

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

November 5, 2020 at 10:30 a.m.

1. **20-90373-E-7**
CLH-3

THOMAS SWARTZ
Peter Macaluso

**OBJECTION TO DEBTOR'S CLAIM OF
EXEMPTIONS**
10-20-20 [77]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on October 20, 2020. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

The Objection to Claimed Exemptions was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, -----
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The Objection to Claimed Exemptions for the Partnership Interest is sustained, and Debtor's claim of an exemption in the Partnership Interest is disallowed, with no leave to file a further amended Schedule C (Debtor and Counsel now having filed a Sixth Amended Schedule C).

November 5, 2020 at 10:30 a.m.

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Jane M. Wright, Ron R. Skrbina, Christina A. Tripp and Gaylord W. Skrbina (“Creditors”) object to Thomas Patrick Swartz’s (“Debtor”) claimed exemptions under C.C.P. § 704.730 in “Parcel Land-60 yr. old tin roof home west point-pine grove Rail Road Flat, Ca 95665 Calaveras County Partnership owns 75% interest in 278.02 acres” on the basis that Debtor cannot claim a homestead exemption in real property owned by a business entity partnership.

The claimed exemption in the Partnership objection to is found on Debtor’s October 12, 2020 Amended Schedule C. Dckt. 74. The exemption claimed is stated as having been made pursuant to “C.C.P. § 704.730.”

DISCUSSION

A claimed exemption is presumptively valid. *In re Carter*, 182 F.3d 1027, 1029 at fn.3 (9th Cir.1999); *See also* 11 U.S.C. § 522(l). Once an exemption has been claimed, “the objecting party has the burden of proving that the exemptions are not properly claimed.” FED. R. BANKR. P. RULE 4003(c); *In re Davis*, 323 B.R. 732, 736 (9th Cir. B.A.P. 2005).

California Code of Civil Procedure 703.140(a) provides for the election of exemptions when a bankruptcy petition is filed. The Debtor may elect to claim all of the exemptions normal, non-bankruptcy proceeding exemptions permitted under California law and an alternative set of exemptions, set forth in California Code of Civil Procedure § 703.140(b) that may be elected for a bankruptcy case.

An exemption of \$120,750 is made as being pursuant to “C.C.P. § 704.730.” Dckt. 74.

Creditor argues that Debtor is not entitled to the homestead exemption for property owned by the partnership. For this proposition, Creditor points the court to *California Coastal Comm v. Allen*, in that case the court held that the a debtor was ineligible for the homestead exemption after he transferred the property to a corporation, of which Debtor was the sole shareholder. *Cal. Coastal Com. v. Allen*, 167 Cal. App. 4th 322, 329 (2008). In this case, Debtor’s property is owned by a partnership, not a natural person.

Creditor is correct, the Objection is sustained and the claim of homestead exemption pursuant to California Code of Civil Procedure § 704.

Further Amended Schedule C

Debtor, prior to obtaining counsel and now after having counsel has engaged in a filing series of amended Schedule C, some filed while this objection was pending. The court reviews the multiple amended Schedules C filed by Debtor in the chart below:

Date filed and Docket No.	Exemption Claimed	Stated Statutory Basis for Exemption	Amount of Exemption Stated
Original Schedule C Filed June 9, 2020 Dckt. 19	Partnership Interest (Debtor <i>in pro se</i>)	11 U.S.C. § 522(b) (1) (2) (3)	\$100,000

1 st Amended Schedule C Filed August 11, 2020 Dckt. 39	Partnership Interest (Debtor <i>in pro se</i>)	11 U.S.C. § 522(b) (1) (2) (3)	\$30,000
2 nd Amended Schedule C Filed September 3, 2020 Dckt. 62	Partnership Interest (Debtor <i>in pro se</i>)	11 U.S.C. § 522(b) (1) (2) (3)	\$30,000
3 rd Amended Schedule C Filed September 24, 2020 Dckt. 67	Partnership Interest (Debtor <i>in pro se</i>)	California 704 Bankruptcy Homestead Exemption	\$30,000
4 th Amended Schedule C Filed October 12, 2020 Dckt. 74	Parcel of Land, Partnership owing 75% Interest (Debtor Represented by Counsel)	C.C.P. § 704.730	\$120,750
5 th Amended Schedule C Filed October 15, 2020 Dckt. 76	Partnership Interest (Debtor Represented by Counsel)	C.C.P. § 703.140(b)(5)	\$30,825
6 th Amended Schedule C Filed October 30, 2020 Dckt. 85	Partnership Interest (Debtor Represented by Counsel)	Calif. Corp. Code 16501, CCP 704.710, 720,730	\$30,000

The Debtor, both *in pro se* and represented by counsel, continued to assert exemptions based on inapplicable statutes. Debtor and counsel then filed another amended Schedule C, while this Objection was pending. Such serial filing of Exemption forms does not deprive the court of the jurisdiction and responsibility of ruling on the objection.

While citing to California Code of Civil Procedure § 703.140(b)(5) in the Fifth Amended Schedule C filed just before the present Objection was filed, Debtor backtracked and jumped on California Corporations Code § 16501 and California Code of Civil Procedure §§ 704.710 and 720.010. These statutory provisions of California law presented to the court by Debtor and Debtor's Counsel in the Sixth Amended Schedule C, Dckt. 85, are:

California Corporations § 16501. Coownership

A partner is not a coowner of partnership property and has no interest in partnership property that can be transferred, either voluntarily or involuntarily.

California Code of Civil Procedure § 704.710. Definitions

As used in this article:

(a) “Dwelling” means a place where a person resides and may include but is not limited to the following:

- (1) A house together with the outbuildings and the land upon which they are situated.
- (2) A mobilehome together with the outbuildings and the land upon which they are situated.
- (3) A boat or other waterborne vessel.
- (4) A condominium, as defined in Section 783 of the Civil Code.
- (5) A planned development, as defined in Section 11003 of the Business and Professions Code.
- (6) A stock cooperative, as defined in Section 11003.2 of the Business and Professions Code.
- (7) A community apartment project, as defined in Section 11004 of the Business and Professions Code.

(b) “Family unit” means any of the following:

- (1) The judgment debtor and the judgment debtor’s spouse if the spouses reside together in the homestead.
- (2) The judgment debtor and at least one of the following persons who the judgment debtor cares for or maintains in the homestead:
 - (A) The minor child or minor grandchild of the judgment debtor or the judgment debtor’s spouse or the minor child or grandchild of a deceased spouse or former spouse.
 - (B) The minor brother or sister of the judgment debtor or judgment debtor’s spouse or the minor child of a deceased brother or sister of either spouse.
 - (C) The father, mother, grandfather, or grandmother of the judgment debtor or the judgment debtor’s spouse or the father, mother, grandfather, or grandmother of a deceased spouse.
 - (D) An unmarried relative described in this paragraph who has attained the age of majority and is unable to take care of or support himself or herself.

(3) The judgment debtor's spouse and at least one of the persons listed in paragraph (2) who the judgment debtor's spouse cares for or maintains in the homestead.

(c) "Homestead" means the principal dwelling (1) in which the judgment debtor or the judgment debtor's spouse resided on the date the judgment creditor's lien attached to the dwelling, and (2) in which the judgment debtor or the judgment debtor's spouse resided continuously thereafter until the date of the court determination that the dwelling is a homestead. Where exempt proceeds from the sale or damage or destruction of a homestead are used toward the acquisition of a dwelling within the six-month period provided by Section 704.720, "homestead" also means the dwelling so acquired if it is the principal dwelling in which the judgment debtor or the judgment debtor's spouse resided continuously from the date of acquisition until the date of the court determination that the dwelling is a homestead, whether or not an abstract or certified copy of a judgment was recorded to create a judgment lien before the dwelling was acquired.

(d) "Spouse" does not include a married person following entry of a judgment decreeing legal separation of the parties, unless such married persons reside together in the same dwelling.

California Code of Civil Procedure § 720.010. Application of definitions

Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this division.

Clearly, the above citations do not provide a basis for claiming an exemption in the partnership interest stated on the above statutory sections. The original and six subsequently filed amended Schedules C are all made with the certifications set forth in Federal Rule of Bankruptcy Procedure 9011 - first by the Debtor in *pro se* and then by the Debtor and his counsel in the FOURTH Amended Schedule C, FIFTH Amended Schedule C, and SIXTH Amended Schedule C.

If there was a valid, legitimate, good faith exemption that could be stated for the partnership interest, the court has to believe that Debtor and Debtor's counsel would have clearly stated it in the SIXTH AMENDED Schedule C. Their failure to do so is an admission that none exists.

Therefore, now having waded through a SIXTH Amended Schedule C, the disallowance of the claim of exemption is the disallowance of a claim of exemption in the Partnership Interest. Debtor and Debtor's counsel cannot continually file repeat amended Schedules C to try and circumvent objections and to slip past/sneak by/mislead the court as to the actual, correct law. ^{FN.1.}

FN. 1. In reviewing these Schedules, the court is reminded of a line from Hamlet, in which an officer of the royal guard say, "Something is rotten in the state of Denmark." Hamlet, Act I, Scene IV; William Shakespear. On the Sixth Amended Schedule C, Dckt. 85, Debtor and Debtor's Counsel have stated an exemption of \$3,000 in a Lincoln pursuant to California Code of Civil Procedure § 704.060. That exemption section is for personal property used in a trade or business.

However, on the Amended Schedules filed by Debtor and Debtor's counsel on October 12, 2020, Debtor states under penalty of perjury that he has no business related property. Amended Schedule A/B, Question 46; Dckt. 75.

On the latest Amended Schedule I Debtor has filed under penalty of perjury, he states that he is unemployed, but when employed he is a "sales clerk." Dckt. 39 at 13-14. On the last Amended Statement of Financial Affairs, Debtor states under penalty of perjury that he has had no business or sole proprietorship at the time of the bankruptcy case was filed or in the four years prior. Dckt. 32 at 13-14.

It is unclear what good faith basis that Debtor and Debtor's counsel have for now asserting an exemption for "business related assets."

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 Objection to Claimed Exemptions filed by the Objecting Creditors, Jane M. Wright, Ron R. Skrbina, Christina A. Tripp and Gaylord W. Skrbina ("Objectors") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Objection is sustained and Debtor's claim of exemption in the property identified as Debtor's interest in a partnership that owns an interest in real property identified as one on which he resides is denied.

Debtor having now file an Original Schedule C and a Sixth Amended Schedule C (filed while this Objection was pending), with Debtor represented by counsel, that fails to state a legal basis for an exemption in this asset, no leave is granted to file a yet further amended Schedule C.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Trustee’s Attorney, and creditors on October 13, 2020. By the court’s calculation, 23 days’ notice was provided. 14 days’ notice is required.

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

After notice and a hearing, the court may order a trustee to abandon property of the Estate that is burdensome to the Estate or is of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion filed by Corazon Maria Hernandez (“Debtor”) requests the court to order Michael D. McGranahan (“the Chapter 7 Trustee”) to abandon property listed as:

Asset	Value	Encumbrance(s)	Exemption
Any and all legal and/or equitable interest in, if any, real property commonly known as 2721 E Orangeburg Ave, Modesto, CA 95355	\$285,000	\$175,406	CCP §703.140(b)(5) - \$28,049.17

2013 Acura ULX U Tech	\$15,000	\$15,189	
Debtor's Bare Legal Title to, as well as any and all other legal and/or equitable interest in, if any, a 2014 Toyota Corolla LE	\$100	\$9,571	CCP §703.140(b)(2) - \$100
Household Goods & Furnishings	\$1,440	\$0	CCP §703.140(b)(3) - \$1,440
Electronics: TV, DVD Player, Tables & Smart Phones, Printers & Scanners, Security Camera System, Camera & Camcorders.	\$550	\$0	CCP §703.140(b)(3) - \$550
Clothing, Leather Coats, Shoes	\$240	\$0	CCP §703.140(b)(3) - \$240
Everyday Jewelry, Watches, Necklaces, Earrings	\$90	\$0	CCP §703.140(b)(4) - \$90
Cash on Hand	\$60	\$0	CCP §703.140(b)(5) - \$60
Bank Account – Savings – Golden 1 CU – 3518-0	\$21	\$0	CCP §703.140(b)(5) - \$21
Bank Account – Checking – Golden 1 CU – 3518-9	\$44.75	\$0	CCP §703.140(b)(5) - \$44.75
Bank Account – App – Bank Mobile Vibe – 4680	\$3.02	\$0	CCP §703.140(b)(5) - \$3.02
Bank Account – Primary Share – Valley 1st CU – 740000	\$25	\$0	CCP §703.140(b)(5) - \$25
Bank Account – Checking – Valley 1st CU – 7400-80	\$0	\$0	
Bank Account – HSA – Optum Bank – 3306	\$17.06	\$0	CCP §703.140(b)(5) - \$17.06
Bank Account – Savings – Travis CU – 7805	\$5	\$0	CCP §703.140(b)(5) - \$5
Retirement Account – Mass Mutual	\$739.27	\$0	CCP §703.140(b)(5) - \$739.27
Retirement Account – StanCERA	\$70,566.13	\$0	CCP §703.140(b)(5) - \$70,566.13

The Declaration of Corazon Maria Hernandez has been filed in support of the Motion. Dckt. 113.

The court finds that the debt secured by the Property exceeds the value of the Property and that there are negative financial consequences to the Estate caused by retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate and orders the Chapter 7 Trustee to abandon the property.

CHAMBERS PREPARED ORDER

The court shall issue an Order (not 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 Compel Abandonment filed by Corazon Maria Hernandez (“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 to Compel Abandonment is granted, and the Property identified as

Asset
Any and all legal and/or equitable interest in, if any, real property commonly known as 2721 E Orangeburg Ave, Modesto, CA 95355
2013 Acura ULX U Tech
Debtor’s Bare Legal Title to, as well as any and all other legal and/or equitable interest in, if any, a 2014 Toyota Corolla LE
Household Goods & Furnishings
Electronics: TV, DVD Player, Tables & Smart Phones, Printers & Scanners, Security Camera System, Camera & Camcorders.
Clothing, Leather Coats, Shoes
Everyday Jewelry, Watches, Necklaces, Earrings
Cash on Hand
Bank Account – Savings – Golden 1 CU – 3518-0
Bank Account – Checking – Golden 1 CU – 3518-9
Bank Account – App – Bank Mobile Vibe – 4680
Bank Account – Primary Share – Valley 1st CU – 740000
Bank Account – Checking – Valley 1st CU – 7400-80

Bank Account – HSA – Optum Bank – 3306
Bank Account – Savings – Travis CU – 7805
Retirement Account – Mass Mutual
Retirement Account – StanCERA

and listed on Schedule A/B by Debtor is abandoned by the Chapter 7 Trustee, Michael D. McGranahan (“Trustee”) to Corazon Maria Hernandez by this order, with no further act of the Trustee required.

This abandonment is subject to, and without prejudice to the rights and interests of the bankruptcy estate pursuant to the Settlement Agreement and Order approving the Settlement (Order, Dckt. 123).

3. [18-90600-E-7](#)
[MF-5](#)

CORAZON HERNANDEZ
Brian Haddix

CONTINUED MOTION TO
COMPROMISE CONTROVERSY/APPROVE
SETTLEMENT AGREEMENT WITH
CORAZON MARIA HERNANDEZ AND
SOCORRO GARIBA
9-17-20 [[103](#)]

Final Ruling: No appearance at the November 5, 2020 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on September 17, 2020. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

Pursuant to the court's order (Dckt. 123), the Motion to Approve Compromise has been granted, and the matter is removed from the calendar.

4. [18-90600-E-7](#)
[19-9016](#)

MCGRANAHAN V. GARIBA

CORAZON HERNANDEZ

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
9-30-19 [[1](#)]

Pursuant to the court's order (Dckt. 42), the Status Conference is continued to 2:00 p.m. on January 28, 2021.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 12 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 7, 2020. By the court’s calculation, 29 days’ notice was provided. 28 days’ notice is required.

The Motion to Extend Deadline for Filing Chapter 12 Plan has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

The Motion to Extend Deadline for Filing Chapter 12 Plan is granted.

The Chapter 12 debtor, Joe Anthony Machado (“Debtor-in-Possession”) moves the Court for an order pursuant to 11 United States Code § 1221 extending the deadline for filing a Chapter 12 plan by 30 days from October 7, 2020 to November 6, 2020.

Review of the Motion

Debtor-in-Possession provides the following grounds in requesting the extension to file a plan of reorganization:

- A. It appears that a liquidating plan may be necessary for the Debtor’s farm property. However, the Debtor’s “adjusted cost basis” for the farm property may be very low, which may affect the feasibility of a liquidating plan.
- B. The Debtor and his counsel have attempted to determine the “adjusted cost basis” for the farm property but Debtor’s accountant has been unable to provide the information.

- C. The Debtor has been expecting a substantial payment from Forbes Global Services, LLC that would allow Debtor to pay delinquent real property taxes and arrears due on the senior deed of trust on the farm property but it has not yet been received.
- D. The Debtor's squab business has suffered dramatically due to COVID-19, with prices dropping in half due to restaurant closures in California, making it difficult to forecast future income and expenses.
- E. The Debtor's almond production has significantly dropped due to many factors beyond the Debtor's control, including the removal of trees in a neighboring orchard, resulting in the movement of squirrels to the Debtor's almond trees.
- F. The Debtor has been involved with the care of his wife (who has experienced serious health challenges) and has lost the benefit of her assistance in the farm operation.
- G. There is a significant discrepancy of more than \$70,000 between the Internal Revenue Service claims is owed in priority claims and what Debtor states is owed that must be resolved. The Debtor's counsel has attempted to resolve it informally without the need of a formal objection to the proof of claim.

DISCUSSION

11 U.S.C. § 1221 also provides that "the court may extend such period if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable."

The deadline for filing a plan of reorganization in this case was October 7, 2020. The motion requests that the deadline to file be extended to November 6, 2020.

As provided by § 1221, the court may extend the deadline for cause. The request for extension of time was filed prior to the deadline.

In his Motion, Debtor explains the circumstances hindering the filing of a plan. At this juncture, it seems Debtor-in-Possession has done all he can do to keep this case moving forward.

~~Granting of the Motion~~

~~As of the court's review of the docket on November 4, 2020, no Chapter 12 Plan had been filed with the court.~~

At the hearing, XXXXXXXXXX

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

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

The Motion to Extend Deadline to File a Chapter 12 Plan filed by the Chapter 12 debtor, Joe Anthony Machado (“Debtor-in-Possession”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is **granted**.

**MOTION TO SELL FREE AND CLEAR
OF LIENS AND/OR MOTION
APPROVING FORM OF ASSET
PURCHASE AGREEMENT, MOTION
APPROVING AUCTION SALE FORMAT
AND BIDDING PROCEDURES, MOTION
SCHEDULING A COURT HEARING
FOR APPROVAL OF THE SALE OF
REAL ESTATE
10-22-20 [[1215](#)]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession’s Attorney, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on October 22, 2020. By the court’s calculation, 14 days’ notice was provided. 14 days’ notice is required.

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

The Motion Approving Auction Sale Format and Bidding Procedures is granted.

Pursuant to the terms of the confirmed Chapter 11 Plan in this case, Focus Management Group USA, Inc., the Plan Administrator, (“Movant”) has filed a Motion requesting the following relief from the court:

- A. A “Bidding Procedures Order” that:
 - 1. Approves the bidding procedures for the sale of the Property (identified below).

- B. A “Sale Order” that
1. Approves the sale of the Real Property to Greenlaw Acquisitions, LLC a California limited liability company and Lewis Land Developers, LLC, a Delaware limited liability company (collectively the “Buyer”) for \$30,539,399;
 2. The above approved sale is subject to overbids as provided in the bidding procedures, and includes a breakup fee for Buyer if there is a successful overbidder;
 3. The sale is approve pursuant to 11 U.S.C. § 363(b) and § 363(f) [free and clear of liens and encumbrances]; and
 4. Authorizes the Movant to pay or reserve from the sales proceeds costs, expenses, commissions, and the net proceeds from the sale.

The real property that is the subject of the sale is identified as:

± 343.25 acres of land: APN: 021-022-332, APN: 021-022-034
APN: 021-022-041, APN: 021-022-042
APN: 021-022-055, APN: 021-022-059
APN: 021-022-061, APN: 021-022-062

(“Property”).

The proposed purchaser of the Property is Greenlaw Acquisitions, LLC a California limited liability company and Lewis Land Developers, LLC, a Delaware limited liability company, and a summary of terms of the sale are (the complete terms of the Purchase and Sale Agreement (“PSA”) are Exhibit 1, Dckt. 1219):

- A. Buyer has agreed to purchase the Property for the sum of \$30,539,399,
- B. The sale is based upon an “all cash” offer that is scheduled to close on or before the date that is thirty (30) days after the date Buyer delivers its Notice of Feasibility Approval.
- C. Proposed sale of the Property is on an As-Is/Where-Is basis.
- D. A Break-Up Fee of 2% of the original gross purchase price of \$30,539,399 (which would total \$610,787,98) shall be paid to the Buyer, intended to compensate the Buyer for its significant costs incurred and time and energies expended in completing its due diligence and related investigations concerning the Property, in negotiating and drafting the PSA, and otherwise to bring the sale of the Property before the Court.
- E. The Estate's listing agreement with Cushman provides for the Estate to pay a broker's commission of 5% of the gross purchase price (the “Commission”), with 2.5% of the commission to be shared with a broker for an overbidding buyer.
- F. The Movant Administrator estimates that closing costs and transfer taxes will not exceed 0.5% of the gross purchase price.

- G. The Movant estimates the taxes attributable to this transaction based upon the Buyer's purchase price to be \$8,982,086. Furthermore, the transaction is also subject to a 1% U.S. Trustee fee, or \$305,394. The Movant requests authority to reserve the income tax and pay the U.S. Trustee fees from the sale proceeds.
- H. The auction for presentation of overbids will be conducted via Zoom on December 16, 2020.

Bidding Procedures

November 5, 2020	Deadline for Brighthouse and Summit Consents to Sale of the Property
December 3, 2020	Deadline for Objections to the proposed sale of the Property
December 9, 2020	Deadline for parties to submit Proposed Agreement and Financial Bona Fides Submission Deadline
December 9, 2020	Bid Deadline, Including Required Deposit
December 14, 2020	Notification of Qualified Bid Status:
December 16, 2020	Auction (by Zoom)
December 17, 2020	Sale Hearing
TBD	Closing Date – By January 14, 2021

The proposed overbidding procedures are (the complete Bidding Procedures are Exhibit 2, Dckt. 1219):

- A. Auction For Presentation of Overbids. The Movant proposes to conduct the Auction of the Property by Zoom on December 16, 2020.
- B. Bidder Qualification. A Potential Bidder must deliver to the Movant, at least eight days prior to the Auction, a cashier's check or wire transfer (with evidence of confirmation and acceptance into escrow), payable the Plan Administrator's counsel's for deposit into its trust account, in the amount of \$710,800 towards the Potential Bidder's purchase of the Property, to be returned to such bidder in the event that such bidder is not the Successful Bidder or Back-Up Bidder at the Auction, and to constitute the bidder's nonrefundable deposit under the terms of the respective Proposed Agreement if the bidder is the successful bidder at the Auction. Potential Bidders must provide evidence of prospective buyer's source of capital or other financial ability to complete the contemplated transactions, the adequacy of which the Plan Administrator will determine in its sole discretion, with the consultation of the Reorganizing Debtor, and with the consultation with the Notice Parties.

- C. Written Bids Conforming to Proposed Agreement and Bidding Procedures. All initial bids must be at least \$710,800 higher than the purchase price agreed upon with the Buyer. Provided, however, that the Proposed Agreement shall not include a Break-Up Fee. Qualified Bids shall not be conditioned on (i) the outcome of unperformed due diligence by the bidder (ii) obtaining financing, or (iii) any other conditions other than (a) being selected as the Successful Bidder or Back-Up Bidder, (b) Plan Administrator Approval, (c) the consent of the Secured Consent Parties for the sale, and (d) Bankruptcy Court Approval.
- D. Overbidding. Qualified Bidders may submit overbids at the Auction. The first initial Subsequent Bid must be at least \$710,800 higher than the purchase price agreed upon with the Buyer. Each incremental Subsequent bid shall be at least \$100,000 over the Starting Bid or the Leading Bid.
- E. Prompt Closing. The Successful Bidder must be able to close the sale on or before the later of January 14, 2021, or 15 days after the entry of an order approving the sale.
- F. Successful Bid. The Plan Administrator shall select the highest and best overbid as the Successful Bid and the Back-Up Bid, if any, based upon its reasonable judgment in consultation with the Reorganizing Debtor.
- G. Backup Buyer. The bidder with the second highest or otherwise best bid (as determined by the Plan Administrator in the exercise of its business judgment) at the Auction the Property shall be required to serve as a back-up bidder (the “Back-Up Bidder”) and keep such bid open and irrevocable until closing with the Successful Bidder or as otherwise provided in the Bidding Procedures.
- H. Break-Up Fee. The Plan Administrator seeks approval of a break-up fee of an amount equal to two percent (2%) of the Purchase Price that is to be paid to Buyer from the proceeds of the sale to the successful bidder as a condition precedent to close of that sale. This fee was negotiated and required by the Buyer to compensate the Buyer for its costs incurred and time and energies expended in completing its due diligence and related investigations relating to the Property.
- I. Reservation of Rights. The Plan Administrator, after consultation with the Reorganizing Debtor (a) may determine after each round of bidding at the Auction which Qualified Bid, if any, is the highest or otherwise best offer and the value thereof, (b) may reject, at any time, any bid that is (i) inadequate or insufficient, (ii) not in conformity with the requirements of the Bankruptcy Code, the Bidding Procedures, or the terms and conditions of the Transaction, or (iii) contrary to the best interests of the Reorganizing Debtor’s estate, and stakeholders as determined by the Plan Administrator in consultation with the Reorganizing Debtor, and (c) except as otherwise specifically set forth herein, may modify the Bidding Procedures or impose, at or prior to the Auction, additional customary terms and conditions on the Transaction.

- J. As Is, Where Is, With all Faults. The sale of the Property will be on an “as is, where is, with all faults” basis and without surviving representations or warranties of any kind, nature, or description except to the extent expressly set forth in the PSA or Proposed Agreement, as applicable, and the schedules thereto, with respect to the Successful Bidder.

- K. Bifurcated Relief. The Plan Administrator proposes bifurcated relief, such that the PSA and Bidding Procedures be approved, and the Secured Consent Parties consent be delivered, in advance of the Sales Procedure Hearing, and that the final sale terms and buyer be approved at the Sale Hearing.

Requested Sale Free and Clear of Liens

The Reorganizing Debtor and Movant seek to sell the Property free and clear of any liens, claims, interests, or other encumbrances as follows:

Priority of Lien	Claim Holder	Satisfaction and Release
Tax	Stanislaus County Tax Collector	The Plan Administrator seeks authority to pay Stanislaus County Tax Collector from the proceeds of the sale. Therefore, the property tax liens shall be satisfied and released as paid in full.
1st	Brighthouse	Brighthouse holds a secured claim against the Property allowed by the Plan pursuant to a deed of trust recorded November 9, 2012 as Instrument No. 2012-0100449-00. The Plan Administrator seeks authority to pay Brighthouse’s remaining allowed claim from the proceeds of the sale. Therefore, Brighthouse’s liens shall be satisfied and released as paid in full.
2nd 3rd	Summit	<p>Summit also holds secured claims against the Property:</p> <ul style="list-style-type: none"> (i) as beneficiary by assignment pursuant to a deed of trust recorded February 28, 2014 as Document No. 2014- 0012421, (ii) as original beneficiary pursuant to a deed of trust recorded April 19, 2017 as Document No. 2017-028232, and (iii) as original beneficiary pursuant to a deed of trust recorded March 27, 2020 as Document No. 2020-022079. <p>The Plan Administrator has sought and will continue to seek the consent of Summit to Summit’s release of its liens on the Property to the extent not paid in full. The Plan Administrator expects that Summit will so consent to the sale of the Property free and clear of their liens provided that the net sale proceeds remaining after paying the closing costs, Commissions, real property taxes, U.S. Trustee Fees, and income tax reserve are paid to Summit subject to the allocation provisions of Section 6.6 of the Plan.</p>

The Motion also seeks to sell the Property free and clear of the lien of the following creditors for who Movant asserts their secured claims have already been paid in full:

Disputed Liens or Other Interests As To Certain Portions of the Property	Basis for Disputes according to Plan Administrator and Reorganized Debtor
<p>(i) Mid Valley Services, Inc.,</p> <p>(ii) Lou Telesmanic and Joanne Telesmanic, husband and wife as joint tenants; Christopher L. Telesmanic</p> <p>(iii) Sam A Borno and Ranna A. Borno, husband and wife, as joint tenants</p> <p>(iv) Sudeep Singh FLLLP</p> <p>(v) Kevin and Janice Delaney Holdings, LLC, a California limited liability company</p> <p>(vi) Golden Gulch Dairy, LLC, a California limited liability company</p> <p>(vii) Lehman Family Farms, Inc., a California corporation</p> <p>(viii) Jesse J. Spain and Bonnie D. Spain, husband and wife as joint tenants</p> <p>(ix) Pensco Trust Company Custodian FBO Sudeep Singh IRA</p> <p style="padding-left: 40px;">(The above collectively, (i) through (ix) are referred to herein as the “Mid Valley Parties #1”)</p> <p>(x) Mid Valley Services, Inc. Retirement Trust Account</p> <p>(xi) Russell Spain</p> <p>(xii) Mid Valley Services, Inc. 401(k) plan</p> <p>(xiii) Gregory A. Kilgore and</p> <p>(xiv) Megan K. Kilgore, husband and wife as joint tenants</p> <p>(xv) Kevin Kummerfield and Sally Kummerfield, husband and wife as joint tenants</p> <p style="padding-left: 40px;">(The above collectively, (x) through (xv) are referred to herein as the “Mid Valley Parties #2”)</p>	<p>The obligations secured by interests of the Mid Valley Parties #1 and #2 have been paid in full. Mid Valley Parties #1 and #2 did not file a proof of claim in this case or otherwise assert an interest in the Property. Therefore, the Reorganizing Debtor contends that the Mid Valley Parties #1 and #2 Deeds of Trust are void and should be reconveyed.</p> <p>If full reconveyances by the Mid Valley Parties #1 and #2 are not promptly recorded for the Mid Valley Parties #1 and #2 Deeds of Trust, the Reorganizing Debtor and/or Plan Administrator intends to formally demand a reconveyance of the Mid Valley Parties #1 and #2 Deeds of Trust.</p> <p>The Plan Administrator seeks entry of an order authorizing the sale of the Property free and clear of the Mid Valley Parties #1 and #2 Deeds of Trust pursuant to Bankruptcy Code section 363(f)(4) with \$0.00 reserved for the Mid Valley DOT #1 and #2.</p>

Disputed Liens or Other Interests As To Certain Portions of the Property	Basis for Disputes according to Plan Administrator and Reorganized Debtor
(xvi) Del Puerto Water District as Lessor (“DPW”)	<p>The Reorganizing Debtor asserts that this lease has expired and terminated according to its own terms and/or is otherwise unenforceable. The property was detached from the water district after the 2014 Annexation into the City of Patterson.</p> <p>The Plan Administrator seeks entry of an order authorizing the sale of the Property free and clear of the DPW Lease pursuant to Bankruptcy Code section 363(f)(4) with \$0.00 reserved for the DPW Lease.</p>
(xvii) Del Puerto Water District	<p>The Reorganizing Debtor asserts that DPW Supply Contract is unenforceable as expired and terminated according to its own terms and/or is otherwise unenforceable. The property was detached from the water district after the 2014 Annexation into the City of Patterson.</p> <p>The Plan Administrator seeks entry of an order authorizing the sale of the Property free and clear of the DPW Supply Contract pursuant to Bankruptcy Code section 363(f)(4) with \$0.00 reserved for the DPW Supply Contract.</p>
(xviii) Odell Hale and Lynee Hale as Lessor and Communication Systems Development, Inc. (“CSD”) as Lessee	<p>The Reorganizing Debtor asserts that this lease has expired and terminated according to its own terms and/or is otherwise unenforceable as having been made a prior owner or someone outside the title to the Property.</p> <p>The Plan Administrator seeks entry of an order authorizing the sale of the Property free and clear of the CSD Lease pursuant to Bankruptcy Code section 363(f)(4) with \$0.00 reserved for the CSD Lease.</p>
(xix) American Tower Systems as lessor and VIA Wireless LLC as Lessee	<p>The Reorganizing Debtor asserts that this lease has expired and terminated according to its own terms and/or is otherwise unenforceable as having been made a prior owner or someone outside the title to the Property.</p> <p>The Plan Administrator seeks entry of an order authorizing the sale of the Property free and clear of the VIA Lease pursuant to Bankruptcy Code section 363(f)(4) with \$0.00 reserved for the VIA Lease.</p>

<p>(xx) LBA Realty LLC, a Delaware limited liability company, as assigned to LBA RV-Company XXVII, LP, a Delaware limited partnership</p>	<p>A certain Purchase and Sale Agreement between the Reorganizing Debtor as seller and LBA Realty LLC, a Delaware limited liability company, as assigned to LBA RV-Company XXVII, LP, a Delaware limited partnership (“LBA”), provides for issuance of a right of first refusal letter to LBA (“ROFR Notice”).</p> <p>On October 5, LBA’s counsel responded that it contends the ROFR Period set forth in the Purchase and Sale Agreement expired and that the Reorganizing Debtor and the Plan Administrator are free to proceed as they see fit with the Buyer’s offer and any future offers. Moreover, more than seven business days have passed since issuance of the ROFR Notice and LBA has not elected to exercise its right to purchase the Property. Therefore, the sale of the Property shall proceed based upon LBA’s ROFR opportunity having been satisfied; and the Plan Administrator seeks entry of an order authorizing the sale of the Property free and clear of the ROFR Memorandum pursuant to Bankruptcy Code section 363(f)(4) with \$0.00 reserved.</p>
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The Bankruptcy Code provides for the sale of estate property free and clear of liens in the following specified circumstances,

(f) The trustee[, debtor in possession, or Chapter 13 debtor] may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f)(1)–(5).

For this Motion, Movant has established grounds based on 11 U.S.C. § 363(f)(5) for the Stanislaus County Tax Collector and Brighthouse Life Insurance, Co. by paying those secured claim in full from the sale proceeds through escrow.

For the Summit secured claims, Movant states that the consent of Summit will be provided, thus allowing the court to order the sale free and clear as provided in 11 U.S.C. § 363(f)(2).

For the remaining claims, Movant has stated grounds showing that each lien, encumbrance, or interest is in *bona fide* dispute, providing a basis for a sale free and clear, with the liens, encumbrances, and interests attaching to the sale proceeds to the same extent, validity, and priority as they existed in the Property sold pursuant to order of the court.

DISCUSSION

At the time of the hearing, the court announced the proposed sale and requested that all other persons interested in submitting overbids present them in open court. At the hearing, the following overbids were presented in open court: **XXXXXXXXXXXXXXXXXX**.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the Property has been extensively exposed to the market (for over three years) along with the rest of the Arambel Business Park and this is the best offer the estate has received. Moreover, the Plan Administrator projects that the sale will generate significant proceeds for payment of secured claims. The Property is not generating any revenue for the Estate but continues to accrue expenses such as property taxes, insurance, etc.

Movant has estimated that a five (5) percent broker's commission from the sale of the Property, with 2.5% of the commission to be shared with a broker for a buyer. As part of the sale in the best interest of the Estate, the court permits Movant to pay the broker an amount not more than five (5) percent commission.

The court grants the Motion and authorizes the sale of the Property to Greenlaw Acquisitions, LLC a California limited liability company and Lewis Land Developers, LLC, a Delaware limited liability company or nominee ("Buyer") for \$30,539,399, on the terms and conditions set forth in the Purchase and Sale Agreement, Exhibit 1, Dckt. 1219, and as further provided below.

The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred to effectuate the sale.

The Property is sold free and clear of the lien of the following creditors asserting a secured claim, pursuant to 11 U.S.C. § 363(f)(2), (4), and 5, of the following interests, with the lien of such creditor, if the creditor is not paid in full through the sale escrow, attaching to the proceeds of the sale in the same amount, extent, validity, and priority as it exists in the Property sold:

11 U.S.C. § 363(f)(5) - Compelled to Release Under Non-Bankruptcy Law

The liens of Stanislaus County Tax Collector and Brighthouse Life Insurance, Co., whose claims shall be paid in full from the sale proceeds through escrow.

For the Brighthouse Life Insurance Company liens, it has filed a response stating consent to the sale, as follows:

Brighthouse consents to the Motion including the form of Bidding Procedures and proposed sale, subject to entry of an order authorizing payment of net proceeds of the sale (after reasonable and authorized expenses) to Brighthouse as requested in the

Motion and updated in preliminary closing statements received by Brighthouse. Brighthouse does not intend to credit bid at the Auction.

At the time of this filing, Brighthouse's claim is no less than \$6,312,089.57. However, the amount of Brighthouse's claim cannot be finally fixed at the sale hearing because: (a) interest, fees, and expenses (including attorneys' fees) continue to accrue; (b) Brighthouse has made and continues to make Plan Funding Loans as provided the Plan of Reorganization confirmed in this case; (c) the closing date has not been finally determined; and (d) other sales of Brighthouse's collateral are pending and each closing will impact the amount of Brighthouse's remaining claim.

Response, Dckt. 1227.

11 U.S.C. § 363(f)(2) - Consent

The liens of Summit for which consent will be provided. Summit filed a Response, stating it's consent as follows:

Summit consents to the Transaction; provided that the Bidding Procedures and the Bidding Procedures Order (a) are entered by the Court in substantially the same form and substance as the proposed Bidding Procedures and Bidding Procedures Order submitted with the Motion; and (b) provide that Summit's right to credit bid at the auction shall be limited solely to the right to submit a credit bid as a Back-Up Bid behind the Successful Bid and all other Back-Up Bids. Summit's consent to the Transaction has been made with the assurances of the Plan Administrator that the Auction will not proceed without a Stalking Horse Bid.

Response, Dckt. 1228.

11 U.S.C. § 363(f)(4) - Interest Subject to Bona Fide Dispute

The Motion requests that the following liens and interests be stripped from the Property sold because Movant states they are in *bona fide* dispute:

- (i) Mid Valley Services, Inc.,
- (ii) Lou Telesmanic and Joanne Telesmanic, husband and wife as joint tenants; Christopher L. Telesmanic
- (iii) Sam A Borno and Ranna A. Borno, husband and wife, as joint tenants
- (iv) Sudeep Singh FLLLP
- (v) Kevin and Janice Delaney Holdings, LLC, a California limited liability company
- (vi) Golden Gulch Dairy, LLC, a California limited liability company

- (vii) Lehman Family Farms, Inc., a California corporation
- (viii) Jesse J. Spain and Bonnie D. Spain, husband and wife as joint tenants
- (ix) Pensco Trust Company Custodian FBO Sudeep Singh IRA
- (x) Mid Valley Services, Inc. Retirement Trust Account
- (xi) Russell Spain
- (xii) Mid Valley Services, Inc. 401(k) plan
- (xiii) Gregory A. Kilgore and
- (xiv) Megan K. Kilgore, husband and wife as joint tenants
- (xv) Kevin Kummerfield and Sally Kummerfield, husband and wife as joint tenants
- (xvi) Del Puerto Water District as Lessor ("DWP")
- (xvii) Del Puerto Water District
- (xviii) Odell Hale and Lynee Hale as Lessor and Communication Systems Development, Inc. ("CSD") as Lessee
- (xix) American Tower Systems as lessor and VIA Wireless LLC as Lessee
- (xx) LBA Realty LLC, a Delaware limited liability company, as assigned to LBA RV-Company XXVII, LP, a Delaware limited partnership

Once stripped off, the Movant requests that they not be attached to the sales proceeds, and that \$0.00 be allocated to each of these disputed liens and interests. The evidence presented for these bona fide disputes is the declaration of Juanita Schwartzkopf, a Senior Managing Director at Movant and the declaration of Jeffery Arambel, the Reorganized Debtor. Dckts. 1217 and 1218, respectively.

In his Declaration, the Reorganized Debtor provides factual testimony, and his legal conclusions why he has determined various asserted interests in the Property are void. He makes references to an "unrecorded lease" that somehow has shown up on a title report because a Memorandum of Lease was recorded. The Reorganized Debtor then states his legal conclusion that the lease had either expired or terminated, or is somehow otherwise unenforceable.

The Reorganized Debtor proceeds to dictate to the court his legal conclusions and findings that the various interests identified of record have either "expired and terminated according to its own terms and/or is otherwise unenforceable."

A sale authorized free and clear of liens and interests is not an adjudication of the rights and interests in the property being sold. It is not a shortcut deprivation of a persons property on a 28 day noticed motion. As discussed in Collier on Bankruptcy:

¶ 363.06 Sale Free of Liens or Interests; § 363(f)

Section 363(f) permits a sale of property of the estate free and clear of an interest in the property, including a lien, under a number of circumstances. It has long been recognized that the bankruptcy court has the power to authorize the sale of property free of liens with the liens attaching to the proceeds, with or without the consent of the lienholder.¹ Absent consent of the lienholder, the well-established rule was that the sale should not be held if it would not produce a surplus² unless there was a bona fide dispute concerning the validity of the lien.³ This limitation was not likely of constitutional dimension. The creditor's only constitutional claim would be to the value of the collateral,⁴ because any so-called right to control the collateral and to conduct a sale were remedies that bankruptcy might stay or abrogate.⁵

The Code makes no material change to the cases decided under the Bankruptcy Act on sales free and clear of liens but clarifies that other grounds for a sale free and clear may also exist. . . .

. . .

[5] Sale When Interest in Bona Fide Dispute; § 363(f)(4)

A sale may proceed free and clear of liens or interests if they are in bona fide dispute.⁵³ The trustee has the burden of demonstrating that a bona fide dispute exists.⁵⁴ To meet this burden the trustee must establish that there is an objective basis for either a factual or legal dispute as to the validity of the debt.⁵⁵ The court is not required to resolve the underlying dispute as a condition to authorizing the sale under this provision, but must determine that it exists.⁵⁶ In one case, however, the court held that a bona fide dispute did exist because the adverse interest holders disputed whether the sale could have been free and clear of their interests under a rent stabilization law.⁵⁷ Such post-hoc application of this paragraph could raise due process concerns.

1. *See Ray v. Norseworthy*, 90 U.S. (23 Wall.) 128 (128) (1875); *Van Huffel v. Harkelrode*, 284 U.S. 225, 52 S. Ct. 115, 76 L. Ed. 256 (1931); *Wright v. Union Central Life Ins. Co.*, 304 U.S. 502, 58 S. Ct. 1025, 82 L. Ed. 1490 (1938), *reh'g denied*, *Wright v. Union Cent. L. Ins. Co.*, 305 U.S. 668, 59 S. Ct. 56, 82 L. Ed. 1490 (1938); *Allebach v. Thomas*, 16 F.2d 853 (4th Cir. 1927), *cert. denied*, 274 U.S. 744, 47 S. Ct. 590, 71 L. Ed. 1325 (1927).

2. *Reconstruction Fin. Corp. v. Cohen*, 179 F.2d 773 (10th Cir. 1950); *Hoehn v. McIntosh*, 110 F.2d 199 (6th Cir. 1940); *In re Miller*, 95 F.2d 441 (7th Cir. 1938).

3. *Coulter v. Blieden*, 104 F.2d 29 (8th Cir. 1939), *cert. denied*, 308 U.S. 583, 60 S. Ct. 106, 84 L. Ed. 488 (1939); *In re National Grain Corp.*, 9 F.2d 802 (2d Cir. 1926).

4. *Wright v. Union Central Life Ins. Co.*, 311 U.S. 273, 61 S. Ct. 196, 85 L. Ed. 184 (1940), *reh'g denied*, 312 U.S. 711, 61 S. Ct. 445, 85 L. Ed. 1142 (1941).

5. *Continental Ill. Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U.S. 648, 55 S. Ct. 595, 79 L. Ed. 1110 (1935).

...

53. 11 U.S.C. § 363(f)(4).

54. See *Scherer v. Federal Nat'l Mortgage Ass'n (In re Terrace Chalet Apartments, Ltd.)*, 159 B.R. 821, 828 (N.D. Ill. 1993) (citing *Octagon Roofing*, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1991)). In some situations it may be a third party that raises the issue of bona fide dispute. See *In re Gerwer*, 898 F.2d 730, 733 (9th Cir. 1990); *Scherer v. Federal Nat'l Mortgage Ass'n (In re Terrace Chalet Apartments, Ltd.)*, 159 B.R. 821, 828 (N.D. Ill. 1993).

55. See *In re Daufuskie Island Props., LLC*, 431 B.R. 626 (Bankr. D.S.C. 2010) (substantial history of significant litigation over validity of creditor's asserted interest); *In re Octagon Roofing*, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1991); *In re Collins*, 180 B.R. 447, 452 (Bankr. E.D. Va. 1995).

56. See *In re Octagon Roofing*, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1991).

57. *Cheslock-Bakker & Assocs. v. Kremer (In re Downtown Athletic Club of New York City, Inc.)*, 44 C.B.C.2d 342, 2000 U.S. Dist. LEXIS 7917 (S.D.N.Y. June 9, 2000).

3 Collier on Bankruptcy P 363.06 (16th 2020)

For the determination of the actual extent, validity, and priority of a lien or interest in property, an adversary proceeding is required to determine such title rights and interests. Fed. R. Bankr. P. 7001.

At the hearing, Movant addressed the propriety of the court ordering the sale free and clear of liens and interests, and then not providing adequate protection for such disputed liens and interests by having them attach to the sale proceeds until released or adjudicated as being invalid clouds on title (and awarding such damages, attorney's fees and costs, and statutory penalties (if any) as appropriate for the Plan Administrator or the Reorganized Debtor). Movant **XXXXXXX**

The Plan Administrator is authorized to pay a real estate broker's commission in an amount not more than five (5) percent of the actual purchase price upon consummation of the sale. The five (5) percent commission shall be paid to the broker, Blake Rasmussen of Cushman & Wakefield. If the Property is sold to an Overbidder and the successful overbidder is represented by another broker or the Buyer is represented by a broker, the 5.0% Commission will be split 50/50 by Cushman and the broker for the buyer.

The bidding procedures as set in Exhibit 2, Dckt. 1219, are approved, including:

1. Sale by Auction. The Plan Administrator proposes to conduct the Auction of the Property by Zoom on December 16, 2020.
2. Bidder Qualification. A Potential Bidder must deliver to the Plan Administrator, at least eight days prior to the Auction, a cashier's check or wire transfer (with evidence of confirmation and acceptance into escrow), payable the Plan Administrator's counsel's for

deposit into its trust account, in the amount of \$710,800 towards the Potential Bidder's purchase of the Property, to be returned to such bidder in the event that such bidder is not the Successful Bidder or Back-Up Bidder at the Auction, and to constitute the bidder's nonrefundable deposit under the terms of the respective Proposed Agreement if the bidder is the successful bidder at the Auction. Potential Bidders must provide evidence of prospective buyer's source of capital or other financial ability to complete the contemplated transactions, the adequacy of which the Plan Administrator will determine in its sole discretion, with the consultation of the Reorganizing Debtor, and with the consultation with the Notice Parties.

3. Written Bids Conforming to Proposed Agreement and Bidding Procedures. All initial bids must be at least \$710,800 higher than the purchase price agreed upon with the Buyer. Provided, however, that the Proposed Agreement shall not include a Break-Up Fee. Qualified Bids shall not be conditioned on (i) the outcome of unperformed due diligence by the bidder (ii) obtaining financing, or (iii) any other conditions other than (a) being selected as the Successful Bidder or Back-Up Bidder, (b) Plan Administrator Approval, (c) the consent of the Secured Consent Parties for the sale, and (d) Bankruptcy Court Approval.
4. Overbidding. Qualified Bidders may submit overbids at the Auction. The first initial Subsequent Bid must be at least \$710,800 higher than the purchase price agreed upon with the Buyer. Each incremental Subsequent bid shall be at least \$100,000 over the Starting Bid or the Leading Bid.
5. Prompt Closing. The Successful Bidder must be able to close the sale on or before the later of January 14, 2021, or 15 days after the entry of an order approving the sale.
6. Successful Bid. The Plan Administrator shall select the highest and best overbid as the Successful Bid and the Back-Up Bid, if any, based upon its reasonable judgment in consultation with the Reorganizing Debtor.
7. Backup Buyer. The bidder with the second highest or otherwise best bid (as determined by the Plan Administrator in the exercise of its business judgment) at the Auction the Property shall be required to serve as a back-up bidder (the "Back-Up Bidder") and keep such bid open and irrevocable until closing with the Successful Bidder or as otherwise provided in the Bidding Procedures.
8. Breakup Fee discussed below.
9. Reservation of Rights. The Plan Administrator, after consultation with the Reorganizing Debtor (a) may determine after each round of bidding at the Auction which Qualified Bid, if any, is the highest or otherwise best offer and the value thereof, (b) may reject, at any time, any bid that is (i) inadequate or insufficient, (ii) not in conformity with the requirements of the Bankruptcy Code, the Bidding Procedures, or the terms and conditions of the Transaction, or (iii) contrary to the best interests of the Reorganizing Debtor's estate, and stakeholders as determined by the Plan Administrator in consultation with the Reorganizing Debtor, and (c) except as otherwise specifically set forth herein, may modify the Bidding Procedures or impose, at or prior to the Auction, additional customary terms and conditions on the Transaction.

10. As Is, Where Is, With all Faults. The sale of the Property will be on an “as is, where is, with all faults” basis and without surviving representations or warranties of any kind, nature, or description except to the extent expressly set forth in the PSA or Proposed Agreement, as applicable, and the schedules thereto, with respect to the Successful Bidder.
11. Bifurcated Relief. The Plan Administrator proposes bifurcated relief, such that the PSA and Bidding Procedures be approved, and the Secured Consent Parties consent be delivered, in advance of the Sales Procedure Hearing, and that the final sale terms and buyer be approved at the Sale Hearing.

Break-Up Fee

Movant seeks approval of a break-up fee of in an amount equal to two percent (2%) of the Purchase Price that is to be paid to Buyer from the proceeds of the sale to the successful bidder as a condition precedent to close of that sale. This fee is stated to have been negotiated and required by the Buyer to compensate the Buyer for its costs incurred and time and energies expended in completing its due diligence and related investigations relating to the Property.

While this is a surplus estate and the break-up fee amount will come out of the Reorganized Debtor’s pocket at the end of the day, a 2% break-up fee for the actual costs and expenses of Buyer in good faith entering into this Agreement to purchase the Property equals more than Six Hundred Thousand Dollars (\$600,000). That seem like a substantial amount of “reasonable costs and expenses” relating to this Agreement.

The Motion offers little insight into what these more than \$600,000 of reasonable costs are, but Movant does affirmatively state:

This fee is intended to compensate the Buyer for its significant costs incurred and time and energies expended in completing its due diligence and related investigations concerning the Property, in negotiating and drafting the PSA, and otherwise to bring the sale of the Property before the Court. Arambel Decl. at ¶ 6; Schwartzkopf Decl. at ¶ 6.

Motion, ¶ 5; Dckt. 1215.

The Reorganized Debtor provides his recitation of the above statement from the Motion in paragraph 6 of his Declaration, apparently doing little more than reading the Motion. Declaration, ¶ 6; Dckt. 1217.

Juanita Schwartzkopf, a Senior Managing Director at Movant, also provides her recitation of the above statement from the Motion in paragraph 6 of her Declaration, apparently doing little more than reading the Motion. Declaration, ¶ 6; Dckt. 1218.

Seeing these verbatim recitations of these two witnesses in their declaration causes the court pause, and to wonder whether anything in either of their declaration is their actual testimony, or merely legal argument prepared by counsel.

At the hearing, **XXXXXXX**

FINAL RULINGS

7. [19-90122-E-11](#) **MIKE TAMANA FREIGHT** **MOTION FOR COMPENSATION BY THE**
[MF-37](#) **LINES, LLC** **LAW OFFICE OF MACDONALD**
4 thru 6 **Reno Fernandez** **FERNANDEZ LLP FOR RENO F.R.**
 FERNANDEZ III, DEBTORS
 ATTORNEY(S) O.S.T.
 10-1-20 [555]

CLOSED: 08/24/2020

CASE DISMISSED: 08/06/2020

Final Ruling: No appearance at the November 5, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor’s Attorney, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on October 1, 2020. By the court’s calculation, 35 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days’ notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days’ notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

Macdonald Fernandez LLP, the Attorney (“Applicant”) for Mike Tamana Freight Lines, LLC, the Debtor in Possession (“Client”), makes a Second and Final Request for the Allowance of Fees and Expenses in this case.

November 5, 2020 at 10:30 a.m.

- Page 31 of 49-

Fees are requested for the period July 1, 2019, through August 6, 2020. The order of the court approving employment of Applicant was entered on April 1, 2019. Dckt. 52. Applicant requests fees in the amount of \$130,845.00 and costs in the amount of \$5,705.20. Applicant has reduced the requested fees to \$130,149.00 as stated in the Supplemental Pleading, Dckt. 587.

The firm received a prepetition retainer of \$89,000, of which \$72,901.33 remained unapplied on the petition date. Motion, ¶ 2.

Applicant also requested, and the Court approved, first interim fees in the amount of \$118,491.00 and expenses in the amount of \$9,417.64, with Debtor in Possession being authorized to pay up to 80% of such compensation and 100% of the expenses and authorized the firm to apply the retainer. Dckt. 326. Only the retainer was applied and no other amounts were paid.

APPLICABLE LAW

Reasonable Fees

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

- A. Were the services authorized?
- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

A review of the application shows that Applicant’s services for the Estate include Asset Investigation, Retention of Professionals, Cash Collateral, DIP Financing, Use, Sale or Lease of Assets, Assumption and Rejection of Executory Contracts and Unexpired Leases, Relief from Stay, Plan & Disclosure Statement, Claims Analysis and Objections, Case Administration, Other Adversary Proceeding/Contested Matter, and Fee Application. The Estate has \$1.4 million of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Asset Investigation: Applicant spent 24.2 hours in this category. Applicant assisted DIP in identifying assets of the estate, including evaluating litigation claims against DIP’s former officers and related discovery efforts.

Retention of Professionals: Applicant spent 26.2 hours in this category. Applicant assisted DIP in obtaining court authority to employ certain professionals, including a finance broker, a CPA firm, special litigation counsel, special counsel in assisting with discovery, and special employment counsel.

Cash Collateral: Applicant spent 29.2 hours in this category. Applicant assisted DIP in obtaining authority to use cash collateral, budgeting for use of cash collateral, and understanding DIP's duties with respect to cash collateral.

DIP Financing: Applicant spent 14.4 hours in this category. Applicant assisted DIP in obtaining financing and obtaining court approval for continuation of its pre-petition factoring arrangement.

Use, Sale or Lease of Assets: Applicant spent 98.6 hours in this category. Applicant assisted DIP in anticipating issues encountered in sale of estate assets including selling or replacing vehicles and related issues of notices and motions.

Assumption and Rejection of Executory and Unexpired Leases: Applicant spent 21.3 hours in this category. Applicant assisted DIP in reviewing pre-petition agreements to categorize them as executory or unexpired, in deciding whether to assume or reject those agreements, and in preparing and obtaining approval of motions to assume and cure arrears.

Relief from Stay: Applicant spent 36.2 hours in this category. Applicant assisted DIP with motions for relief from automatic stay, related issues of adequate protection stipulations, and correspondence with parties.

Plan & Disclosure Statement: Applicant spent 62.5 hours in this category. Applicant assisted DIP in developing a plan of reorganization, a disclosure statement, and in obtaining their approval and confirmation.

Claims Analysis and Objections: Applicant spent 23.4 hours in this category. Applicant assisted DIP in analyzing and, where appropriate, objecting to claims of various parties.

Case Administration: Applicant spent 93.3 hours in this category. Applicant assisted DIP with administration of the case including evaluating DIP operations, reviewing and filing monthly operating reports, issues regarding DIP bank accounts, and overall strategy for management of the case.

Other Adversary Proceeding/Contested Matter: Applicant spent 18.3 hours in this category. Applicant reviewed issues connected with potential litigation against third parties and former officers of DIP.

Fee Application: Applicant spent 13.8 hours in this category. Applicant assisted DIP in preparing final fee application for Applicant and previous interim fee applications for professionals retained.

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

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Alexander K. Lee ^{FN.1}	84.3	\$290.00	\$23,751.00

Daniel E. Vaknin	247	\$290.00	\$71,630.00
Matthew J. Olson	78.8	\$290.00	\$22,852.00
Reno F.R. Fernandez III	23.4	\$390.00	\$9,126.00
Samantha Brown	27.9	\$100.00	\$2,790.00
	0	\$0.00	\$0.00
Total Fees for Period of Application			\$130,149.00

 FN.1. Mr. Lee's fees have been reduced by \$696.00. Supp. Pldg. Dckt. 587.

Pursuant to prior Interim Fee Applications the court has approved pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330.

Application	Interim Approved Fees	Interim Fees Paid
First Interim	\$118,491.33	\$0.00
	<u>\$0.00</u>	
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	\$118,491.33	

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$5,705.20 pursuant to this application. Pursuant to prior interim applications, the court has allowed costs of \$9,417.64.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Conference Calls		\$20.86
Facsimile (5)	\$0.10	\$1.00
Copies - Notary Bond		\$140.00
Inside Photocopies (1,070)	\$0.10	\$107.00

Telephonic Court Appearance		\$269.20
Outside Printing & Mailing	\$0.10	\$3,228.95
Postage		\$72.40
Transcripts		\$966.50
Witness & Service Fees		\$899.29
		\$0.00
Total Costs Requested in Application		\$5,705.20

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. Second and Final Fees in the amount of \$130,149.00 and prior Interim Fees in the amount of \$118,491.33 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by Debtor in Possession from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11.

Costs & Expenses

Second and Final Costs in the amount of \$5,705.20 and prior Interim Costs in the amount of \$9,417.64 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by Debtor in Possession from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11.

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

Fees	\$130,149.00
Costs and Expenses	\$5,705.20

pursuant to this Application and prior interim fees of \$118,491.00 and interim costs of \$9,417.64 as final fees pursuant to 11 U.S.C. § 330 in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Macdonald Fernandez LLP (“Applicant”), Attorney for Mike Tamana Freight Lines, LLC, the

Debtor in Possession, (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Macdonald Fernandez LLP is allowed the following fees and expenses as a professional of the Estate:

Macdonald Fernandez LLP, Professional employed by the Debtor in Possession

Fees in the amount of \$130,149.00

Expenses in the amount of \$5,705.20,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for Debtor in Possession.

The fees and costs pursuant to this Motion, and fees in the amount of \$118,491.00 and costs of \$9,417.64 approved pursuant to prior Interim Application, are approved as the final fees and costs above pursuant to 11 U.S.C. § 330.

8. [19-90122-E-11](#)
[MF-38](#)

MIKE TAMANA FREIGHT
LINES, LLC
Reno Fernandez

MOTION FOR COMPENSATION FOR
BACHECKI, CROM & CO., LLP,
ACCOUNTANT(S) O.S.T.
10-1-20 [[560](#)]

CLOSED: 08/24/2020

CASE DISMISSED: 08/06/2020

Final Ruling: No appearance at the November 5, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor’s Attorney, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on October 1, 2020. By the court’s calculation, 35 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days’ notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days’ notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

Jay D. Crom of Bachecki, Crom & Co., LLP, the Accountant (“Applicant”) for Mike Tamana Freight Lines, LLC, the Debtor in Possession (“Client”), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period April 1, 2019, through August 6, 2020. The order of the court approving employment of Applicant was entered on April 1, 2019. Dckt. 151. Applicant requests fees in the amount of \$78,144.50 and costs in the amount of \$41.15.

APPLICABLE LAW

Reasonable Fees

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

- A. Were the services authorized?
- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the professional exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

A review of the application shows that Applicant's services for the Estate include accounting, preparing monthly operating reports, investigating potentially recoverable transfer investigation, and providing tax return preparation and Cares Act consultation. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Accounting: Applicant spent 3.7 hours in this category. Applicant consulted with DIP's Officer, Accounting Personnel, and Counsel regarding general and forensic accounting issues, reviewed bankruptcy schedules, and consulted with DIP and DIP's counsel regarding various issues.

Monthly Operating Reports: Applicant spent 156.2 hours in this category. Applicant consulted with Debtor and Debtor's counsel regarding the preparation of monthly reports for the year 2019 and the first and second quarter of 2020; and prepared the reports for that time period; and prepared amended reports when needed.

Potentially Recoverable Transfer Investigation: Applicant spent 4.90 hours in this category. Applicant conducted investigation into potentially recoverable transfer to an insider by reviewing bank statements and ledgers; searched public records; and made finding available to Debtor and Debtor's counsel.

Tax Return Preparation and Cares Act Consultation: Applicant spent 27.10 hours in this category. Applicant reviewed prior tax returns; prepared the federal and state income tax returns for 2018 and 2019; prepared disclosure statements; assisted Debtor in making estimated tax payments for 2019 and 2020; and consulted with Debtor and Debtor's counsel regarding possibly obtaining a CARES Act Payroll Protection Program loan.

General Case Administration: Applicant spent 1.30 hours in this category. Applicant prepared this final application for compensation.

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

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Jay D. Crom	15.90	\$525 - \$535	\$8,360.50
Austin Wade	176.80	\$390 - \$400	\$69,618.00
Paula Law	0.20	\$380.00	\$76.00
Jason Tang	0.30	\$300.00	\$90.00
	0	\$0.00	<u>\$0.00</u>
Total Fees for Period of Application			\$78,144.50

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$41.15 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
ACCURINT	N/A	\$11.55
PACER	N/A	\$29.60
		\$0.00
Total Costs Requested in Application		\$41.15

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$78,144.50 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by Debtor in Possession from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

Costs & Expenses

First and Final Costs in the amount of \$41.15 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by Debtor in Possession from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

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

Fees	\$78,144.50
Costs and Expenses	\$41.15

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

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

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

The Motion for Allowance of Fees and Expenses filed by Jay D. Crom of Bachecki, Crom & Co., LLP (“Applicant”), Accountant for Mike Tamana Freight Lines, LLC, the Debtor in Possession, (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Jay D. Crom of Bachecki, Crom & Co., LLP is allowed the following fees and expenses as a professional of the Estate:

Jay D. Crom of Bachecki, Crom & Co., LLP, Professional employed by the Debtor in Possession

Fees in the amount of \$78,144.50
Expenses in the amount of \$41.15,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for Debtor in Possession.

9. [19-90122-E-11](#)
[MF-39](#)

MIKE TAMANA FREIGHT
LINES, LLC
Reno Fernandez

MOTION FOR COMPENSATION FOR
TIMOTHY BOWLES, SPECIAL
COUNSEL(S) O.S.T.
10-1-20 [[565](#)]

CLOSED: 08/24/2020

CASE DISMISSED: 08/06/2020

Final Ruling: No appearance at the November 5, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor’s Attorney, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on October 1, 2020. By the court’s calculation, 35 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days’ notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days’ notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

Timothy Bowles, the Special Counsel (“Applicant”) for Mike Tamana Freight Lines, LLC, the Debtor in Possession (“Client”), makes a Second and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period May 8, 2020, through August 6, 2020. The order of the court approving employment of Applicant was entered on February 16, 2020. Dckt. 462. Applicant requests fees in the amount of \$33,873.45 and costs in the amount of \$244.05.

Applicant also requested, and the Court approved, first interim fees in the amount of \$17,142.75 and expenses in the amount of \$11.50. Dckt. 525. The firm received a postpetition retainer of \$15,000, which was applied, as authorized, to the interim fees approved and Debtor in Possession paid the remaining amount on July 27, 2020. Motion, ¶ 2.

APPLICABLE LAW

Reasonable Fees

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

- A. Were the services authorized?
- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

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

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

A review of the application shows that Applicant’s services for the Estate include defending workplace-related post-petition claims against the Debtor in Possession for alleged violations of California Labor Laws regarding compensation and workplace conditions. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

State Court Litigation: Applicant spent 102.51 hours in this category. Applicant compiled and evaluated adequate documentation which could establish Petitioner’s claims as groundless and bring down the requested settlement amount. The meticulous investigation allowed for a reconstruction of Petitioner’s movements, claimed physical conditions and communications between Petitioner and Debtor in Possession which showed the claims as groundless. Finally, the work encompassed a comprehensive email memo to Petitioner’s counsel distilling all such information and documentation. That memo concluded that each of Petitioner’s were without basis and that no counter-offer was immediately warranted until Petitioner’s attorney had the opportunity to review the 700-plus pages of materials Applicant had provided. No response has yet been received.

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

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Timothy Bowles	41.8	\$525.00	\$21,945.00
Cynthia Bamforth	0.4	\$420.00	\$168.00
Margaret Alexandre	5.85	\$195.00	\$1,140.75
Daniska Coronado	54.46	\$195.00	\$10,619.70

	0	\$0.00	<u>\$0.00</u>
Total Fees for Period of Application			\$33,873.45

Pursuant to prior Interim Fee Applications the court has approved pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330.

Application	Interim Approved Fees	Interim Fees Paid
First Interim	\$17,142.75	\$17,142.75
	<u>\$0.00</u>	
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	\$17,142.75	

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$244.05 pursuant to this application. Pursuant to prior interim applications, the court has allowed costs of \$11.50.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Copies	\$0.10 per page	\$66.70
Legal Research		\$177.35
		\$0.00
Total Costs Requested in Application		\$244.05

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. Second and Final Fees in the amount of \$33,873.45 and prior Interim Fees in the amount of \$17,142.75 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by Debtor in Possession from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

Costs & Expenses

Second and Final Costs in the amount of \$244.05 and prior Interim Costs in the amount of \$11.50 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by Debtor in Possession from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

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

Fees	\$33,873.45
Costs and Expenses	\$244.05

pursuant to this Application and prior interim fees of \$17,142.75 and interim costs of \$11.50 as final fees pursuant to 11 U.S.C. § 330 in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Timothy Bowles (“Applicant”), Special Counsel for Mike Tamana Freight Lines, LLC, the Debtor in Possession, (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

Timothy Bowles, Professional employed by the Debtor in Possession

Fees in the amount of \$33,873.45
Expenses in the amount of \$244.05,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for Debtor in Possession.

The fees and costs pursuant to this Motion, and fees in the amount of \$17,142.75 and costs of \$244.05 approved pursuant to prior Interim Application, are approved as final fees and costs pursuant to 11 U.S.C. § 330.

Final Ruling: No appearance at the November 5, 2020 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 7 Trustee, and creditors as stated on the Certificate of Service on October 16, 2020. The court computes that 20 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: \$31.00 due on September 30, 2020.

The Order to Show Cause is discharged, and the bankruptcy case shall proceed in this court.

The court's docket reflects that the default in payment that is the subject of the Order to Show Cause has been cured.

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

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

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

IT IS ORDERED that the Order to Show Cause is discharged, no sanctions ordered, and the bankruptcy case shall proceed in this court.

Final Ruling: No appearance at the November 5, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's, Chapter 12 Trustee, Creditor, and Office of the United States Trustee on June 1, 2020. By the court's calculation, 66 days' notice was provided. 28 days' notice is required.

The Motion to Enforce Terms of Confirmed Amended Chapter 12 Plan has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Enforce Terms of Confirmed Amended Chapter 12 plan having been Dismissed Without Prejudice (Dckt. 174), the Matter is removed from the Calendar.

NOVEMBER 5, 2020 CONTINUED HEARING

On November 2, 2020, the parties filed a Stipulation whereby the parties stipulated to the dismissal without prejudice the Motion to enforce Terms of Confirmed Amended Chapter 12 Plan, and for the parties to bear their own costs and attorney's fees incurred in this matter. Dckt. 174. The Stipulation is signed by the attorney for Debtor and dated October 30, 2020, and by attorney for LoanCare and dated November 2, 2020. *Id.*

The Parties having dismissed this Contested Matter without prejudice as provided in Federal Rule of Civil Procedure 41(a)(1)(A)(ii) and Federal Rules of Bankruptcy Procedure 7041 and 9014(b), the Matter is removed from the Calendar.