UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

November 6, 2014 at 10:30 a.m.

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1. 13-36132-E-7 THAN PHUNG — MOTION TO COMPEL ABANDONMENT
ACK-2 Aaron C. Koenig — 10-23-14 [95]

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

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)(iii).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on October, 23 2014. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Abandon Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Abandon Property is granted.

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or 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 Than Boi Phung ("Debtor") requests the court to order the Trustee to abandon property commonly known as sole proprietorship known as "Ace Auto Wrecking" (the "Property"). This Property is encumbered by the liens of Grand Pacific Financing Corporation, securing a claim of $282,783.81. The Declaration of Than Boi Phung has been filed in support of the motion and values the Property to be $22,389.26. The declaration states that the Chapter 7 Trustee, Susan Smith, called debtor's counsel informing them that there would be no yield of a benefit to the estate if sold and that Debtor should file a this Motion to Abandon.

This is the Debtor's second attempt at compelling the abandonment of the Property. The first attempt was denied for Debtor's failure to state with particularity what items specifically the Debtor was seeking to have abandoned. Dckt. 89. However, the instant Motion specifically states what property is sought to be abandoned. The court can now properly determine whether abandonment is proper.

The Motion states with particularity the following assets to be abandoned:

1. Business Checking Account at Cathay Bank (last 4 digits 2056) monies, not to exceed $3,788.26;

2. Office Equipment with an aggregate value of $600.00;

3. Inventory and Parts of the business with an aggregate value of not more than $15,000.00;

4. Forklift with a value not more than $3,000.00; and

5. Sole-Proprietorship Business itself ("Ace Auto Wrecking")

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 retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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 Abandon Property filed by Than Boi Phung ("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 that the Property identified as:

1. Business Checking Account at Cathay Bank (last 4 digits 2056) monies, not to exceed $3,788.26;

2. Office Equipment with an aggregate value of $600.00;

3. Inventory and Parts of the business with an aggregate value of not more than $15,000.00;

4. Forklift with a value not more than $3,000.00; and

5. Sole-Proprietorship Business itself ("Ace Auto Wrecking")

and listed on Schedule B by Debtor is abandoned to Than Boi Phung by this order, with no further act of the Trustee required.

2. 13-29073-E-7 HSM-2 | **AARON/JOLINE ROBERTSON** | **Bruce Charles Dwiggins** | **MOTION FOR COMPENSATION BY THE LAW OFFICE OF HEFNER, STARK & MARIOS, LLP FOR HOWARD S. NEVINS, TRUSTEE'S ATTORNEY(S) 10-9-14 [94]**

Final Ruling: No appearance at the November 6, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on October 9, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is granted.

FEES REQUESTED

Howard Nevins, the Attorney ("Applicant") for Michael Dacquisto the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period August 23, 2013 through November 6, 2014. The order of the court approving employment of Applicant was entered on September 23, 2013, Dckt. 42.

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

General Case Administration: Applicant spent 7.8 hours in this category.

1. Applicant assisted Client with reviewing Debtor's Schedules, statement of financial affairs and other bankruptcy documents.

2. Prepared Counsel's employment application papers and obtained approval.

3. Advised and represented Trustee in connection with general case matters including discharge and issues regarding claims of exemptions and possible objections to same.

4. Drafted and Prosecuted Counsel's First and Final Compensation Application.

Efforts to Assess and Recover Property of the Estate: Applicant spent 26.2 hours in this category.

1. Applicant assisted Trustee in connection with his investigation into the estate's interest in a closely held property management company in Redding.

2. Informal discovery and subsequent review and analysis of documents provided by Debtors and others related to the property management company and valuation work regarding the same.

3. Reviewed documentation and analyzed an asserted lien, and the perfection thereof, in the shares owned by the estate.

4. Analyzed and advised the Trustee regarding avoidance powers concerning the purported lien and other transactions.

5. Advised Trustee in connection with and drafted opposition to Debtor's motion to compel abandonment of property and to avoid lien on residence.

6. Advised Trustee regarding the sale of a tri-plex rental property in Redding and seeking and obtaining through an ex parte motion herein an amended sale order for said property necessitated by the title company.

7. Assisted Trustee in connection with his disposition of the estate's interest in a closely held property management company

in Redding, as well as the estate's interest in the Debtor's residence.

8. Communicated with Trustee and counsel for the largest creditor, McAtee, setting forth the Trustee's options concerning the administration of assets, the anticipated costs and expenses, and the creditor's preference going forward.

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Benefit to the Estate

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

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including assistance in selling properties benefitting the estate in the total of $58,400.00. The estate has $56,800.00 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES ALLOWED

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Howard Nevins (29 years)	5.05	$380.00	$1,919.00
Howard Nevins (29 years)	27.05	$390.00	$10,549.50
Aaron Avery (8 years)	.2	$295.00	$59.00
Aaron Avery (8 years) (.2 free hours 1.7-.2)	1.5	$300.00	$450.00
Total Fees For Period of Application			$12,977.50

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $12,977.50 subject to final review pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $179.20 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Copies	N/A	$3.20 FN.1.
Court Filing Fee	$176.00	$176.00
Total Costs Requested in Application		$179.20

The First and Final Costs in the amount of $179.20 subject to final review pursuant to 11 U.S.C. § 330 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees $12,977.50
Costs and Expenses $ 179.20

pursuant to this Application 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 Howard Nevins (“Applicant”), Attorney for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Howard Nevins is allowed the following fees and expenses as a professional of the Estate:
>
> Howard Nevins, Professional Employed by Trustee
>
> Fees in the amount of $ 12,977.50
> Expenses in the amount of $ 179.20,

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

3. 13-21878-E-7 THOMAS EATON — **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
David Foyil — **10-2-14 [143]**

Final Ruling: No appearance at the November 6, 2014 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Thomas Eaton ("Debtor"), Trustee, and other such other parties in interest as stated on the Certificate of Service on October 4, 2014. The court computes that 33 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 ($176.00 due on September 18, 2014).

The court's decision is to discharge the Order to Show Cause, and the case shall proceed in this court.

The court's docket reflects that the default in payment which is the subjection of the Order to Show Cause has been cured. Debtor has paid the previously delinquent filing fees for his Motion to Compel Abandonment (Docket Control Number DEF-3) on October 9, 2014.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The 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 case shall proceed in this court.

4. 13-21878-E-7 THOMAS EATON **MOTION TO COMPEL ABANDONMENT**
DEF-3 **9-18-14 [133]**

Final Ruling: No appearance at the November 6, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on September 18, 2014. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

The Motion to Abandon Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Motion to Abandon Property is granted.

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or 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 Thomas Eaton ("Debtor") requests the court to order the Trustee to abandon property commonly known as dental equipment, which specifically consists of:

1. 4 Operating Chairs
2. 4 Operating Lights
3. 4 Ex-Ray Units
4. 1 Autoclave
5. 1 Ex-Ray Processor
6. 4 Computers

7. 2 Cabinets

8. 2 Carts

9. 1 Lathe Polisher

10. 4 Stools

11. Dental Tools/Drills

12. 4 Dental Units

13. 1 Couch

14. 4 Office Chairs

15. 2 Printers

16. 1 Typewriter

17. 1 Copy Machine

(the "Property"). The Declaration of Thomas Eaton has been filed in support of the motion and values the Property to be $35,000.00. Debtor notes that there is no value to the creditors in the wholly exempted dental equipment and office supplies.

The court finds that the Debtor has exempted the total value of the Property and that there are negative financial consequences to the Estate retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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 Abandon Property filed by Thomas Eaton ("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 that the Property identified as:
>
> 1. 4 Operating Chairs
>
> 2. 4 Operating Lights
>
> 3. 4 Ex-Ray Units
>
> 4. 1 Autoclave

5. 1 Ex-Ray Processor

6. 4 Computers

7. 2 Cabinets

8. 2 Carts

9. 1 Lathe Polisher

10. 4 Stools

11. Dental Tools/Drills

12. 4 Dental Units

13. 1 Couch

14. 4 Office Chairs

15. 2 Printers

16. 1 Typewriter

17. 1 Copy Machine

and listed on Schedule B by Debtor is abandoned to Thomas Eaton by this order, with no further act of the Trustee required.

5. 13-21878-E-7 THOMAS EATON
LR-1 David Foyil

TRUSTEE FINAL ACCOUNT AND DISTRIBUTION REPORT
9-4-14 [130]

Tentative Ruling: The Objection to Trustee's Final Account and Distribution and Discharge/Closing was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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)(iii).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on October 5, 2014. By the court's calculation, 32 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The court's decision is to sustain the Objection.

Lorain Rice ("Creditor") filed an objection to the Trustee's Final Account and Distribution Report Certification in this case on September 30, 2014 and an objection to the closing of the bankruptcy case. Dckt. 141.

The Objection states the following grounds with particularity, upon which the request for relief is based:

A. All schedules filed by the Debtor omitted his child support obligation and Debtor did not list the Creditor or the Department of Child Support as first priority creditors. Therefore, the Creditor was unable to timely file claims,

objections, or participate in a 341 examination.

B. On April 2, 2014, Creditor filed a Proof of Claim for the child support debt of $125,000. The Trustee was served a copy of the claim.

C. On April 16, 2014, Creditor filed a complaint to revoke the Debtor's discharge under 11 U.S.C. § 727 alleging that the Debtor is not entitled to a discharge because Debtor's schedules and statements contradict information provided under oath in the parties family law case in Place County Superior court, assets are not exempt from domestic support obligations, and the Debtor is not entitled to a discharge.

D. Trustee has not fulfilled the following requirements:

1. Trustee was obligated to ensure the Debtor performs the intention as specified in § 521(a)(2)(B) and verify the Debtor's current monthly income analysis and review any documents submitted in support of the Debtor's mean test calculation;

2. Take possession of all assets of the Debtor, including all books and records;

3. Send notification of the commencement of the case to every entity holding property subject to the Debtor's withdrawal or order;

4. Collect all accounts receivable;

5. Furnish information to parties of interest who make reasonable request therefor.

E. Creditor alleges the final report omitted or incorrectly stated the following:

1. A detailed statement of the services performed by the Trustee, time expended and expenses incurred

2. Total receipts and total disbursements of the Trustee.

3. Total disbursements made by the Trustee in continuing the business of the Debtor

4. A statement that all the assets have been reduced to cash and that the estate is ready to be closed

5. A statement referring in reasonable detail to the item of property mentioned in the Debtor's schedules, including accounts receivable and chooses in action, and accounting for the same.

6. A statement that the Trustee has examined the

amount paid, prior to the filing f the petition, to any attorney for the Debtor services rendered or to be rendered in connection with the bankruptcy, setting forth the amount of such payment, and whether the Trustee deems the fee reasonable; and if unreasonable, what proceedings have been taken thereon.

7. A statement of the amounts of compensation requested by the Trustee's attorneys and accountants, together with such comments or recommendations as the Trustee may deem appropriate.

8. A statement that all disbursements made by the Trustee were reasonable in amount and properly made.

9. A statement that the claims on file with the court have been examined and the Trustee has no objection to the allowance of such claims in the amounts claimed or for such amounts as have been fixed by order.

10. The compensation requested by the Trustee for services and the amount of any previous compensation allowed including the previous Chapter 13 Trustee.

11. A list of unpaid claims incurred in any prior proceedings superseded by the bankruptcy and filed with the trustee or the court containing the names of the holders, their addresses and amounts, and a statement whether such claims are valid and, if not, that objections thereto have been or are being filed and noticed for hearing including but not limited to the child support obligation, credit cards, attorney fees, and secured creditors.

12. Attached to the report should be original bank statements and checks

F. On September 4, 2014, the Trustee filed his final account and distribution report and certification that the estate has been fully administered and application to be discharged. Plaintiff alleges the following:

1. All funds on hand have not been accounted for and/or been distributed. The Trustee has accounted for certain bank accounts and other property available to the estate. Creditor further states the information was given to the Trustee and is not reflected in the final accounting report.

2. Assets have not been properly accounted for and

exempted properly. Domestic support obligations can reach exempted property and the $32,600.61 in exempt assets should be used to pay the family support obligation.

3. The total gross receipts have erroneously been allocated. Trustee has been provided with tax returns, bank statements, and statements prepared by Certified Public Accountants to verify the gross receipts. $14,000.00 is not the correct amount of the gross receipts and this sum has not been properly substantiated.

4. A Proof of Claim for a $125,000.00 child support obligation is not listed anywhere in the Trustee's report.

5. Not all bank statements, deposit slips, and cancelled checks have been submitted to the U.S. Trustee.

6. The Trustee's compensation demonstrates he has done no further investigation into the Debtor's finances since being provided with additional documentation regarding undisclosed debts and assets.

7. There is no documentation of the Debtor's conversion from Chapter 13 to 7.

G. The closing of a bankruptcy case generally is triggered by the filing of a Trustee's final report and the Chapter 7 Trustee's discharge, the Creditor is filing this Response and Objection out of abundance of caution to ensure that the Bankruptcy Case is not closed prematurely and the Debtor's discharge sustained based on inaccurate facts.

H. As described in more detail in Creditor's complaint, a sufficient basis exists for the discharge to be revoked rather than the case be closed. If the Bankruptcy Case is closed before the complaint is adjudicated, the request sought would effectively be rendered moot and further motions would be needed to reopen the case. Accordingly, until this court rules on the complaint, it would be improper for the Bankruptcy Case to be closed.

I. To the extent that the filing of the Trustee's Final Account and Distribution Report Certification and Application To Be Discharged would result in the closing of the Bankruptcy Case, the Creditor requests the court strike the Report and/or deny the Chapter 7 Trustee's request to be discharged. Further, the Creditor objects to the closing of the Bankruptcy Case until the court is able to hear, and decide, the complaint and all other actions that are, or will be, pending in this Bankruptcy Case.

TRUSTEE'S FINAL ACCOUNT AND DISTRIBUTION REPORT

The Trustee filed his Final Account and Distribution Report on September 4, 2014. Dckt. 130. According to the report, there was a total net receipts of $14,000.00 from the liquidation of the property of the estate. The report states that:

	Claims Scheduled	**Claims Asserted**	**Claims Allowed**	**Claims Paid**
Secured Claims	$0.00	$1,094,598.26	$0.00	$0.00
Priority Claim: Chapter 7 Admin. Fees and Charges	$0.00	$2,297.81	$2,297.81	$2,297.81
Priority Claim: Prior Chapter Admin. Fees and Charges	$0.00	$0.00	$0.00	$0.00
Priority Claim: Priority Unsecured Claims	$0.00	$212,364.14	$51,975.79	$11,702.19
General Unsecured Claims	$0.00	$855,122.39	$129,273.05	$0.00
TOTAL DISBURSEMENTS	**$0.00**	**$2,164,382.60**	**$183,546.65**	**$14,000.00**

The report then breaks down the individual claims for each of these categories. None of the claims list the Creditor's domestic support obligation claim which was filed April 2, 2014 in the amount of $125,000.00. Proof of Claim No. 10.

APPLICABLE LAW

11 U.S.C. § 726 outlines how a Chapter 7 Trustee should distribute the property of the estate. Specifically and in relevant part, § 726 states:

> (a) Except as provided in section 510 of this title, property of the estate shall be distributed -
>
> (1) first, in payment of claims of the find specified in,

> and in the order specified in , section 507 of this title, proof of which is timely filed under section 501 of this title or tardily filed on or before the earlier of -
>
> (A) the date that is 10 days after the mailing to creditors of the summary of the trustee's final report; or
>
> (B) the date on which the trustee commences final distribution under this section.

11 U.S.C. § 507 lists the expanses and claims that have priority. First priority is given to "allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor...." 11 U.S.C. § 507(a)(1)(A). The only caveat to this first priority is "If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302, the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for payment of such claims." 11 U.S.C. § 503(a)(1)(C). FN.1.

FN.1. 11 U.S.C. § 507(a)(1), (2), and (8) provide, in relevant part [emphasis added],

"§ 507. Priorities

(a) The following expenses and claims have priority in the following order:

(1) **First:**

(A) **Allowed unsecured claims for domestic support obligations** that, **as of the date of the filing** of the petition in a case under this title, **are owed to or recoverable by a spouse, former spouse**, ...

...

(C) If a **trustee is appointed** or elected **under section 701, 702**,..., the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) **shall be paid before payment of claims under subparagraphs (A)** and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

(2) **Second, administrative expenses allowed under section 503(b) of this title**,...

...

(8) **Eighth,** allowed **unsecured claims of governmental units**, only to the extent that such claims are for–

(A) a tax on or measured by income or gross receipts for a taxable

year ending on or before the date of the filing of the petition--...”

These payments that are allowed before the domestic support obligation relevant to the instant case include “(1)(A) the actual necessary costs and expenses of preserving the estate, including - (I) wages, salaries, and commissions for services rendered after the commencement of the case...(2)compensation and reimbursement awarded under section 330(a) of this title...;(6) the fees and mileage payable under chapter 119 of title 28.” 11 U.S.C. § 503(b).

Fed. R. Bankr. P. 5008 provides that:

> If in a chapter 7, chapter 12, or chapter 13 case the trustee has filed a final report and final account and has certified that the estate has been fully administered, and if within 30 days no objection has been filed by the United States trustee or a party in interest there shall be a presumption that the estate has been fully administered.

DISCUSSION

Trustee’s Final Report Does Not Provide For Creditor’s Domestic Support Obligation

The Creditor’s objection is well-taken as it appears that the Trustee has not provided for the Creditor’s Domestic Support Obligation claim, as required by § 507(a)(1). The Trustee’s report does not list the Creditor or her domestic support obligation anywhere as having been distributed to the Creditor as a first priority claim.

As required by 11 U.S.C. § 726(a), the Creditor properly filed her claim before the Trustee filed his first Trustee Final Report on April 25, 2014. Dckt. 118. The Creditor’s Proof of Claim was filed on April 2, 2014. While this is past the deadline for filing proofs of claim which was set for December 13, 2013 (Dckt. 72), the Creditor filed it before the mailing of the Trustee’s Final Report and before Trustee’s final distribution. Therefore, under § 726, Creditor’s proof is timely for purposes of distribution.

Proof of Claim No. 10 states a claim in the amount of $125,000.00. The basis for the claim stated in response to Section 2 of the Proof of Claim to be “Child Support.” In Section 5 of the Proof of Claim Creditor has checked the box asserting that the claim is entitled to priority as “Domestic support obligations under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).”

As discussed supra, domestic support obligations are given first priority, except for a certain amount of administration expenses. However, the Trustee in his report does not list that any priority distribution was given to the Creditor. The report lists that certain priority unsecured claims were paid $11,702.19 prior to there being any disbursement on Creditor’s priority domestic support obligation claim. Specifically, the report has that the Internal Revenue Service, the Franchise Tax Board, and the Employment Development Department were paid distributions before the Creditor, as a first priority claim holder, received any distribution.

Because of this error in the report and the Trustee's failure to account for distributions to Creditor's first priority domestic support obligation, the Trustee's report cannot be approved. The Creditor's objection is sustained as to the Chapter 7 Trustee's Final Account and Distribution Report Certification That The Estate Has Been Fully Administered And Application To Be Discharged (Dckt. 130).

The Objection Does Not Specifically State the Grounds by which Creditor Asserts the Trustee Did Not Fulfill His Duties.

The Creditor has not provided any declarations, affidavits, or evidence as to the factual claims made in the Objection. The Creditor's Objection makes allegations concerning the Trustee's treatment of the case and whether the Trustee has fulfilled his duties pursuant to the Bankruptcy Code.

However, the Creditor merely repeats all of the statutory duties of a trustee and concluded that the Trustee has failed to satisfy these requirements. There is no evidence, or stating with particularity, as to which duties and why it is asserted that the Trustee has not fulfilled these obligations.

For instances, the Creditor argues that "[t]he Trustee has not accounted for certain bank accounts and other property available to the estate." However, the Creditor does not give any bank statements, property, or location of these alleged assets that should have been accounted for by the Trustee. If such assets actually exist and Creditor has knowledge of them, then disclosing the assets insures that the Trustee will act, to the extent it is proper to do so in exercising the rights of the bankruptcy estate, to recover those assets.

Without any type of evidence substantiating these claims, the Creditor's objections are merely conclusory statements made by the Creditor, regurgitating the requirements of a trustee under the Bankruptcy Code. The court cannot make any determination of the validity of these objections without the Creditor providing proof as to these claims.

The Trustee is Not Responsible to Reach Exempt Assets for the Payment of Support Obligations

The Creditor alleges that "[a]ssets have not been properly accounted for and exempted properly. Domestic Support obligations can reach exempted property and the $32,600.61 in exempt assets should be used to pay the family support obligation." Dckt. 141, pg. 4. However, the Creditor conflates the responsibilities of the Trustee. The Trustee's duties flow to, and responsible, to recover and distribute property of the bankruptcy estate. It is not to exercise individual rights for creditors. Exempt property is not property for the Trustee to distribute. *See Schwab v. Reilly*, 560 U.S. 770, 774 (2010). It is the obligation, and right, of this Creditor to enforce the domestic support obligations against the Debtor and any assets she is entitled to based on special exceptions to the exemption laws that the California Legislature has granted creditors with such judgments.

The Trustee's scope of duties consists of the property that is part of the estate as stated in 11 U.S.C. § 704(a)(1). 11 U.S.C. § 704(a)(1)("The trustee shall - (1) collect and reduce to money the property of the estate for

which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest..."). While a Debtor's exempted interest may still be property of the estate until the time it is revested in the Debtor, the exempted portion of the property is not part of the Trustee's distribution. Any right a creditor has in that exempted property is an individualized right to that creditor and one the creditor must pursue. If the Debtor properly exempted certain property, it is beyond the reach of the Trustee for distribution. *See Schwab v. Reilly*, 560 U.S. 770, 774 (2010). If the Creditor wishes to enforce these support obligations against the Debtor's exempted property, the Creditor may do so herself.

The Closing of a Bankruptcy Case Does Not Moot a Pending Complaint Under 11 U.S.C. § 727(d)(1)

The Creditor states that she "is filing this Response and Objection out of an abundance of caution to ensure that the Bankruptcy Case is not closed prematurely and the Debtor's discharge sustained based on inaccurate facts." Dckt. 141, pg. 4-5. The Creditor filed an Adversary Proceeding on April 16, 2014 in which the Creditor argues for: (1) the nondischargeability of a debt under 11 U.S.C. § 523(a)(5); and (2) to revoke the Debtor's discharge under 11 U.S.C. § 727(d)(1). The Creditor's concern seems to be that the closing of the Debtor's underlying bankruptcy case would moot out that second cause of action as to the Debtor's discharge.

The Bankruptcy Code provides for the fact that some activities may occur after the closing of a bankruptcy case. "[T]he completion of the trustee's work does not mean that everything has been done that may need to be done." *In re Menk*, 241 B.R. 896, 911 (B.A.P. 9th Cir. 1999). Specifically, the B.A.P. in *Menk* found that, after the closing of a case, "[a] discharge or confirmation may need to be revoked" under 11 U.S.C. §§ 727(e)(1), 1144, & 1328(e); or "[t]he discharge status of various debts may... need to be determined" under 11 U.S.C. § 523(a)(1)–(18). *Id.* The B.A.P. also noted that "14 of 18 grounds for nondischargeability have no time limit." *Id.*

Here, the Creditor filed her Complaint on April 16, 2014, within one year of the Debtor's discharge which was entered on September 23, 2013. Since the Creditor's request to revoke the discharge met the timing requirements of 11 U.S.C. § 721(e)(1), the pending Adversary Proceeding on the § 523 nondischargeability issue and the § 727(d)(1) issue would survive the Debtor's underlying bankruptcy case being closed. However, since the Creditor's objection to the Trustee's Final Report has been sustained and the Final Report not being approved, the case remains open.

In conclusion, the court finds that the Chapter 7 Trustee's Final Account and Distribution Report Certification That The Estate Has Been Fully Administered And Application To Be Discharged does not provide for the Creditor's timely filed first priority domestic support obligation claim as required by 11 U.S.C. § § 506(a)(1) & 726. Therefore, the Creditor's objection is sustained and the Chapter 7 Trustee's Final Account and Distribution Report Certification That The Estate Has Been Fully Administered And Application To Be Discharged (Dckt. 130) is not approved.

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

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

The Objection to the Trustee's Final Account and Distribution Report filed by Lorain Rice ("Creditor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection is sustained and the Chapter 7 Trustee's Final Account and Distribution Report Certification That The Estate Has Been Fully Administered And Application To Be Discharged (Dckt. 130) is not approved. The Objection is sustained on the grounds that asserted that Creditor's priority claim has not been provided for as required by 11 U.S.C. §§ 726 and 507(a)(1)(A), with all other asserted grounds overruled without prejudice.

6. 12-28879-E-11 ANNETTE HORNSBY **MOTION TO EMPLOY SUNITA KAPOOR**
Sunita Kapoor **AS ATTORNEY(S)**
10-7-14 [301]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 11 Trustee, parties requesting special notice, and Office of the United States Trustee on October 7, 2014. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

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

The Motion to Employ is granted, and the request for retroactive employment authorization is denied.

Chapter 11 Debtor in Possession, Annette Hornsby, seeks to employ counsel Sunita Kapoor, pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of counsel to assist the Debtor in preparing motions, orders, reorganization plans, disclosure statements and general legal advise for Debtor's duties as Debtor in Possession.

CHAPTER 11 CASE

This Chapter 11 case was filed on May 8, 2012. No motion seeking authorization for employment of counsel was filed until October 6, 2014 – 29 months after the commencement of the case. No Chapter 11 case has been confirmed in this case.

The Debtor in Possession has been challenged in complying with the basic fiduciary duties of a debtor in possession. One of these is that the Debtor in Possession is chronically late in filing monthly operating reports. Some times it will be months late, other times weeks late. This is a "simple" Chapter 11 individual debtor bankruptcy case (to the extent that Chapter 11 cases are ever "simple") in which the Debtor in Possession receives residential rental income, Social Security benefits, and a retirement benefit. There is no ongoing business or other complex financial operation of the estate or Debtor.

The September 2014 Monthly Operating Report was filed on October 28, 2014 (two weeks late). Dckt. 313. During this case it reports that the estate has received $89,475 in rent income (approximately $3,085 a month), $152,727 in retirement income, and $415,517 in Social Security benefits. The rental income is generated from two single family residences.

The Debtor's in Possession Original Proposed Chapter 11 Plan and Disclosure Statement was filed on November 12, 2013. Dckts. 180, 181. (Nineteen months into the case.) The First Amended Plan and Disclosure Statement was filed on November 27, 2013. Dckts. 186, 187. The Second Amended Plan and Disclosure Statement were filed on April 15, 2014. Dckts. 235, 236. The Third Amended Plan and Disclosure Statement were filed on September 4, 2014. Dckts. 266, 267. The Fourth Amended Plan and Disclosure Statement were filed on September 5, 2014. Dckts. 270, 272. The Fifth Amended Plan and Disclosure Statement were filed on October 7, 2014. Dckts. 305, 307.

The court has denied approval of the various previously filed disclosure statements. For the Fourth Amended Disclosure Statement, the court denied approval for several reasons. First, Notice was not properly provided to the Internal Revenue Service. Civil Minutes, Dckt. 287. Also, that the payment information for general unsecured claims was inconsistent. Third, the Stan Shore Trust creditor made an 11 U.S.C. § 1111(b) election and the proposed Disclosure Statement did not disclose that election or the effect that the failure to provide for such election rendered the plan unconfirmable. Fourth, the Debtor in Possession failed to disclose the status of ongoing state court litigation or provide for that asset in the Plan or disclose that such asset would be retained by the Debtor for her personal benefit. Fifth, the Debtor in Possession was purporting to have hired and was paying state court counsel – without having obtained authorization to employ (which rendered such counsel not being authorized to be paid for such services) and that such attorney (a fiduciary of the bankruptcy estate) was being paid (and quite possibly directed) by non-estate third parties. Sixth, the Debtor in Possession failed to provide information as to the income and expenses from the rental properties for creditors to make an informed decision whether the information was truthful and whether the plan was feasible.

Some of these shortcomings were not new to the Fourth Amended Plan and Disclosure Statement. In denying approval of a prior Disclosure Statement, one of the grounds was the failure to properly serve the Internal Revenue Service. Civil Minutes, Dckt. 229. Additionally, the Disclosure Statement failed to inform creditors that the state court litigation had taken an adversary turn, with the parties in that state court action having prevailed on a summary judgment motion against the Debtor in Possession.

REQUEST TO EMPLOY COUNSEL

The Debtor in Possession argues that counsel's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate regarding present Chapter 11 proceedings and duties of a Debtor in Possession. FN.1.

FN.1. Though counsel has now been appearing in this court, in this District, for more than 29 months, the court notes that counsel continues to fail to comply with basic rules for practicing law in this District. For the present motion and the related motion to approve the employment of special counsel, no Docket Control Number has been provided. L.B.R. 9014-1(c). Counsel apparently is aware of the Rule and has designated Docket Control Numbers for other Contested Matters. However, the failure to do so now is reflective of a "comply when we must" attitude of the Debtor in Possession in this case.

Sunita Kapoor, Attorney at Law, testifies that she is representing Annette Hornsby as the Chapter 11 Debtor in Possession. Ms. Kapoor testifies she does not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

The Motion states that this representation has been undertaken "upon a retainer of $7,500.00 for her [Counsel's] standard hourly rate of $350.00 per hour." Motion ¶ 6, Dckt. 301. The Motion states that "a" disclosure of compensation of attorney was filed on May 16, 2012. The court could not find the required Disclosure Form in the multiple document filings that date by Counsel is which every part of the Schedules and Statement of Financial Affairs were filed separately and strewn over Docket Entries 21 through 37. The Motion does not provide a Docket Number to which the court would be directed to find the required documents. The court notes that the payment of $7,500.00 to counsel as a retainer is disclosed on the Statement of Financial Affairs, Question 9. Dckt. 34 at 5.

The Motion also cites the court to *Okamoto v. THS Fin. Corp (In re THC Fin. Corp.)*, 837 F.2d 389, 392, stating that nunc pro tunc approval of employment of a professional in a bankruptcy case will be granted only under "exceptional circumstances." Counsel requests that her employment be retroactively approved back to May 7, 2012.

DISCUSSION

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

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

of such terms and conditions.

Debtor-in-Possession and Ms. Kapoor have stated the simple terms that Counsel will represent the Debtor in Possession and bill for her time hourly. This is the most common method by which attorneys represent Chapter 11 debtors in possession. In approving such employment, the court does not pre-approve any terms of such representation, including any hourly rate.

The curve through by the Debtor in Possession and Counsel is that Counsel, who presents herself as knowledgeable, competent, experienced counsel to represent a debtor in possession (and purports to be of a skill level for such representation to charge $350.00 an hour for such services), requests that the court approve such employment retroactively to cover 29 months in which she provided such representation without the Debtor in Possession being authorized to employ her.

It is well established law that approval of employment pursuant to 11 U.S.C. § 327 is a condition precedent to a professional being awarded fees for representing a trustee, debtor in possession, or creditors' committee in a Chapter 11 case. A trustee (and debtor in possession as provided in 11 U.S.C. § 1107) "**with the court's approval**, may **employ** one or more **attorneys**... to represent or **assist** the trustee [debtor in possession] in **carrying out the trustee's [debtor's in possession] duties** under this title." 11 U.S.C. § 327(a).

In *Atkins v. Wain (In re Atkins),* 69 F.3d 970 (9th Cir. 1995), the Ninth Circuit Court of Appeals addressed the requirement for approval of employment before compensation may be allowed counsel for the trustee or debtor in possession. "In bankruptcy proceedings, professionals who perform services for a debtor in possession cannot recover fees for services rendered to the estate unless those services have been previously authorized by a court order. See 11 U.S.C. § 327(a); 2 Fed. R. Bank. P. 2014(a); 3 see, e.g., *McCutchen, Doyle, Brown & Enersen v. Official Comm. of Unsecured Creditors (In re Weibel, Inc.)*, 176 Bankr. 209, 211 (Bankr. 9th Cir. 1994) (citation omitted)." *Id.*, pg. 973. While bankruptcy courts have the equitable power to retroactively authorize such employment, such retroactive approval is limited to exceptional circumstances. *Id.*, pg. 974.

What is required for a professional to qualify for such equitable relief for such exceptional circumstances is described by the Circuit as follows:

> "To establish the presence of exceptional circumstances, professionals seeking retroactive approval must satisfy two requirements: they must (1) satisfactorily explain their failure to receive prior judicial approval; and (2) demonstrate that their services benefitted the bankrupt estate in a significant manner. *In re Occidental Fin. Group, Inc.*, 40 F.3d at 1062 (finding retroactive approval inappropriate where these two conditions were not met); *In re THC Fin. Corp.*, 837 F.2d at 392 (affirming denial of retroactive approval where these two conditions were not satisfied) (citations omitted). Whether additional factors should or must be considered is contested in this appeal.

Id. Factors considered by the court, though not all elements are required for the court to grant retroactive employment, include the following, which were originally discussed in *In re Twinton Properties Partnership*, 27 B.R. 817 819-20 (Bankr. N.D. Tenn. 1983).

1. The debtor, trustee or committee expressly contracted with the professional person to perform the services which were thereafter rendered;

2. The party for whom the work was performed approves the entry of the *nunc pro tunc* order;

3. The applicant has provided notice of the application to creditors and parties in interest and has provided an opportunity for filing objections;

4. No creditor or party in interest offers reasonable objection to the entry of the *nunc pro tunc* order;

5. The professional satisfied all the criteria for employment pursuant to 11 U.S.C. § 327 (West 1979) and Rule 2014] of the Federal Rules of Bankruptcy Procedure at or before the time services were actually commenced and remained qualified during the period for which services were provided;

6. The work was performed properly, efficiently, and to a high standard of quality;

7. No actual or potential prejudice will inure to the estate or other parties in interest;

8. The applicant's failure to seek pre-employment approval is satisfactorily explained; and

9. The applicant exhibits no pattern of inattention or negligence in soliciting judicial approval for the employment of professionals.

Id., pg. 975. The Atkins panel noted that “These factors, among others, have been cited with approval by the Ninth Circuit BAP. See, e.g., *Credit Alliance Corp. v. Boies (In re Crook)*, 79 Bankr. 475, 478 (Bankr. 9th Cir. 1987); *In re Crest Mirror & Door Co.*, 57 Bankr. 830 at 832; *In re Kroeger Properties & Dev., Inc.*, 57 Bankr. at 823.” *Id.* Other factors included (1) the good faith of the professional in proceeding without an order, (2) the response to information that no order had been entered, (3) the emergent need for the services, (4) whose responsibility it was to obtain the order, (5) applicant’s relationship with the debtor, and (6) applicant’s sophistication in bankruptcy law.

In the Motion, the following grounds are stated with particularity (Fed. R. Bankr. P. 9013) as the basis upon which the retroactive employment should be authorized for Counsel in representing the Debtor in Possession.

A. From the beginning the Debtor was “immediately faced with extensive deadlines.”

B. These extensive deadlines "consumer [Counsel's] time including preparation of Bankruptcy Schedules, Statement of Financial Affairs, Statement regarding ownership of Corporate Debtor and filing of Certification of Resolution Authorizing Chapter 11 Petition and List of Equity Shareholders."

C. "A lot of work has been performed...to preserve the Bankruptcy estate,..."

D. The preservation of the bankruptcy estate is alleged to include, "successful Motion to Value Collateral on both Debtors [sic] personal residence and rental property, approval of loan modification on personal residence, motion to approve loan modification obtained, resolving objections filed by Creditors to prior disclosure statements and plans..."

Motion, Dckt. 301.

In her declaration Counsel states under penalty of perjury the following in support of the retroactive employment.

A. Due to the "time constraints posed by imminent foreclosure of Debtors [sic] properties and review of Debtors' [sic] numerous prior Bankruptcy filings, I thought that I had filed a fee application..."

B. Counsel though that she had filed a fee application because an unsigned order form was in her file.

C. "A lot of legal work has been performed by [Counsel]..." The work is the same as stated in the Motion.

Declaration, Dckt. 303.

Review of Retroactive Employment Factors

The court exercising the power to retroactively approve employment is an equitable power, limited to extraordinary circumstances. Counsel has not provide the court with a points and authorities in support of this request, and has not directed the court to specific rulings concerning the proper consideration of a debtor's in possession attorney failing to obtain an order authorizing his or her employment.

The Motion and supporting declaration fail to present the court with an "exceptional circumstances" by which retroactive employment should properly be authorized. Rather, the "exceptional circumstances" are the simple, common events which occur in every "routine" Chapter 11 case. Preparing schedules and statement of financial affairs and responding to a motion for relief from the automatic stay.

The bankruptcy case was filed on May 8, 2012. Deutsche Bank National Trust Company filed a motion for relief from the automatic stay on May 15, 2014. Dckt. 14. The Schedules and Statement of Financial Affairs were filed on May 16, 2012. Dckts. 21 - 34. On June 14, 2012 the court issued the order granting relief from the automatic stay. Dckt. 43. The next pleadings filed

(other than untimely monthly operating reports) were for two Motion to Value filed by the Debtor in Possession on September 4, 2012. Dckts. 51 and 55. The next motion filed by the Debtor in Possession was on April 24, 2013, which was to obtain approval of a loan modification. Dckt. 110.

For even a moderately experience bankruptcy attorney the first eleven months of this case were very uneventful, with little "emergency" matters which had to be addressed. No cash collateral motions were filed. No motions to authorize adequate protection payments were filed. No motions to sell or use property were filed. No motions for employment of professionals were filed. No motions to enforce the automatic stay or for damages for violation of the automatic stay were filed.

This case is not one in which Counsel was special counsel who was not purporting be to knowledgeable bankruptcy counsel and was being employed for non-bankruptcy work. Rather, it is Debtor's in Possession Counsel who is attempting to explain why she did not get an order authorizing her employment.

In considering the services provided, the court cannot say that the work has been timely performed, efficiently performed, or performed to a high standard of quality. The Debtor in Possession has chronically failed to timely file monthly operating reports. The Debtor in Possession failed to obtain authorization to employ special counsel for the state court litigation. The Debtor in Possession had third parties pay money to the state court counsel for fees not approved by the court and to fund a retainer not approved by the court. The Debtor in Possession has filed multiple proposed plans and disclosure statements, failing to get even one disclosure statement approved. In addition to substantive problems, on multiple occasions for the failure to properly serve the United States of America (Internal Revenue Service). This court had to issue an Order to Show Cause due to Counsel's failure to attend the Chapter 11 Status Conference and the Debtor in Possession to file Monthly Operating Reports (DCN: RHS-1). The Debtor in Possession failed to obtain authorization to use cash collateral, and for many months used cash collateral without the authorization of the court or consent of counsel. (Though at least one creditor belated objected based on the "unauthorized" use of cash collateral, the court did not find such "objection" to be substantial given that the creditor slept on its rights for the many months that the rents from the rental properties were used and disclosed on the untimely filed Monthly Operating Reports.)

The court notes that this "realization" that there was no order authorizing the employment of Counsel did not arise until the court raised the issue of the state court counsel purporting to have been employed by the Debtor in Possession. In the context of that issue, it was disclosed that third-parties were paying the attorney, who is a fiduciary of the bankruptcy estate, not the third-parties paying him. The court infers from these events that Counsel did not know, or at least appreciate, that the mandatory employment authorization requirements were "requirements," but merely treated them as an inconvenience that might be addressed at a later date.

In reviewing the current Motion, the court notes that no information is provided as to Counsel's Chapter 11 bankruptcy experience. Such information is routinely provided by experienced, and even moderately experienced bankruptcy attorneys. The court has conducted a search of its files to identify the bankruptcy cases in which Counsel, Sunita Kapoor, is listed as an

attorney. These cases and Counsel's activities, are as follows:

A. *In re Califormacy, Inc.*, Chapter 7 Case No. 13-27715

1. Filed June 5, 2013, as Chapter 11 Case.

2. Converted by Debtor to Chapter 7 on July 5, 2013 (30 days into the case).

B. U.S. Trustee v. Hornsby, 12-2718

1. Complaint filed December 17, 2013

2. Injunction sought to prevent Debtor from refiling a bankruptcy case for five years. The Complaint identified multiple bankruptcy cases filed in the Northern District of California and the Eastern District of California by the Debtor which relate to the properties the Debtor was attempting to protect in the Current Case.

a. In re Nardac, LLC, N.D. Cal. Case No. 06-42363. Case was dismissed.

b. Ramoan Roberts, N.D. Cal. Case No. 07-41069. Case was dismissed.

c. Ramoan Roberts, N.D. Cal. Case No. 07-41747. Case was dismissed.

d. Ramoan Roberts, N.D. Cal. Case No. 07-42672. Case was dismissed.

e. Annette Hornsby, N.D. Cal. Case No. 07-44398. Case was dismissed.

f. Annette Hornsby, N.D. Cal. Case No. 08-40528. Case was dismissed.

g. Annette Hornsby, N.D. Cal. Case No. 08-41908. Case was dismissed.

h. Annette Hornsby, E.D. Cal. Case No. 07-29857. Case was dismissed.

i. Ramoan Roberts, N.D. Cal. Case No. 08-45255. Case was dismissed.

j. Annette Hornsby, E.D. Cal. Case No. 08-35711. Case was dismissed.

k. Ramoan Roberts, N.D. Cal. Case No. 10-46575. Case was dismissed.

l. Ramoan Roberts, N.D. Cal. Case No. 10-32580. Case

was dismissed.

m. Kennett P. Taylor, N.D. Cal. Case No. 10-32793. Case was dismissed.

n. Kennett P. Taylor, N.D. Cal. Case No. 10-33303. Case was dismissed.

o. Annette Hornsby, E.D. Cal. Case No. 12-21050. Case was dismissed.

p. Annette Hornsby, E.D. Cal. Case No. 12-21050. Current Case.

3. Annette Hornsby's default was entered in the Adversary Proceeding. The U.S. Trustee filed a motion for entry of default judgment. The court issued an extensive Memorandum Opinion and Decision granting the motion and issuing a judgment barring Ms. Hornsby from filing a further case without a pre-filing review and approval of the court in which the case is to be filed. FN.2.

FN.2. Counsel appeared for Debtor Annette Hornsby, arguing that upon the evidence presented proper grounds did not exist for the court issuing a pre-filing review injunction. Not only did the court find the arguments for the Debtor without merit, but that they indicated a lack of sophistication (rather than outright duplicitous arguments) on behalf of counsel.

> "For this Defendant-Debtor [Annette Hornsby] and Counsel (Sunita Kapoor), she does not find it strange or unusual that one person would be filing seven personal bankruptcy cases and nine related cases. This is highly unusual and the vast majority of debtors commence only one or two bankruptcy cases in their lifetime. Those debtors prosecute those cases they file, receive the extraordinary relief available under the Bankruptcy Code, fulfill their obligations under the Bankruptcy Code, and never again grace this court with their presence. This Defendant-Debtor has made the bankruptcy court her home for multiple cases over the past seven years."

Memorandum Opinion and Decision, FN.2., Adv. No. 12-2718, Dckt. 20.

C. California Gas Stations, LLC, E.D. Cal. Case No. 11-37370.

1. Filed as Chapter 11 Case on July 14, 2011.

2. At the hearing on a Motion for Relief From the Automatic Stay by a creditor, the bankruptcy judge ordered the appointment of a Chapter 11 Trustee. *Id.*; Order, Dckt. 48. The court's findings of fact and conclusions of law were stated on the record, with no transcript being filed in that case.

3. A motion to convert was filed by the Chapter 11 Trustee on August 15, 2014. *Id.* at Dckt. 68. The order converting the case was filed on September 7, 2011. *Id.* at Dckt. 111.

D. California Gas Stations, LLC, E.D. Cal. Case No. 11-35118.

1. Filed as a Chapter 11 case on June 17, 2011.

2. Case dismissed on July 6, 2011, for failure to timely file the required documents. 11-35118, Dckt. 31.

E. Richard and Veronica Solis, E.D. Cal. Case No. 10-91258.

1. Filed as a Chapter 11 case on April 5, 2010.

2. On June 23, 2010, a Substitution of Attorney was filed, with Sunita Kapoor withdrawing as counsel and Thomas Gillis substituting in as counsel for the Debtor in Possession. *Id.*, Dckt. 34.

3. Debtors then sought to have the case dismissed, with the motion also filed on June 23, 2010. *Id.*, Dckt. 36.

The court has also reviewed the records available on-line through Pacer for the United States Bankruptcy Court for the Northern District of California. They reflect that since 2008, Sunita Kapoor has been an attorney in thirty bankruptcy cases. These cases break down as follows:

A. Sixteen Chapter 7 Cases.

B. Eleven Chapter 13 Cases.

1. 5 Dismissed

2. 1 Completed

3. 2 Motion to Dismiss Pending

4. 3 Cases Pending

C. Three Chapter 11 Cases.

1. 2 Dismissed.

2. 1 Confirmed Creditor Chapter 11 Plan

a. Sunita order to Disgorge $6,000.00 in fees. *In re Giron,* N.D. Cal. Case No. 11-32371; Order, Dckt. 223. Counsel permitted to retain $10,000.00 of retainer.

In addition, Ms. Kapoor is listed as counsel in two adversary proceedings.

A. *Nagra v. Nagra*, N.D. Cal. Adv. Pro. No. 09-04557, filed December 2, 2009.

1. Dismissed April 20, 2011, Order stating there being no substantive activity in the adversary proceeding for an extended period of time. *Id.*, Dckt. 15.

B. Nagra v. Nagra, N.D. Cal. Adv. Pro. No. 08-04209, filed August 4, 2008.

1. Dismissed pursuant to settlement. Conditional Order of Dismissal. *Id.*, Dckt. 19. No settlement agreement filed, or order or judgment entered in the adversary proceeding.

The filings in the United States Bankruptcy Courts for the Eastern and Norther Districts do not reflect that counsel has significant bankruptcy experience. Significant or extensive bankruptcy experience is not required for many bankruptcy cases and proceedings. However, the lack of such is offset for attention to detail and diligence in making sure that the minimal statutory and procedural requirements have been complied with by the debtor, debtor in possession and attorney. These include filing the basic motion for employment as counsel for a debtor in possession.

The Adversary Proceeding and the information as to prior filings may well be indicative of an attorney, the Current Counsel, having a kind heart, and a Debtor who is devilishly abusing the Bankruptcy Code and federal courts, as well as Counsel. As even moderately experienced bankruptcy and financial attorneys know, desperate (or the ethically challenged) people do desperate, dishonest things in trying to achieve their goals. Those improper actions include deceiving well intentioned, but naive attorney. (The court makes no determination as to who, if anyone is responsible, for any abuse of the bankruptcy laws and courts, or any person, but the various facts of the prior cases and the conduct of this case develops an interesting mosaic of conduct.)

The conduct in this case reflects at best an indifference to seeking employment, and at worse an active ignoring of the responsibilities of the Debtor in Possession and Counsel. This case has dragged on, with the Debtor in Possession failing time and again in fulfilling basic fiduciary duties. Quite possibly the court should have, *sua sponte*, issued an order to show cause why the case should not have been converted or dismissed. Possibly the court was allowing Counsel the benefit of the doubt. However, allowing the case to continue is not a basis for Counsel being rewarded with an order allowing retroactive employment authorization.

Based on the totality of the circumstances, the court concludes that the necessary exceptional circumstances exist for the approving of retroactive employment. No reason has been given for the failure to seek and obtain such authorization, other than Counsel believing that this case was such a whirlwind of activities that is excusable that she “forgot” to file a motion to be employed. As discussed above, this case as been about as passive a Chapter 11 case one could imagine (short of it being a “pre-pack” case in which all of the work has been done pre-petition and the bankruptcy case confirmation process is a mere formality).

The court grants the Motion and authorizes the Debtor in Possession to hire Sunita Kapoor as bankruptcy counsel for the Debtor in Possession. The authorization for employment is effective from September 1, 2014 (thirty days prior to the filing of the motion, extended to the first day of that month). No authorization is given for the employment of Ms. Kapoor prior to September 1, 2014.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by the Chapter 11 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 and Annette Hornsby, the Debtor in Possession, is authorized to employ Sunita Kapoor, as general bankruptcy counsel for the Debtor in Possession, subject to the following reasonable terms and conditions:
>
> 1. The Application is subject to the terms and conditions of 11 U.S.C. § 328(a).
>
> 2. No compensation is permitted except upon court order following application pursuant to 11 U.S.C. §§ 330(a) or 331.
>
> 3. All funds received in connection with this matter for post-petition services, regardless of whether they are denominated a retainer or are said to be non-refundable, are deemed to be an advance payment of fees and to be property of the estate.
>
> 4. Funds that are deemed to constitute an advance payment of fees shall be maintained in Attorney Sunita Kapoor's Client Trust Account maintained in an authorized depository. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.
>
> 5. There will be no compensation for services that constitute performance of trustee duties. *In re McKenna*, 93 B.R. 238 (Bankr. E.D. Cal. 1988).
>
> 6. No hourly rates or other monetary terms

of compensation or reimbursement of expenses are authorized by this court.

IT IS FURTHER ORDERED that the request for retroactive approval for employment back to the May 8, 2012 commencement of this bankruptcy case is denied.

7. 12-28879-E-11 ANNETTE HORNSBY
SK-6 Sunita Kapoor

MOTION TO EMPLOY WALLACE C. DOOLITTLE AS SPECIAL COUNSEL AND/OR MOTION FOR COMPENSATION BY THE LAW OFFICE OF LAW OFFICES OF SUNITA KAPOOR FOR WALLACE C. DOOLITTLE, SPECIAL COUNSEL(S)
10-6-14 [293]

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

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)(iii).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, all creditors, parties requesting special notice, and Office of the United States Trustee on October 7, 2014. By the court's calculation, 30 days' notice was provided. 14 days' notice is required.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Employ is denied without prejudice.

Debtor-in-Possession, Annette Hornsby, seeks to employ special counsel Wallace Doolittle, pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor-in-Possession seeks the

employment of counsel to assist the Debtor-in-Possession in the appeal of a summary judgment determining that the purchasers of property commonly known as 950 Harrison Street, Number 207, San Francisco, California were the owners of the property in San Francisco Superior Court Case No. CGC 12-520585.

Debtor-in-Possession argues that counsel's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate regarding present circumstances, including Debtor-in-Possession's efforts to recover the Property for the Bankruptcy Estate.

Wallace Doolittle, testifies that he is representing Debtor-in-Possession in an appeal of a summary judgment determining that parties other than the Debtor-in-Possession are the owners of the Property at 950 Harrison Street, Number 207, San Francisco, California. Mr. Doolittle testifies he does not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys. Mr Doolittle further testifies that he is not familiar with bankruptcy procedures and did not know that he needed to seek court approval of his employment. He now seeks retroactive allowance of the $10,000.00 flat fee received upon the beginning of his representation of Debtor-in-Possession.

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

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.
It is well established law that approval of employment pursuant to 11 U.S.C. § 327 is a condition precedent to a professional being awarded fees for representing a trustee, debtor in possession, or creditors' committee in a Chapter 11 case. A trustee (and debtor in possession as provided in 11 U.S.C. § 1107) "**with the court's approval**, may **employ** one or more **attorneys**... to represent or **assist** the trustee [debtor in possession] in **carrying out the trustee's [debtor's in possession] duties** under this title." 11 U.S.C. § 327(a).

In *Atkins v. Wain (In re Atkins),* 69 F.3d 970 (9th Cir. 1995), the Ninth Circuit Court of Appeals addressed the requirement for approval of employment before compensation may be allowed counsel for the trustee or debtor in possession. "In bankruptcy proceedings, professionals who perform services for a debtor in possession cannot recover fees for services rendered to the estate unless those services have been previously authorized by a court order. See 11 U.S.C. § 327(a); 2 Fed. R. Bank. P. 2014(a); 3 see, e.g., *McCutchen, Doyle, Brown & Enersen v. Official Comm. of Unsecured Creditors (In re Weibel, Inc.)*, 176 Bankr. 209, 211 (Bankr. 9th Cir. 1994) (citation omitted)." *Id.*,

pg. 973. While bankruptcy courts have the equitable power to retroactively authorize such employment, such retroactive approval is limited to exceptional circumstances. *Id.*, pg. 974.

What is required for a professional to qualify for such equitable relief for such exceptional circumstances is described by the Circuit as follows:

> "To establish the presence of exceptional circumstances, professionals seeking retroactive approval must satisfy two requirements: they must (1) satisfactorily explain their failure to receive prior judicial approval; and (2) demonstrate that their services benefitted the bankrupt estate in a significant manner. *In re Occidental Fin. Group, Inc.*, 40 F.3d at 1062 (finding retroactive approval inappropriate where these two conditions were not met); *In re THC Fin. Corp.*, 837 F.2d at 392 (affirming denial of retroactive approval where these two conditions were not satisfied) (citations omitted). Whether additional factors should or must be considered is contested in this appeal.

Id. Factors considered by the court, though not all elements are required for the court to grant retroactive employment, include the following, which were originally discussed in *In re Twinton Properties Partnership*, 27 B.R. 817 819-20 (Bankr. N.D. Tenn. 1983).

1. The debtor, trustee or committee expressly contracted with the professional person to perform the services which were thereafter rendered;

2. The party for whom the work was performed approves the entry of the *nunc pro tunc* order;

3. The applicant has provided notice of the application to creditors and parties in interest and has provided an opportunity for filing objections;

4. No creditor or party in interest offers reasonable objection to the entry of the *nunc pro tunc* order;

5. The professional satisfied all the criteria for employment pursuant to 11 U.S.C. § 327 (West 1979) and Rule 2014] of the Federal Rules of Bankruptcy Procedure at or before the time services were actually commenced and remained qualified during the period for which services were provided;

6. The work was performed properly, efficiently, and to a high standard of quality;

7. No actual or potential prejudice will inure to the estate or other parties in interest;

8. The applicant's failure to seek pre-employment approval is satisfactorily explained; and

9. The applicant exhibits no pattern of inattention or negligence in soliciting judicial approval for the employment of professionals.

Id., pg. 975. The Atkins panel noted that "These factors, among others, have been cited with approval by the Ninth Circuit BAP. See, e.g., *Credit Alliance Corp. v. Boies (In re Crook)*, 79 Bankr. 475, 478 (Bankr. 9th Cir. 1987); *In re Crest Mirror & Door Co.*, 57 Bankr. 830 at 832; *In re Kroeger Properties & Dev., Inc.*, 57 Bankr. at 823." *Id.* Other factors included (1) the good faith of the professional in proceeding without an order, (2) the response to information that no order had been entered, (3) the emergent need for the services, (4) whose responsibility it was to obtain the order, (5) applicant's relationship with the debtor, and (6) applicant's sophistication in bankruptcy law.

RELIEF REQUESTED IN THE MOTION

The Motion requests that the court authorize the employment retroactive to April 23, 2014. This is a companion motion in which Sunita Kapoor, serving as the Debtor's in Possession general bankruptcy counsel, seeks retroactive authorization for her employment back to the May 8, 2012, filing of this bankruptcy case. The court has denied Ms. Kapoor's request for retroactive authorization, finding that no sufficient showing of exceptional circumstances exist for the general bankruptcy counsel.

Here, the court finds that there has not been a sufficient showing of exceptional circumstances to justify the retroactive employment of special counsel, Wallace Doolittle. Balancing the factors outlined in the Atkins panel as well as noting the glaring omissions in the Motion and the retainer agreement, the court denies the Motion without prejudice.

In the Motion, the Debtor in Possession cites the Ninth Circuit Decision "*Okamoto v. THC Fin. Corp. (In re THC Fin. Corp)*, 837 F. 2d 389, 397," for the proposition that a bankruptcy judge may grant retroactive authorization to employ counsel pursuant to 11 U.S.C. § 227 only under exceptional circumstances. The "extraordinary circumstances" stated in the Motion with particularity (Fed. R. Bankr. P. 9013) are,

A. "Here, such circumstances [exceptional circumstances] exist,..."

B. "Mr. Doolittle's services were not only beneficial to the Debtor, but necessary for Debtor to preserve the property as an asset for the Bankruptcy estate." FN.1.

FN.1. This statement appears to express a fundamental misunderstanding of who the client is and whose interests are being "protected." It is not the "Debtor" who is seeking authorization to employ Mr. Doolittle, but the "Debtor in Possession." The "Debtor" has no right to seek to employ counsel in this Chapter 11 case pursuant to 11 U.S.C. § 327 or have the estate pay for such counsel for the "Debtor." The rights and interests of the "Debtor" are not being advanced, but the rights and interests of the Bankruptcy Estate.

C. Mr. Doolittle is not an experience bankruptcy attorney and did not know that prior court approval is required to be employed

> by, and entitled to compensation for such services, a Debtor in Possession. (While not expressly stating, the court infers that Mr. Doolittle asserts that he relief on the expertise of the general bankruptcy counsel for the Debtor in Possession in electing to represent the Debtor in Possession.)

Motion, Dckt. 293.

The fees for the services are to be $10,000.00, as a flat fee for all the work and costs. The services are to represent the Debtor in Possession for the prosecution of an appeal, which includes all briefing and oral argument, from the summary judgment granted for Victor Li and Yao Lun Jiang in California Superior Court, San Francisco County, case no. CGC 12-520585.

The Retainer Agreement providing for the scope of representation and the fixed fee is referenced in the Motion as Exhibit B. A document titled "Retainer Agreement" has been filed at the same time as this Motion, Dckt. 296. It does not have a docket control number and is not numbered as Exhibit B. Given that it is signed by Annette Hornsby and Wallace Doolittle, it is fair to infer that this is the Retainer Agreement referenced in the Motion. In his Declaration, Mr. Doolittle testifies that "Exhibit B" is a copy of the Retainer Agreement signed by Mr. Doolittle and "Debtor." Declaration, Dckt. 295.

There is a glaring error in the Retainer Agreement – it is only between Wallace Doolittle and Annette Hornsby personally, not in her fiduciary capacity as the Debtor in Possession. Just as an attorney would not purport to contract with a trustee by only entering into a contract with the person in his non-representative, personal, non-fiduciary capacity, a professional does not merely contract with the debtor and ignore the fiduciary capacity of the debtor in possession and that the professional owes a fiduciary duty to the bankruptcy estate, and not the debtor personally.

The Retainer Agreement makes reference to Mr. Doolittle having already received payment of the $10,000.00 flat fee. No such payment of monies of the bankruptcy estate have been authorized by the court and the Debtor in Possession would be acting in violation of her fiduciary duties in paying monies of the estate to a profession under such circumstances.

While the Motion makes reference to a $10,000.00 flat fee to Mr. Doolittle, it is mum on the source of the monies. Mr. Doolittle's declaration does not attest to the source of the monies. No exhibit is provided as a copy of the check or other payment method. The court does not know if monies of the Bankruptcy Estate were disbursed, without authorization; the Debtor in Possession has purported to borrower monies to pay Mr. Doolittle; or some third party is paying Mr. Doolittle, and possibly directing his conduct rather than the Debtor in Possession.

Another issue arises with the Motion. The court is in the dark as to the claims being litigated on appeal, what was determined against the Debtor in Possession (or whether the Debtor in Possession is even a party to the state court action), and what issues are being appealed for the $10,000.00 fee.

While $10,000.00 to brief and argue an appeal in the California District Court of Appeal is not unreasonable (and for some issues could well be viewed as a bargain), the Debtor's in Possession continued failure to

fulfill her fiduciary duties and treat her fiduciary obligations as the Debtor in Possession as merely annoyances which she and her bankruptcy counsel are disdained to be bothered with, have left Mr. Doolittle in a precarious position.

Unless and until the Debtor in Possession provides competent, admissible, credible evidence of the source of the $10,000.00 payment and why such payment would be consistent with the fiduciary duties of the Debtor in Possession, the court cannot authorize the employment.

Further, unless and until the Debtor in Possession seeks to employ Mr. Doolittle as counsel for the Debtor in Possession, in her fiduciary capacity for the Bankruptcy Estate, the court cannot authorize the employment. The court does not authorize the employment of attorneys for the Debtor, in her individual capacity, to venture out into litigation which may, or may not, involve the Bankruptcy Estate.

The Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by the Debtor-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ Wallace Doolittle as special counsel for the Debtor is denied. The denial is without prejudice to the Debtor in Possession, or any successor fiduciary of the Bankruptcy Estate seeking to employ Mr. Doolittle.

8. 14-22679-E-7 DENNIS FLORES
Mark Lapham

MOTION TO RECONVERT CASE FROM CHAPTER 7 TO CHAPTER 13
10-3-14 [97]

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

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)(iii).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Chapter 13 Trustee, Capitol One – Guitar Center, Chase Bank VISA, Lowe's / GGCRB, Medic Ambulance Service, Nationstar Mortgage, LLC, and United Recovery Systems, LP on October 3, 2014. By the court's calculation, 34 days' notice was provided. 21 days' notice is required. Fed. R. Bank. P. 2002(a)(4) 21-day notice for Chapter 7, 11, and 12 cases.

The Motion to Convert the Bankruptcy Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

The Motion to Convert the Chapter 7 Bankruptcy Case to a Case under Chapter 13 is continued to 10:30 a.m. on December 11, 2014.

On November 1, 2014, the Debtor and the Chapter 7 Trustee filed a Stipulation to continue the hearing on the Motion to Reconvert the Case to One Under Chapter 13 to December 11, 2014. In light of the actions taken in this case and the related Adversary Proceeding, the court continues the hearing to 10:30 a.m. on December 11, 2014.

9. 13-28480-E-7 CHARLES/TAMYRA HEARD
PGM-6 Peter G. Macaluso

MOTION BY PETER G. MACALUSO TO WITHDRAW AS ATTORNEY
9-29-14 [130]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on September 29, 2014. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

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

The Motion to Withdraw as Attorney is granted.

Peter G. Macaluso, attorney of record for Debtors, Charles H. and Tamyra L. Heard, filed a Motion to Withdraw as Attorney as Debtor's counsel in the bankruptcy case. Movant states the following reasons for the motion: (1) lack of cooperation, communication, and response from the Debtor, (2) disagreement between Movant and Debtor on how to proceed with the case, and (3) Debtor's conversion of this case without prior knowledge or consent from Movant. Movant does not reveal any specific facts because he is bound by the attorney-client privilege.

RELEVANT LEGAL AUTHORITY

District Court Rule 182(d) governs the withdrawal of counsel. Local Bankr. R. 1001-1(C). The District Court Rule prohibits the withdrawal of counsel leaving a party *in propria persona* unless by motion noticed upon the client and all other parties who have appeared in the case. E.D. Cal. L.R.

182(d). The attorney must provide an affidavit stating the current or last known address or addresses of the client and efforts made to notify the client of the motion to withdraw. *Id.* Leave to withdraw may be granted subject to such appropriate conditions as the Court deems fit. *Id.*

Withdrawal is only proper if the client's interest will not be unduly prejudiced or delayed. The court may consider the following factors to determine if withdrawal is appropriate: (1) the reasons why the withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the harm withdrawal might case to the administration of justice; and (4) the degree to which withdrawal will delay the resolution of the case. *Williams v. Troehler*, 2010 U.S. Dist. LEXIS 69757 (E.D. Cal. 2010). FN.1.

FN.1. While the decision in *Williams v. Troehler* is a District Court case and concerns Eastern District Court Local Rule 182(d), the language in 182(d) is identical to Local Bankruptcy Rule 2017-1.

It is unethical for an attorney to abandon a client or withdraw at a critical point and thereby prejudice the client's case. *Ramirez v. Sturdevant*, 21 Cal. App. 4th 904 (Cal. App. 1st Dist. 1994). An attorney is prohibited from withdrawing until appropriate steps have been taken to avoid reasonably foreseeable prejudice to the rights of the client. *Id.* at 915.

The District Court Rules incorporate the relevant provisions of the Rules of Professional Conduct of the State Bar of California ("Rules of Professional Conduct"). E.D. Cal. L.R. 180(e).

The termination of the attorney-client relationship under the Rules of Professional Conduct is governed by Rule 3-700. Counsel may not seek to withdrawal from employment until Counsel takes steps reasonably foreseeable to avoid prejudice to the rights of the client. Cal. R. Prof'l. Conduct 3-700(A)(2). The Rules of Professional Conduct establish two categories for withdrawal of Counsel: either Mandatory Withdrawal or Permissive Withdrawal.

Mandatory Withdrawal is limited to situations where Counsel (1) knows or should know that the client's behavior is taken without probably cause and for the purpose of harassing or maliciously injuring any person, (2) knows or should know that continued employment will result in violation of the Rules of Professional Conduct or the California State Bar Act, and (3) has a mental or physical condition which makes Counsel's continued employment unreasonably difficult. Cal. R. Prof'l. Conduct 3-700(B).

Permissive Withdrawal is limited to when to situations where:

(1) Client:

(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or

(b) seeks to pursue an illegal course of conduct, or

(c) insists that the member pursue a course of conduct that is

illegal or that is prohibited under these rules or the State Bar Act, or

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or

(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or

(f) breaches an agreement or obligation to the member as to expenses or fees.

(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or

(3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or

(4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or

(5) The client knowingly and freely assents to termination of the employment; or

(6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

Cal. R. Prof'l. Conduct 3-700(C).

DISCUSSION

Movant filed and noticed a motion to the Debtor. Movant provided the following address for the Debtor: 1685 Hickam Circle, Suisun City, California in the Motion, not in the declaration.

Overview of Bankruptcy Case

Debtors, with the assistance of Counsel, commenced this bankruptcy case as a Chapter 13 case on June 25, 2013. A Chapter 13 Plan was confirmed by an Order filed on September 5, 2013. Dckt. 42. On January 7, 2014, a proposed Modified Plan was filed by the Debtors. Dckt. 66. In the Motion to Confirm the Modified Plan the Debtors stated that they needed to modify the plan because they obtained a loan modification and they were 4.83 monthly payments in default under the then confirmed plan. Motion, Dckt. 62. The Court granted the Motion and confirmed the Modified Plan. Order, Dckt. 81.

On June 6, 2014, the Debtors filed a Second Modified Plan. Dckt. 96. In the Motion to Confirm Debtors state that they need to amend the confirmed First Modified Plan because they have negotiated a loan modification. Further they are $4,395.00 in default in payments, which defaults are to be forgiven. Motion, Dckt. 92. The court denied confirmation of the Second Modified Plan for several grounds. First, the Debtors were in default in payments required under the Second Modified Plan. Second, the Debtors deleted the increase in plan payments which are provided in the confirmed First Modified Plan following

the payment of claim secured by a Harley Davidson motorcycle. Third, the financial information on the various Schedule I's filed in the case were inconsistent and did not support confirmation. Civil Minutes, Dckt. 103.

On September 12, 2014, the Chapter 13 Trustee filed a Notice of Default and Motion to Dismiss the Case. Motion, Dckt. 118. As of the filing of the Notice and Motion, the Trustee asserted that the Debtors were $8,790.00 in default under the required plan payments.

On September 22, 2014, the Debtors filed a two sentence piece of paper, with no caption or title, in which they stated that they were converting their case to one under Chapter 7. Dckt. 124. No updated schedules have been filed.

Appropriateness of Withdrawal of Counsel

Movant provides various reasons for his Motion to Withdraw as Attorney such as his inability to work and communicate with Debtor since September 6, 2014 to move the case forward. Additionally, Movant and Debtor are in disagreement over how to proceed forward with the case after Debtor took voluntarily filed a conversion to Chapter 7 in Pro Per, without Movant's prior knowledge.

Movant acknowledges that the Debtor may well need the assistance of legal counsel to avoid "legal prejudice to their position," but asserts that he cannot provide such assistance since the Debtors have failed to communicate with him. In his declaration Movant does not provide the court with specific attempts to communicate and does not specifically identify the methods of communications, dates of attempted communication, and specific persons in his office who attempted to communicate with the Debtors.

Neither the Trustee, Debtor or any other relevant party has filed an opposition to this Local Bankruptcy Rule 9014-1(f)(1) motion. Furthermore, under the California Rules of Professional Conduct 3-700(C)(1)(d), Debtor's conduct, such as the lack of response to correspondence from the Movant as well as inability to agree with the Movant on how to proceed forward with the case, is hindering Movant's ability to carry out his employment and duties effectively. These are sufficient reasons for permissive withdrawal.

As many of the judges in this District have stated on other occasions, an attorneys' stock in trade is his or her reputation. This specific attorney is know for being a diligent, zealous advocate for his clients and one who has his clients actively engaged in their cases. For him to come to the court needing to "fire a client" is a rare occasion. This judge cannot recall it occurring previously.

The Motion is granted. An attorney can only assist clients who desire and accept that assistance. Even more importantly, an attorney can assist clients in a bankruptcy case when the client is engaged and participating in the case. Here, Movant has provided the court with sufficient evidence that these Debtors are not so engaged and have elected to proceed with the bankruptcy case in the manner they deem best – without regard to the advice of counsel.

The Motion is granted and Peter Macaluso is authorized to withdraw as counsel for the Debtors. By the order of the court Peter Macaluso is

substituted out as counsel of record and the Debtors, and each of them, are substituted in pro se in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Withdraw as Attorney filed by Debtor's Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Withdraw as Attorney is granted. Peter Macaluso is substituted out as counsel of record, and Charles H. Heard and Tamyra L. Heard, and each of them, are substituted in *pro se* in his place.