant's Fees Allowed in the amount of \$7,637.50
Applicants Expenses Allowed in the amount of \$107.29,

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

18. [10-90762-E-7](#) **DESIREE BRUNKEN-SAGE AND** **MOTION FOR COMPENSATION FOR**
SSA-5 **STEVEN SAGE** **STEVEN S. ALTMAN, TRUSTEE'S**
Cherie L. D'Arcy **ATTORNEY(S), FEE: \$3,550.00,**
EXPENSES: \$89.42
9-4-13 [46]

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 Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 4, 2013. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

Final Ruling: The Final Application for 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 respondent 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 Final Application for Fees is granted. No appearance required.

FEES REQUESTED

Steven S. Altman of Steven Altman PC, Counsel for the Trustee, makes a Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period June 8, 2011 through August 26, 2013. The order of the court approving employment of counsel was entered on June 8, 2011.

Description of Services for Which Fees Are Requested

Asset Disposition: Counsel spent 7.5 hours in this category for total fees of \$1,875.00. Counsel describes tasks performed as assisting the Trustee and the Broker with sale, marketing and liquidation of subject property. Counsel also prepared Motion for Sale and reviewed closing escrow statement.

Case Administration: Counsel spent .7 hours in this category for total fees of \$175.00. Counsel describes tasks performed as advising the Trustee on estate matters such as liquidation of lot property, appointment, fee applications, and closing of escrow.

Business Operation: Counsel spent .3 hours in this category for total fees of \$75.00. Counsel describes tasks performed as holding a conference with the Broker regarding nature of commission for the sale of the lot.

Claim Administration: Counsel spent .2 hours in this category for total fees of \$50.00. Counsel describes tasks performed reviewing Trustee's claims in estate including Debtor's exemption claims and reductions.

Fee/Employment Application: Counsel spent 5.5 hours in this category for total fees of \$1,375.00. Counsel describes tasks performed as preparing appointment and fee application.

DISCUSSION

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.

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal 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 legal services undertaken 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 [legal fee] tab 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 is obligated to consider:

- (a) Is the burden of the probable cost of legal 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 Counsel's services rendered a successful appointment of a broker and relator to assist with listing and sale of real property and resolution of lien issues against the property. The estate has \$15,864.99 to be administered as of the filing of the application. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$250.00/hour for counsel for 14.2 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$3,550.00 are approved 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.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of \$89.42 for copies and postage. The total costs in the amount of \$89.42 are approved 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.

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

Attorneys' Fees	\$3,550.00
Costs and Expenses	\$ 89.42

For a total final allowance of \$3,639.42 in Attorneys' Fees and Costs in this 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 for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Steven S. Altman is allowed the following fees and expenses as a professional of the Estate:

Steven S. Altman, Counsel for the Trustee
Applicant's Fees Allowed in the amount of \$3,550.00
Applicants Expenses Allowed in the amount of \$89.42,

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

19. [13-91669-E-7](#) MARTHA RETANA
Pro Se

ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
9-24-13 [[12](#)]

CASE DISMISSED 9-27-13

Final Ruling: The case having previously been dismissed, the Order to Show Cause is dismissed as moot.

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

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

The Order to Show Cause having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Order to Show Cause is dismissed as moot, the case having been dismissed.

20. [12-92371-E-7](#) DORRIS CLARK
SLF-4 Scott D. Mitchell

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF THE SUNTAG LAW
FIRM FOR DANA A. SUNTAG,
TRUSTEE'S ATTORNEY(S), FEES:
\$3,500.00, EXPENSES: \$177.77
9-9-13 [35]

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, all creditors, and Office of the United States Trustee on September 9, 2013. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

Final Ruling: The Final Application for 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 respondent 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 Final Application for Fees is granted. No appearance required.

FEES REQUESTED

The Suntag Law Firm, Counsel for the Chapter 7 Trustee, makes a Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period September 24, 2012 through October 10, 2013. The order of the court approving employment of counsel was entered on November 1, 2012.

Description of Services for Which Fees Are Requested

General Case Administration: Counsel spent 7.5 hours in this category. Counsel describes tasks performed as reviewing the Debtor's schedules to evaluate the exemptions, preparing employment application, and preparing stipulation to extend the deadline to object to exemptions.

Assess and Recover Property of the Estate: Counsel spent 4.8 hours in this category. Counsel describes tasks performed as investigating a transfer of personal property by the Debtor to family members, drafting a demand letter to retrieve the property or its value under 11 U.S.C. Section 547 and correspondence with creditors.

Adversary Proceeding: Counsel spent 12.6 hours in this category. Counsel describes tasks performed as filing an adversary complaint to avoid Transfer and recover personal property or its value, investigating security interest of the creditor, requesting court for default entry, requesting the Court to extend deadline to file application for default judgment and preparing a stipulation to dismiss the adversary proceeding.

Settlement: Counsel spent 10.8 hours in this category. Counsel describes tasks performed as negotiating the terms of the settlement with the Creditors over the personal property, preparing the settlement agreement, and preparing and filing motion to compromise.

DISCUSSION

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).

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal 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 legal services undertaken 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 [legal fee] tab 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 is obligated to consider:

- (a) Is the burden of the probable cost of legal 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 Counsel's services totaled \$9,370.50, which Counsel discounts to \$3,500.00. The estate has approximately \$10,000.00 to be administered as of the filing of the application. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case for:

- an Attorney admitted to the Bar in 1986 are \$315.00/hour for 4.4 hours,
- an Attorney admitted to the Bar in 2001 are \$295.00/hour for 21.9 hours,
- an Attorney admitted to the Bar in 2008 are \$225.00/hour for 18.0 hours, and
- an Attorney admitted to the Bar in 2011 are \$195.00/hour for 6.0 hours.

However, Applicant submits request for \$3,500.00, rather than the full \$9,370.50 documented in the motion, for all the services. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$3,500.00 are approved 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.

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

Attorneys' Fees and Costs	\$3,500.00
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For a total final allowance of \$3,500.00 in Attorneys' Fees and Costs in this 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 for Allowance of Fees and Expenses filed by Counsel 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 Suntag Law Firm is allowed the following fees and expenses as a professional of the Estate:

The Suntag Law Firm, Counsel for the Chapter 7 Trustee Applicant's Fees and Costs Allowed in the amount of \$ 3,500.00

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

21. [11-91773-E-7](#) GORDON/PAMELA YEATS
JDP-1 Ann Marie Friend

MOTION TO AVOID LIEN OF ASSET
ACCEPTANCE, LLC
9-4-13 [[29](#)]

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 Debtors, Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on September 4, 2013. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Avoid a Judicial Lien 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 respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid a Judicial Lien is granted. No appearance required.

A judgment was entered against the Debtor in favor of Asset Acceptance, LLC for the sum of \$11,471.79. The abstract of judgment was recorded with Sacramento County on August 2, 2005. That lien attached to the Debtor's residential real property commonly known as 1600 Waterloo Court, Modesto, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$60,000 as of the date of the petition. The unavoidable consensual liens total \$80,581.22 on that same date according to Debtor's Schedule A. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of \$100.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$115,000.00 as of the date of the petition. The unavoidable consensual liens total \$162,313.32 on that same date according to Debtor's Schedule A. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of \$100.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the judgment lien of Citibank, N.A., Stanislaus County Superior Court Case No. 676437, recorded on January 17, 2013, with the Stanislaus County Recorder, Document No. 2013-0004757-00, against the real property commonly known as 12208 Quicksilver Street, Waterford, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

23. [13-91197-E-7](#) **GEORGE ADOMYETZ**
JDP-2 **James Pitner**

**MOTION TO AVOID LIEN OF
CITIBANK, N.A.
9-3-13 [19]**

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, Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on September 3, 2013. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Avoid a Judicial Lien 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 respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid a Judicial Lien is granted. No appearance required.

A judgment was entered against the Debtor in favor of Citibank, N.A. for the sum of \$5,411.84. The abstract of judgment was recorded with Sacramento County on August 9, 2012. That lien attached to the Debtor's residential real property commonly known as 12208 Quicksilver Street, Waterford, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$115,000.00 as of the date of the petition. The unavoidable consensual liens total \$162,313.32 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of \$100.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the judgment lien of Citibank, N.A., Stanislaus County Superior Court Case No. 674413, recorded on August 9, 2012, with the Stanislaus County Recorder, Document No. 2012-0070666-00 against the real property commonly known as 12208 Quicksilver Street, Waterford, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.