UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

November 10, 2016, at 10:30 a.m.

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1. **15-90502-E-7** **ANNA STARR**
16-9003 **Peter Macaluso**
ADJ-2
EDMONDS V. STARR ET AL

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH WILLIAM K. STARR AND ANNA E. STARR
10-12-16 [35]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant, Defendant's Attorney, parties requesting special notice, creditors, and Office of the United States Trustee on October 12, 2016. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion For Approval of Compromise is granted.

Irma Edmonds, the Trustee ("Movant"), requests that the court approve a compromise and settle competing claims and defenses with William Starr and Anna Starr ("Settlor"). The claims and disputes to be resolved by the proposed settlement are the estate's interest in the real property commonly known as 9458 Berkley Glen Way, Elk Grove, California, and more specifically described as Lot 160, as shown on that

certain map entitled "Vesting Map of East Park Unit No. 2-A," filed in the Office of the County Recorder of Sacramento County, California on December 17, 1998 in book 257 of Maps, at page 3 ("Property").

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit C in support of the Motion, Dckt. 39):

A. Settlor agrees to pay Movant the amount of $60,716.67 in full satisfaction of any claims or ownership interest in which the bankruptcy estate has in the Real Property.

B. Within five days of the court's entry of an order approving the Agreement, Trustee shall dismiss the Adversary Action as to all Parties, with prejudice.

FILING OF MOTION

The Trustee is seeking authorization to compromise rights and interests of the estate. The Motion is brought pursuant to Federal Rule of Bankruptcy Procedure 9019. Notice is given on the trustee, U.S. Trustee, creditors , and other parties in interest as provided in Federal Rule of Bankruptcy Procedure 2002. Such motions are filed in the bankruptcy case itself, not in a separate adversary proceeding. The Trustee is seeking authority to transfer property of the estate to the Settlor—a use or sale of property pursuant to 11 U.S.C. § 363.

Though the Trustee filed the Motion in the Adversary Proceeding, the Trustee has served the Notice of Hearing on all of the creditors. Dckt. 41. The Notice clearly discloses the terms of the Settlement, providing proper information to creditors. The misfiling of the Motion in the Adversary Proceeding is not a substantive defect—for this one motion—for the court to deny it on such filing grounds.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Movant argues that the four factors have been met. Under the Settlement, Movant shall recover $60,716.67 in satisfaction of the estate's claim for recovery of the property, with an asserted value of $365,000.00, from Settlor. Movant asserts that the property can be recovered for the estate pursuant to 11 U.S.C. § 541(a)(2) due to the Property being community property and therefore, property of the estate. This proposed settlement allows Movant to recover for the estate $60,716.67 without further cost or expense and is 16.6% of the maximum amount of the claim identified by Movant.

Probability of Success

Movant argues that Movant would have the stronger case at trial in this adversary action. Movant states that where a federal court applies state law, the state's interpretation of that law is mandatory on the federal court. Movant indicates that the holding in *Hanf v. Summers (In re Summer)* should not stand in light of the current state of California law thus, the community property presumption in Family Code section 760 and the marital property transmutation statute in Family Code section 852(a), as indicated by *In re Marriage of Valli* (2014), should apply.

Difficulties in Collection

Movant argues that assuming a sale of the Property for $380,000.00, the bankruptcy estate would only recover $57,600.00 based on the estimated sale price less 8% for commission and costs of sale ($30,400.00), the debt on the property ($192,000.00), and the claimed exemption ($100,000.00).

Expense, Inconvenience and Delay of Continued Litigation

Movant argues that litigation in this case would only lead to additional legal fees, inconvenience, and delay in the commission of the bankruptcy estate. Further, Movant states that even if Movant prevailed at trial, she would still likely have to evict the Defendant and minor children from their home and sell the Property.

Paramount Interest of Creditors

Movant argues that settlement is in the paramount interests of creditors because the compromise provides prompt payment to creditors that could be consumed by the additional costs and administrative expenses created by further litigation.

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to the Movant to purchase or prosecute the property, claims, or interests of the estate to present such offers in open court. At the hearing ----------.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because it allows Movant to expeditiously recover more money for the estate than Movant expects to recover through litigation. The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Irma Edmonds, the Trustee ("Movant"), 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 Approve Compromise between Movant and William Starr and Anna Starr ("Settlor") is granted, and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed as Exhibit C in support of the Motion (Dckt. 39).

2. **15-90502-E-7** **ANNA STARR**
16-9006 **Peter Macaluso**
ADJ-1
EDMONDS V. STARR ET AL

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH WILLIAM K. STARR, ANNA E. STARR AND MARLENE STARR
10-12-16 [32]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant, Defendant's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on October 12, 2016. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion for Approval of Compromise is granted.

Irma Edmonds, the Trustee ("Movant"), requests that the court approve a compromise and settle competing claims and defenses with William Starr, Anna Starr, and Marlene Starr ("Settlor"). The claims and disputes to be resolved by the proposed settlement are the Estate's interest in William Starr's one-third interest in a 1959 Chevrolet Corvette, VIN ending in 8244 ("Property").

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit C in support of the Motion, Dckt. 36):

A. Anna Starr and William Starr agree to pay the Trustee the amount of $9,283.33 in full satisfaction of any claims or ownership interest which the bankruptcy estate has in the Property.

B. Anna Starr and William Starr have already delivered the sum of $4,800.00 to the Trustee, leaving a balance due of $4,483.33.

C. Within five days of the court's entry of an order approving the Agreement, the Trustee shall dismiss the Adversary Actions as to all Parties, with prejudice.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Movant argues that the four factors have been met. Under the Settlement Movant shall recover $9,283.33 in satisfaction of the estate's claim for recovery of the property, with an asserted value of $9,193.33, from Settlor. Movant asserts that the property can be recovered for the estate pursuant to 11 U.S.C. § 541(a)(2) due to William Starr holding a one-third interest in the Property and, the Property being community property that is therefore property of the estate. This proposed settlement allows Movant to recover for the estate $9,283.33 without further cost or expense and is 100.98% of the maximum amount of the claim identified by Movant.

Probability of Success

Movant argues that she is likely to prevail if this adversary action were litigated through Trial based on William Starr's Certification confirming that he holds a one-third interest in the Property. Movant asserts that because William Star and Debtor Anna Starr were married when the Corvette was purchased, their interest in the Corvette is presumably community property. As a result, the one-third interest in the Property is property of the bankruptcy estate pursuant to 11 U.S.C. § 541(a)(2).

Difficulties in Collection

Movant argues that in order to realize a recovery after the entry of a judgment, she will have to take possession of and sell the Property. This will result in additional costs such as storage, transportation, and auctioneer costs. Additionally, Movant asserts that William Starr and Debtor Anna Star will pay one-third of the value of the property for their one-third interest in the same, which is likely to provide a higher net recovery than would occur through a sale of the Property by the Trustee to a third party.

Expense, Inconvenience and Delay of Continued Litigation

Movant indicates that while this is not complex litigation, the bankruptcy estate will bear additional expenses to pursue the litigation and a sale of the Property by the Trustee and the amount in controversy does not justify further legal fees. Movant argues there is no reason to delay settlement of this matter, especially when William Starr and Debtor Anna Starr are paying an amount equal to the value of their one-third interest in the Property. The bankruptcy estate's recovery should be far greater under the settlement because of the avoidance of additional legal fees and costs related to a sale of the Property.

Paramount Interest of Creditors

Movant argues that settlement is in the paramount interests of creditors because the compromise provides prompt payment to creditors that could be consumed by the additional costs and administrative expenses created by further litigation.

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to the Movant to purchase or prosecute the property, claims, or interests of the estate to present such offers in open court. At the hearing ----------.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because it provides for prompt (and excess) payment to Movant. The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Irma Edmonds, Trustee, ("Movant") 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 Approve Compromise between Movant and William Starr, Anna Starr, and Marlene Starr ("Settlor") is granted, and the respective rights and interests of the parties are settled on the Terms set forth in

the executed Settlement Agreement filed as Exhibit C in support of the Motion (Dckt. 36).

3.	**16-90002-E-11** **RLC-9**	**1263 INVESTORS LLC** **Stephen Reynolds**	**APPROVAL OF DISCLOSURE STATEMENT FILED BY DEBTOR** **O.S.T.** **10-9-16 [72]**

Final Ruling: No appearance at the November 10, 2016 hearing is required. The Court has issued an order continuing the hearing to 10:30 a.m. in the Courtroom 33 of the Federal Courthouse in Sacramento, California.

Local Rule 9014-1(f)(3) Motion—Final Hearing.

Correct Notice Not Provided. The court's Order Shortening Time for Service required all creditors to be served by October 13, 2016. Dckt. 76. A review of the docket shows that a Certificate of Service has not been filed.

The Motion to Approve Disclosure Statement was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). The Debtor in Possession, 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 offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The hearing on the request for Approval of the Disclosure Statement is continued to 10:30 a.m. on November 17, 2016. The court orders Stephen Reynolds, the attorney for the Debtor in Possession, to appear at the continued hearing.

NO NOTICE PROVIDED

For the second time in this case, the Debtor in Possession has requested the court shorten time so that it could have a hearing on approval of a disclosure statement on a expedited schedule.

The Order Shortening Time for Service required that all creditors be served by October 13, 2016. Dckt. 76. No Certificate of Service has been filed. Accordingly, the Motion for Approval of Disclosure Statement is denied without prejudice. The court granted the first motion, but then had to deny the motion when nobody appeared to prosecute the motion at the hearing set as requested by the Debtor in Possession. The prior motion was not served on any parties in interest. Civil Minutes, Dckt. 68.

The Debtor in Possession then filed an amended plan and disclosure statement. Again, the Debtor in Possession requested an order shortening time to conduct an expedited hearing on the Motion to Approve the Disclosure Statement. In the second Motion for Order Shortening Time (Dckt. 74), it is alleged that time should properly be shortened because there are a small number of creditors and because the Debtor in Possession is attempting to close a sale a sale of real property. The court has previously denied without prejudice a motion by the Debtor in Possession to sell the property, which denial was for a multitude of reasons. Order, Dckt. 55; Civil Minutes, Dckt. 51. FN.1.

FN.1. In concluding that the motion to sell was denied without prejudice, the court stated:

> "In considering the Motion, including the Mothorities, in their totality, the court does not grant the Motion. The court is concerned that hidden in the thirty-one pages of small print sale documents could well be improper hidden terms. If the Debtor in Possession, the Movant, cannot (or is unwilling) to clearly state the sales terms but leave it for the court and parties in interest to divine, the court will not take up and speak for the Debtor in Possession."

Civil Minutes, p. 6; Dckt. 51.

The court granted the second Motion for Order Shortening Time, giving the Debtor in Possession the benefit of the doubt—to a qualified extent. Order, Dckt. 76. In shortening time, the court also ordered:

> "**IT IS FURTHER ORDERED** that notice of the hearing shall be filed and served (deposited in the U.S. Mail, postage prepaid) on or before October 13, 2016, and written oppositions filed and served on or before November 2, 2016. Replies, if any, to the opposition will be filed and served on or before November 4, 2016.
>
> **IT IS FURTHER ORDERD** [sic] that counsel for the Debtor in Possession shall file and 11 serve on the U.S. Trustee an explanation of the failure to attend the hearing on September 29, 2016 which was set pursuant to the Debtor in Possession's motion for order shortening time or notifying the court that the motion set on shortened time was dismissed and not being by the Debtor in Possession if there had been a determination that a new plan and disclosure statement were required. The court will consider the explanation in ultimately ruling on the legal fees requested in this case (including appropriate hourly rate) for counsel for the Debtor in Possession."

There is no Certificate of Service filed, there is no notice of the hearing on November 10, 2016 filed, there is no notice advising parties in interest of the filing deadlines for objections to the proposed disclosure statement as required by the above order shortening time. If the motion to approve disclosure statement (none filed) and notice of hearing had been timely served, a certificate of service would have been filed no later than October 16, 2016. L.B.R. 9014-1(e)(2).

RESPONSE BY COUNSEL FOR FAILURE TO PROSECUTE PRIOR MOTION TO APPROVE DISCLOSURE STATEMENT

As required by the court, counsel for the Debtor in Possession submitted a response to the court's order for an explanation of counsel's "failure to attend the hearing on September 29, 2016 which was set pursuant to the Debtor in Possession's motion for order shortening time or notifying the court that the motion set on shortened time was dismissed and not being by the Debtor in Possession if there had been a determination that a new plan and disclosure statement were required." Order, Dckt. 76. The explanation is that an office error occurred, in which counsel thought he had instructed a paralegal to send the notices, but through error it was not sent, and correspondingly the hearing date was not set on counsel's calendar. Response, Dckt. 79.

The fact that human error might occur is neither shocking nor unexpected from anyone. Human beings are subject to such occasional errors.

Unfortunately, such "error" appears to be continuing in this case, with no motion to approve disclosure statement or notice of the November 10, 2016 hearing having been given to any parties in interest. The only notice on the docket for a hearing on approval of the latest filed disclosure statement is the one filed on October 9, 2016, a date prior to the court issuing the October 11, 2016 order shortening time to conduct the hearing on November 7, 2016.

That Notice tells creditors: (1) the hearing will be conducted at 2:00 p.m. on October 20, 2016; and (2) it does not specify the opposition filing dates. There now appears to be no notice for the November 10, 2016 hearing.

4. **11-94410-E-7** **SAWTANTRA/ARUNA CHOPRA** **MOTION FOR COMPENSATION FOR**
HSM-42 **Joseph McCarty** **RYAN, CHRISTIE, QUINN & HORN, ACCOUNTANT(S)**
10-7-16 [1469]

Final Ruling: No appearance at the November 10, 2016 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, creditors, parties requesting special notice, and Office of the United States Trustee on October 6, 2016. By the court's calculation, 35 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen (14) days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is granted.

Ryan, Christie, Quinn, & Horn, Accountants ("Applicant") for Gary Farrar, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case. This case was originally filed as a voluntary Chapter 11 case on December 30, 2011. The case was converted to a Chapter 7 on October 2, 2014. Prior to the conversion, the accountant was previously authorized to be employed by the Trustee. The accountant was again employed for the Chapter 7 case, effective October 2, 2014. The court has, by final order, approved fees to Applicant for services provided to the Chapter 11 Trustee. Order, Dckt. 1094.

The period for which fees for services provided to the Chapter 7 Trustee are requested is October 9, 2014, through August 20, 2016. The order of the court approving employment of Applicant was entered on November 3, 2014. Dckt. 1142. Applicant requests fees in the amount of $23,630.00.

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 a professional are "actual," meaning that the fee application reflects time entries properly charged for services, the professional must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). A professional must

exercise good billing judgment with regard to the services provided as the court's authorization to employ a professional to work in a bankruptcy case does not give that professional "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including administration ($1,600.00), tax return preparation and tax related issues ($21,055.00), and correspondence ($975.00). The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

FEES REQUESTED

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 6.4 hours in this category. Applicant assisted Client with preparation of First and Final Fee Application, including a declaration detailing the professional services provided and how each of the debtor's estates benefitted.

Tax Return Preparation & Tax Related Issues: Applicant spent 95.8 hours in this category. Applicant prepared the 2014, 2015, and 2016 trust tax returns for each estate and discussed with the Trustee and the CPA for the debtors regarding various tax consequences, determination of tax basis, and allocation and utilization of available tax attributes.

Correspondence: Applicant spent 3.9 hours in this category. Applicant corresponded with the Internal Revenue Service and the Franchise Tax Board insolvency groups and requested Prompt Audit Determination for each estate for the 2014, 2015, and 2016 trust tax returns for each estate.

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

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Paul Quinn, CPA	67.5	$250.00	$16,875.00
Deborah Monis, CPA	38.6	$175.00	$6,755.00
	0	$0.00	$0.00
Total Fees For Period of Application			$23,630.00

FEES ALLOWED

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $23,630.00 pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

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

Fees: $23,630.00

pursuant to this Application as first and 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 Ryan, Christie, Quinn, & Horn ("Applicant"), Accountant for the Chapter 7 Trustee, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Ryan, Christie, Quinn, & Horn is allowed the following fees and expenses as a professional of the Estate for the Chapter 7 Trustee:
>
> Ryan, Christie, Quinn, & Horn, Professional Employed by Trustee
>
> Fees in the amount of $23,630.00,
>
> The fees are allowed pursuant to 11 U.S.C. § 330, subject to final review.

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.

5. 11-94410-E-7 HSM-43 | **SAWTANTRA/ARUNA CHOPRA** **Joseph McCarty** | **MOTION TO UNBLOCK FUNDS** **10-13-16 [1476]**

Final Ruling: No appearance at the November 10, 2016 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, creditors, parties requesting special notice, and Office of the United States Trustee on October 13, 2016 By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Unblock Funds is granted.

Gary Farrar, the Chapter 7 Trustee, filed this Motion to Unblock Funds received by the estate pursuant to sales of the estate's interests in:

A. Real property designated with Stanislaus County Assessor's Parcel Number 032-059-023-000 and commonly known as 1317 Oakdale Road, Building E, Modesto, California; and

B. Real property designated with Stanislaus County Assessor's Parcel Number 078-015-025 and described as Vacant Commercial Land, 9.53 acres, located on Dale Road, Modesto, California.

Regarding the Oakdale Road property, the court ordered the property sold free and clear of encumbrances from a deed of trust and from a claim by TerraCotta Shangri-La, LLC (two writs of attachment each in the amount of $5,307,894.97 and an abstract of judgment for $2,599,556.43). Dckt. 1388. Similarly, the Dale Road property was sold free and clear of an encumbrance from the deed of trust on the property. Dckt. 1389. The liens from both sales were attached to the net proceeds of the sales, pending further orders of the court.

Those properties have now been sold by the Trustee. The deeds of trust for each property were assigned to the Trustee, and each lien was released through agreements (note that TerraCotta Shangri-La, LLC's agreement included a payment of $25,000.00 from the sales proceeds of the Dale Road property). *See* Exhibits A & B, Dckt. 1480. No party asserts any interest in the liens on those properties, which allows sales funds to remain property of the estate to be distributed according to the Code. *See* Exhibits A & D, Dckt. 1480.

The Trustee seeks an order that:

A. The lien associated with the Oakdale Road Deed of Trust is not attached to the net proceeds from the sale of the Oakdale Road property;

B. The liens associated with the TerraCotta Encumbrances are not attached to the net proceeds from the sale of the Oakdale Road property;

C. The lien associated with the Dale Road Deed of Trust is not attached to the net proceeds from the sale of the Dale Road property; and

D. The Trustee is authorized to distribute the net proceeds from the sales of the Oakdale Road property and the Dale Road property according to the priorities set forth in the Bankruptcy Code.

DISCUSSION

The court previously ordered the two properties to be sold free and clear of all liens, with the liens attaching to the net proceeds of the sale. Each party holding a lien, however, has released any interest in the lien such that the proceeds may now be distributed by the Trustee according to the Bankruptcy Code.

Accordingly, the Motion is granted, and the Chapter 7 Trustee is authorized to release such monies from the blocked account and disburse the monies not subject to any lien or other interest as provided under Chapter 7 of the Bankruptcy Code.

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 to Unblock Funds filed by Gary Farrar, the Chapter 7 Trustee ("Movant"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, and the Chapter 7 Trustee is authorized to release such monies, the net proceeds from the sales of the Oakdale Road and Dale Road properties, from the blocked account, and disburse the monies as not being subject to any lien or other interest as provided under Chapter 7 of the Bankruptcy Code.

6. 11-94410-E-7 HSM-44 | **SAWTANTRA/ARUNA CHOPRA** **Joseph McCarty** | **MOTION FOR COMPENSATION BY THE LAW OFFICE OF HEFNER, STARK & MAROIS FOR AARON A. AVERY, TRUSTEE'S ATTORNEY(S) 10-13-16 [1481]**

Final Ruling: No appearance at the November 10, 2016 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, creditors, parties requesting special notice, and Office of the United States Trustee on October 13, 2016. 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen (14) days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is granted.

Hefner, Stark & Marois, LLP, the Attorney ("Applicant") for Gary Farrar, the Chapter 7 Trustee ("Client"), makes a Second and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period April 1, 2015, through November 10, 2016. The order of the court approving employment of Applicant was entered on November 3, 2014. Dckt. 1141. Applicant requests fees in the amount of $130,757.00 and costs in the amount of $482.40.

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 no—
> (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 gaining benefit from various assignments and resolving the underlying issues with such assignments, selling the estate's interest in the Oakdale Road property for $288,500.00, selling the estate's interest in the Dale Road Property for $1,500,000.00, and drafting a compromise motion for the Trustee and Debtor. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Asset Investigation: Applicant spent 11.6 hours in this category, including 0.40 hours billed at no charge. Applicant assisted Client with reviewing legal and factual issues in connection with Yosemite Investments; Hillcrest Drive property; and pre-petition IMAX contracts, payments made to IMAX, and background issues related to IMAX contract.

Asset Disposition: Applicant spent 251.20 hours in this category, including 7.80 hours billed at no charge. Applicant advised and represented the Trustee in connection with his efforts to administer the estate's remaining real property and personal property assets including: the Oakdale Road Property; New

Era Capital; the Dale Road Property; the partnership interest in Memorial Medical Office Building; Hartford Annuity; and IMAX.

Claims: Applicant spent 45.6 hours in this category, including 0.40 hours billed at no charge. Applicant advised the Trustee and analyzed legal issues in connection with multiple proofs of claims and amendments.

Litigation: Applicant spent 23.60 hours in this category, including 9.30 hours billed at no charge. Applicant represented the Trustee in adversary proceeding against Hartford Life and Annuity Insurance Company, which included filing status reports and communications with opposing counsel; reviewed and analyzed issues related to ongoing litigation between Debtors and Mid Valley creditors; and represented the Trustee in connection with the dismissal of Loanvest XI adversary proceedings

General: Applicant spent 122.40 hours in this category, including 14.60 hours billed at no charge. Applicant drafted various motions and applications, analyzed issues and advised Trustee in connection with various issues, communicated with creditors, and investigates issues related to Debtors' criminal proceedings.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
A. Avery	293	$300.00	$87,900.00
A. Avery	112.6	$310.00	$34,906.00
H. Nevins	18.5	$390.00	$7,215.00
H. Nevins	12.3	$400.00	$4,920.00
M. Steiner	2.7	$400.00	$1,080.00
J. Levy	12.4	$380.00	$4,712.00
Not Billed	32.5	$0.00	($9,976.00)
Total Fees For Period of Application			$130,757.00

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

Application	Interim Approved Fees	Interim Fees Paid
First Interim	$43,005.00	$34,404.00
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	$43,005.00	

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $484.40 pursuant to this applicant. Pursuant to prior interim applications, the court has allowed costs of $1,076.87.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Photocopies		$2,731.25
Process Service		$30.00
Telephonic Appearance		$60.00
Filing Fees		$365.00
Mileage		$87.40
Not Billed		($2,791.25)
Total Costs Requested in Application		$482.40

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. Second and Final Fees in the amount of $130,757.00 are approved and prior Interim Fees in the amount of $8,601.00 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.

Costs & Expenses

The Second and Final Costs in the amount of $482.40 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	$130,757.00
Costs and Expenses	$482.40

pursuant to this Application and prior interim fees of $8,601.00 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 Hefner, Stark & Marois, LLP ("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 Hefner, Stark & Marois, LLP is allowed the following fees and expenses as a professional of the Estate:
>
> Hefner, Stark & Marois, LLP, Professional Employed by the Trustee
>
> Fees in the amount of $130,757.00
> Expenses in the amount of $482.40,
>
> The fees and costs pursuant to this Motion, and fees in the amount of $8,601.00 approved pursuant to prior Interim Application are approved as final fees pursuant to 11 U.S.C. § 330.
>
> **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.

7.	**11-94410-E-7 HSM-45**	**SAWTANTRA/ARUNA CHOPRA Joseph McCarty**	**MOTION FOR COMPENSATION FOR GARY FARRAR, CHAPTER 7 TRUSTEE 10-13-16 [1487]**

Final Ruling: No appearance at the November 10, 2016 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, creditors, parties requesting special notice, and Office of the United States Trustee on October 13, 2016. 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen (14) days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is granted.

Gary Farrar, the Current Chapter 7 Trustee and former Chapter 11 Trustee ("Applicant") for the Debtors Sawtantra Chopra and Aruna Chopra ("Client"), makes a Third and Final Request for the Allowance of Fees and Expenses in this case.

This Application covers the Chapter 7 phase of this case. Fees are requested for the period of October 2, 2014, through November 10, 2016. Applicant requests fees in the amount of $73,138.43 and costs in the amount of $178.21.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature,

the extent, and the value of such services, taking into account all relevant factors, including–

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

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

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including collecting and partially distributing $2,309,001.34 in compensable funds. When considered with the funds the Trustee distributed in the Chapter 11 phase of the case, the Trustee has or will distribute $3,115,582.20 in compensable funds. The estate has $1,922,516.31 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 were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Case Administration: Applicant spent 123.6 hours in this category. Applicant assisted with routine administrative matters involved with converting Debtor's Chapter 11 case to Chapter 7; prepared monthly accountings; worked with Debtor to settle personal asset matters; investigated estate assets; and monitored and coordinated professional relationships.

Asset Analysis and Recovery: Applicant spent 6.7 hours in this category. Applicant pursued and confirmed existence and values of notes receivable, various scheduled real estate values, uses and zoning, leases, lien validity, determination of retirement accounts and exemptions claimed, franchise rights and values, other scheduled business interests, and business developments.

Asset Disposition: Applicant spent 19.1 hours in this category. Applicant monitored and coordinated with various professionals and service agencies moving assets to liquidation; closed two real estate sales that generated approximately $1,791,403.76; settled the non-exempt annuity investment; and completed the settlement regarding personal property and over-encumbered assets abandoned or released that generated another approximately $464,845.00 for creditors.

Claims: Applicant spent 14.8 hours in this category. Applicant engaged in a detailed claims review in this case; finalized claims affected by criminal restitution and settlement payments; and obtained CPA Quinn's assistance in spurring the Internal Revenue Service's updated claims after post-Chapter 11 payments made by Debtor.

Accounting and Tax Issues: Applicant spent 28.7 hours in this category. Applicant covered CPA preparation of estate tax returns; communicated with Debtor and CPA; addressed tax years 2009, 2010, 2011, 2012, 2013, 2014, 2015, and 2016 for each Debtor coordinating entities' tax carry forwards; and offsets and dealt with tax attorneys.

The fees requested are computed pursuant to 11 U.S.C. § 326(a) as follows:

A. 25% of the first $5,000.00 = $1,250.00
B. 10% of the next $45,000.00 = $4,500.00
C. 5% of the next $950,000.00 = $47,500.00
D. 3% of the next $2,115,582.20 = $63,467.47
E. Total = $116,717.47

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

Application	Interim Approved Fees	Interim Fees Paid
First Interim	$15,302.11	$15,302.11
Second Interim	$28,276.93	$28,276.93
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	$43,579.04	

Because the Trustee has already received the full allowed aggregate Chapter 11 compensation of $43,579.04, the Trustee is limiting his Chapter 7 compensation request to $73,138.43 ($116,717.47–$43,579.04 = $73,138.43).

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $178.21 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
File Folders	$5.00	$15.00
Photocopies	$0.10	$120.00
Postage and Mailer	$1.49	$43.21
Total Costs Requested in Application		$178.21

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the fees computed on a percentage basis recovery are reasonable and that Applicant effectively used appropriate rates for the services provided. Third and Final Fees in the amount of $73,138.43 and prior Interim Fees in the amount of $43,579.04 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.

Costs & Expenses

The Third and Final Costs in the amount of $178.21 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	$73,138.43
Costs and Expenses	$178.21

pursuant to this Application and prior interim fees of $43,579.04 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 Gary Farrar ("Applicant"), Trustee for the 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 Gary Farrar is allowed the following fees and expenses as a professional of the Estate:
>
> Gary Farrar, Trustee
>
> Fees in the amount of $73,138.43
> Expenses in the amount of $178.21,

The Fees and Costs pursuant to this Applicant, and Fees in the amount of $43,579.04 approved pursuant to prior Interim Application are approved as final fees and costs pursuant to 11 U.S.C. § 330.

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.

8. **16-90933-E-7** **JIMMY/VIRGINIA ROJAS** **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Pro Se **10-20-16 [16]**

Final Ruling: No appearance at the November 10, 2016 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Jimmy Rojas and Virginia Rojas ("Debtor") and the Chapter 7 Trustee, as stated on the Certificate of Service on October 22, 2016. The court computes that 19 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 ($335.00).

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

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

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

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

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

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

9. **09-90542-E-7** **NATHAN TREMBLE** **MOTION TO AVOID LIEN OF PATELCO CREDIT UNION**
SMC-2 **Scott Mitchell** **10-5-16 [22]**

Final Ruling: No appearance at the November 10, 2016 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, creditors, parties requesting special notice, and Office of the United States Trustee on October 6, 2016. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Patelco Credit Union ("Creditor") against property of Nathan Tremble ("Debtor") commonly known as 799 The Burl, Turlock, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $15,481.19. An abstract of judgment was recorded with Stanislaus County on November 6, 2008, which encumbers the Property. Exhibit 4, Dckt. 25.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $110,000.00 as of the date of the petition. The unavoidable consensual liens that total $164,000.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor filed an Amended Schedule C on October 5, 2016, and claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00. Exhibit 2, Dckt. 25.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Patelco Credit Union, California Superior Court for Stanislaus County Case No. 628852, recorded on November 6, 2008, Document No. 2008-0119297-00 with the Stanislaus County Recorder, against the real property commonly known as 799 The Burl, Turlock, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

10. 12-93049-E-11 MARK/ANGELA GARCIA MOTION TO SELL
MJH-18 Mark Hannon 10-25-16 [871]

Final Ruling: No appearance at the November 10, 2016 hearing is required.

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

Incorrect Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 25, 2016. By the court's calculation, 16 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(2), 21 day notice.)

The Motion to Sell Property was not 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The hearing on the Motion to Sell Property is continued to 2:30 p.m. on November 16, 2016, in Courtroom 33, Sacramento Federal Courthouse.

The Bankruptcy Code permits the court to authorize the sale of property by a fiduciary of the bankruptcy estate (trustee, debtor in possession, or Chapter 13 debtor after a noticed hearing. 11 U.S.C. § 363. FN.1. These provisions are incorporated in the confirmed Chapter 11 Plan in this case, providing that the property described below will be sold through the bankruptcy court. Plan, Class 3 treatment terms, p.6:7–10, (which also states that United States Fire Insurance has agreed to a 20% carve-out to be disbursed to creditors holding general unsecured claims). Here, Mark Garcia and Angela Garcia, Plan Administrators under the Confirmed Chapter 11 Plan (who are also the Debtors in this case) ("Movant" or "Plan Administrators/Debtors"), seek authorization to sell the real property commonly known as 5672 Eleanor Road, Oakdale, California ("Property") under the terms of the confirmed Chapter 11 Plan.

FN.1. Unless otherwise designated, the debtor has the duty as a matter of bankruptcy law to perform the terms of the plan. 11 U.S.C. § 1142(a). The plan administrator serves in that capacity to perform the plan, not to use those powers to personally benefit the debtor, much in the similar capacity as a trustee, receiver, or other third-party who is responsible to the beneficiaries (the creditors) of the corpus of the plan. The confirmed Chapter 11 Plan provides the following definition: "'Plan Administrators' means Mark Anthony Garcia and Angela Marie Garcia. The Plan Administrators shall perform the duties and obligations under the terms of this Plan." Order, Dckt. 781; Plan attached, p. 2:10–11.

Federal Rule of Bankruptcy Procedure 2002(a)(2) requires twenty-one days' notice for the instant Motion, but only sixteen days' notice was provided. No motion to shorten time has been requested, but the Plan Administrators/Debtors have self-exempted themselves from the notice rules.

PRIOR MOTION TO SELL PROPERTY

Plan Administrators/Debtors, the Movants, originally sought to have the court approve the sale of this property, with an approximate 20% of net proceeds after payment of the senior lien and costs carve-out paid to Movants' attorney (for work done as counsel for Movants as Debtors in Possession and then as Debtors, after the Chapter 11 Trustee was appointed). When it was reported by the U.S. Trustee at the October 20, 2016 hearing on that motion that Mark Garcia, one of the fiduciary plan administrators under the Plan and one of the debtors, appeared to be a member of the proposed purchaser as disclosed in the California Secretary's of State records—which fact was not only not disclosed, but Mark Garcia testified under penalty of perjury that the Debtors and Plan Administrators did not have any interest in the purchaser—the court denied the prior motion without prejudice. Civil Minutes, Dckt. 868.

The Chapter 11 Trustee had negotiated a 20% carve-out for the bankruptcy estate. Exhibit C in support of the prior motion was an excerpt from the confirmed Plan in this case, stating that after payment of the obligation secured by the senior lien, United States Fire Insurance is to be paid 80% of the proceeds and 20% into the Plan for distribution to creditors holding general unsecured claims. Exhibit E, Dckt. 852. There are no time or other limitations on the 80%-20% split of the net proceeds.

In the prior motion, the Plan Administrators/Debtors sought to have the $21,756.00 carve-out paid to their attorney, not into the confirmed Plan for distribution to creditors holding general unsecured claims.

The Plan Administrators/Debtors and United States Fire Insurance Company then filed a "stipulation" on October 10, 2016 (Dckt. 864), that recites various "facts," as interpreted by the Plan Administrators/Debtors and concurred in by USFI. These included:

A. The Chapter 11 Plan "incorporated" the Chapter 11 Trustee's stipulation with USFI for the 20% carve-out.

B. The 20% carve-out was subject to USFI's "withdrawal of consent to the Stipulation if the Oakdale Property had not been sold within six months of the Order approving the Stipulation."

C. That USFI was not withdrawing its consent under the Chapter 11 Trustee's Stipulation, but USFI was requiring that $21,756.00 of the sales proceeds (the 20% carve-out) be paid to the Plan Administrators'/Debtors' counsel.

Stipulation, Dckt. 864.

When the issue arose at the 10:30 a.m. hearing on October 20, 2016, as to whether Plan Administrators/Debtors had any interest in, and who the purchaser actually was, the court continued the hearing to 2:30 p.m. that afternoon to allow the Plan Administrators/Debtors to address this issue and clear

the way for the court to approve the sale. Unfortunately, the U.S. Trustee obtained information indicating that Mark Garcia's statements under penalty of perjury of not having any interest in the purchaser were false.

At the 2:30 p.m. continued hearing on October 20, 2016, counsel for the Plan Administrators advised the court that the Plan Administrators were abandoning any attempt to recover the 20% carve-out and that all of the money would just go to USFI. This sudden abandonment of this $21,756.00 asset of the plan estate, which USFI just hours earlier was willing to have paid out under the Plan terms, was shocking.

In the proper motion to sell (Dckt. 849) the Plan Administrators/Debtors (though the motion identified them only as "Debtors," ignoring their fiduciary obligations as the Plan Administrators under the confirmed Chapter 11 Plan), the court is directed to read the declaration of Mark Garcia to discover the grounds upon which the relief is requested. Motion, ¶ 1, Dckt. 849. The motion states that the sales price is $675,000.00, the obligation secured by the senior deed of trust is stated to be ($500,000.00), USFI is to be paid ($130,000.00), and ($21,756.00) is to be paid to counsel for the Plan Administrators/Debtors. These numbers indicate that there would be ($23,244.00) in escrow fees and other obligations to be paid through escrow.

In his declaration, Mark Garcia's testimony under penalty of perjury includes the following:

A. "I am one of the debtor(s) in this proceeding and am making this declaration in support of our motion to sell our residence." Declaration ¶ 1; Dckt. 851.

With this testimony, Mark Garcia again ignores that he is a Plan Administrator and must act in that fiduciary capacity, not merely what he seeks to gain personally as the "Debtor."

B. "The offer seems to be the fair market value of our residence at this time. Cal Trans is still considering whether to use our residential property for a major freeway interchange." Declaration ¶ 5; *Id.*

As noted at the prior hearing, the Plan Administrators/Debtors offer no testimony as to what the Plan Administrators/Debtors have done to effectively and in a commercially reasonable manner to market the property to be sold.

C. "This sale is an arm's length transaction. **Neither my wife nor myself has any personal or family relationship with the buyers**." Declaration ¶ 7; *Id.* [emphasis added].

D. "We will not receive any proceeds from the sale. **We are requesting that our attorney Mark J. Hannon receive $21,756.00 from the escrow proceeds**." Declaration ¶ 8; *Id.*

E. "We owe a total of $40,000.00 to our attorney Mark J Hannon for representation in our bankruptcy proceeding, and the sum of $21,756.00 has been approved by the court." *Id.*

Again, the Plan Administrators/Debtors, and their attorney, ignore services provided by counsel as the attorney for the Debtors when they served in the fiduciary capacity as debtor in possession (which the court removed them from for cause and appointed a Chapter 11 trustee), and seek to divert monies as the Debtors (and their counsel) wish, without regard to the Plan Administrators'/Debtors' obligations under the confirmed Chapter 11 Plan.

As stated by the court at the October 20, 2016 hearing on the prior motion and in the Civil Minutes, the identity of the buyer was very cryptically stated in the prior motion and the Real Estate Purchase Agreement. By the time of the 2:30 p.m. continued hearing on October 20, 2016, the U.S. Trustee was reporting that Mark Garcia was reported to be a member of the cryptically described buyer. Counsel for the Plan Administrators/Debtors offered no response, either way, and merely said that the Plan Administrators/Debtors were withdrawing the request to have the $21,756.00 from the sale diverted around the plan and instead be given to USFI (which had already stipulated to having the $21,756.00 diverted to Plan Administrators'/Debtors' counsel).

Terms of the Confirmed Chapter 11 Plan

The court has reviewed the actual terms of the Chapter 11 Plan (which was written and promoted by both the Debtors (whose participation was not openly disclosed) and YP Western Directory, LLC. It provides for the USFI claim in Class 3 of the confirmed Chapter 11 Plan as follows:

A. USFI will be paid monthly payments of $3,000.00 for a period of four years, with a balloon payment for the remaining balance of the $400,000.00 secured claim.

B. If the property securing the claim is sold, the holder of the first deed of trust will be paid in full.

C. "The remaining sum, after authorized expenditures, is to be paid to USFI. In that event, USFI has agreed to a 'carve-out' procedure, where 20% of the proceeds payable to USFI are to be paid to unsecured creditors."

D. The Debtors' agreement to pay the $400,000.00, plus interest, as provided in the plan was

1. "[c]onditioned upon the terms and subject to the provisions of (1) the Order approving the Chapter 11 Trustee's Motion to Compromise, entered on July 6, 2015 (Dckt. No. 649), (2) the Stipulation for Allowance and Payment of Claim No. 19-3 by United States Fire Insurance Company, subject to Bankruptcy Court approval, and (3) the Stipulation for Entry of Judgment for Non-Dischargeability of Debt, subject to Bankruptcy Court approval, which Order and Stipulations are incorporated by this reference."

This provision reads that the Debtors' agreement to pay the $400,000.00 is conditioned on those terms, not USFI's agreement to the Plan terms for the 20% carve-out for creditors holding general unsecured claims.

E. The express terms of the Plan for payment of the USFI claim are stated as:

1. "1) USFI is to receive 80% if the Net Sales Proceeds of a sale of the Debtors' residence at 5672 Eleanor Avenue, Oakdale, California 95361 (the 'Oakdale Property'), after deduction of the costs of sale senior liens as provided in the Order approving compromise entered on July 6,2015."

2. "2) The Debtors will pay the balance due after application of the Net Sales Proceeds above, if any, as provided by the Stipulation for Allowance and Payment of Claim, at $3,000.00 per month, including interest accrued on principal at six percent (6%) per annum for 48 months. The entire sum is all due and payable 48 months after the first payment, together with any accrued interest and/or late charges. . . ."

3. "In the event that the Trustee has not completed a sale of the Oakdale Property and the escrow for such sale has not closed within six (6) months of the Order approving this Stipulation, then USFI's consent to such sale shall be deemed withdrawn. In the event that the Debtors have defaulted on the monthly payments due to USFI, USFI may petition the Court for relief from automatic stay and/or default under the confirmed plan to obtain its remedies with respect to the Oakdale Property by judicial or non-judicial foreclosure."

Order Confirming Plan, Dckt. 781; Confirmed Chapter 11 Plan attached as an Exhibit.

The court's order approving the Chapter 11 Trustee's Stipulation with USFI was filed on July 6, 2015. Dckt. 649. Six months after the issuance of that order was January 5, 2016. However, the YP Western Directory, LLC and Debtors Plan was not confirmed until May 6, 2016. Dckt. 781. If the Plan terms as written by YP Western Directory, LLC and Debtors were to mean that the six-month limitation on the Trustee being able to sell the property and recover the 20% carve-out was an additional limitation on the Plan Administrators/Debtors under the confirmed plan, then the 20% carve-out would be illusory—given that confirmation occurred four months after the time period for the Trustee to conduct a sale had expired.

At this point, the court will not presume that the plan proponents and involved creditors were actively working to mislead and defraud the court and creditors by drafting intentionally illusory, ineffective plan provisions. Rather, the more rational, good faith, bona fide interpretation of this provision is that once the Plan Administrators/Debtors took over for the Trustee under the confirmed plan, which USFI voted for, is that there was no such limitation. It is clear that USFI did not contend that such a provision was not enforceable, as it readily stipulated to the Plan Administrators'/Debtors' demand that if the Plan Administrators/Debtors conducted the sale (as part of exercising their fiduciary duties under the Plan) to have the money diverted to counsel for the Plan Administrators/Debtors.

REVIEW OF CURRENT PLEADINGS AND TESTIMONY OF MARK GARCIA

The current Motion for Authority to Sell the property was filed on October 25, 2016, five days after the October 20, 2016 hearing in which the U.S. Trustee reported the California Secretary of State

information that Mark Garcia, one of the Plan Administrators/Debtors was a member in the purchasing company (two of those five days being the weekend of October 2–3, 2016). The current Motion again states that "Debtors" seek an order authorizing them, the "Debtors" to sell the property. Motion, Dckt. 871. This continues to demonstrate a lack of understanding, or more likely a refusal to accept, the fiduciary duties of a plan administrator.

The Motion alleges that the property will be sold for $675,000.00, of which $500,000.00 will be paid to the creditor holding the claim secured by the senior deed of trust and the balance of the sales proceeds, all $150,000.00, will be paid to USFI. No monies are to be paid for the 20% carve-out into the Plan to be disbursed to creditors holding general unsecured claims. This is essentially the same "fall-back" proposal made by Plan Administrators'/Debtors' counsel when the U.S. Trustee disclosed that Mark Garcia, was a member of the buyer. The court denied that request, the Plan Administrators/Debtors "folding" the estate's tent and giving away the $21,756.00 that USFI had already stipulated to being paid and the 20% provided for in the confirmed Chapter 11 Plan. FN.1.

FN.1. The court's concern in the prior hearing, and now amplified in the current Motion, is that the Plan Administrators/Debtors, their counsel, and USFI have made a backroom deal to divert the 20% portion of the sales proceeds around the Plan, away from the creditors holding unsecured claims, and into the Debtors' pockets.

The Motion further states that the holder of the senior deed of trust has relief from the automatic stay under the Plan and can then schedule a non-judicial foreclosure sale (21-day notice). Motion ¶ 9; *Id.* The Motion appears to indicate a sense of urgency, but it appears that any urgency now arises due to the Plan Administrators/Debtors failing to act timely to market and sell the property to get whatever 20% portion of the sales proceeds are due under the confirmed Chapter 11 Plan. In some respects, the Motion can be read that the Plan Administrators/Debtors are acting to advance the interests of USFI, saving it the cost and expense of foreclosing, paying the obligation owed on the obligation secured by the senior deed of trust, and then having to own (and pay all expenses related thereto) and market (which reasonably can be estimated to take a year) the property to recover what was paid the senior lien creditor, all of the foreclosure costs and expenses, the costs and expenses of holding the real property, and the marketing and real estate commission (which at an estimated sales price of $675,000.00 would be $40,500.00 for a 6% residential real estate commission alone).

That the Plan Administrators/Debtors cannot recover the 20% portion of the sale proceeds for distribution through the Plan is unfathomable. Instead, they appear to be giving away the Plan Estate's right and power to sell the property, effectively "paying" USFI (by helping USFI avoid incurring all of the normal creditor expenses incurred in foreclosing on, owing, and selling real property collateral) for the "privilege" of acting as USFI's sales agent and selling property for which no purpose is served under the confirmed Chapter 11 Plan.

Even if there is not a backroom deal to divert a portion of the proceeds through USFI to Debtors, the real personal interest of Debtors in the transaction, at the expense of the Chapter 11 Plan creditors, is that Debtors have set up a "flipper" entity to buy the property and then resell it later for a profit. Motion ¶ 10; *Id.*

The Motion states that the money to make the purchase is being funded by Christopher L. Martin, another member of the Buyer. The declaration of "Christopher L Martin" is provided in support of the current Motion. Dckt. 874. He testifies under penalty of perjury that he is providing all of the monies for Mr. Martin and Mark Garcia to buy this property. He testifies under penalty of perjury that his business estimates are that when he and Mr. Garcia re-sell the property they will net between $130,000.00 to $150,000.00, and he will pay 20% of the net proceeds to Mark Garcia. This 20% is exactly what the Plan Administrators/Debtors should be recovering from the current sale to be paid through the confirmed Chapter 11 Plan. Mr. Martin's testimony is that the estimated net sales proceeds on which the 20% share for Debtors will be computed is exactly the net sales proceeds estimated for the current proposed sale – $150,000.00 (Declaration of Mark Garcia, ¶ 3; Dckt. 871).

Again, this testimony further demonstrates that Mark Garcia and Angela Garcia, the Plan Administrators/Debtors, will engage in any transaction they can to not fulfill their fiduciary duties to recover the 20% to be paid through the Chapter 11 Plan, but instead put it in their own pockets.

Declaration of Mark Garcia

Mark Garcia has provided a new declaration in support of the current Motion. Dckt. 873. This most recent testimony under penalty of perjury includes the following:

A. "I am one of the debtor(s) in this proceeding and am making this declaration in support of our motion to sell our residence." Declaration ¶ 1; Dckt. 873.

Yet again, Mark Garcia ignores that he is a Plan Administrator and that he has fiduciary duties having elected to take on such position and responsibilities.

B. He is providing this declaration to correct "mistakes" and "inadvertent omissions" made under penalty of perjury in his prior declaration. Declaration ¶ 2; *Id.*

C. The property was marketed for a year by the Chapter 11 Trustee, with no sale obtained.

D. The Plan Administrators/Debtors have relied upon a real estate agent they were directed to by counsel for USFI to determine an opinion as to the value of the property. Mr. Garcia testifies:

1. "Mr. Salvato, who represents the second mortgage USFI in this case, referred a Craig Lewis, a CEO of Prudential Real Estate, to appraise my house and determine if a sale could take place. **I talked with Mr. Lewis twice**. He told me that maybe it would sell for $640,000.00, but **he did not think a sale would result in a significant dividend to USFI**." Declaration ¶ 7; *Id.* [emphasis added].

With this testimony, Mr. Garcia demonstrates that without the Plan Administrators/Debtors selling the property, with the 20% dividend recovered for disbursement through the Plan, USFI would not recover any significant payment on its junior lien position. However, if the Plan Administrators/Debtors merely

recovered the 20% portion of the net sales proceeds (and did not attempt to hardball USFI into a higher percentage), $30,000.00 would be recovered for disbursement through the Chapter 11 Plan and USFI would receive $120,000.00 (assuming only $150,000.00 of net sales proceeds) for its secured claim, as well as receiving some disbursement on its remaining general unsecured claim.

E. In describing the "mistakes" and "omissions" in his prior declaration under penalty of perjury, Mr. Garcia now testifies under penalty of perjury:

1. "My previous declaration dated September 15, 2016, docket number 851, was mistaken in several respects." Declaration ¶ 13; *Id.*

2. "**This sale is not an arm's length transaction**, as I am a member/owner of the buyer Interface Investment Capital, LLC." *Id.* [emphasis added].

3. "There is no personal or family relationship, but **there is a business relationship**." *Id.* [emphasis added].

4. "I entered into this transaction to save the house from foreclosure and to replay [sic] the second mortgage a substantial amount." *Id.* [emphasis added].

In this statement under penalty of perjury, Mark Garcia admits that the transaction was not one to perform the Plan and fulfill the obligations of the Plan Administrators/Debtors, but to personally benefit the Debtors by keeping a house that they were obligated to sell as Plan Administrators/Debtors.

5. "**I did not review the declaration dated September 15, 2016**, before signing it and I apologize to the Court and any parties who relied on those portions of my declaration. It was a serious mistake on my part." *Id.* [emphasis added].

The testimony that Mr. Garcia did not read the prior declaration, and therefore should be excused from making a false statement and the Plan Administrators/Debtors excused from their fiduciary duties in performing the Chapter 11 Plan is not credible or persuasive for several reasons.

Implicit in the testimony is that Mr. Garcia is blaming his counsel for making up a declaration without first obtaining the necessary information to prepare the testimony under penalty of perjury for his client. If this were true, then counsel will have not only violated the California Rules of Professional Conduct (State Bar Rules 5-200), but counsel will also have violated Federal Rule of Bankruptcy Procedure 9011, which provides in pertinent part:

> Rule 9011. Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers
>
> (b) Representations to the court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other

> paper, **an attorney** or unrepresented party **is certifying that to the best of the person's knowledge**, information, and belief, **formed after an inquiry reasonable under the circumstances**[,]--
>
> (1) it **is not being presented for any improper purpose**, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> . . .
> (3) the allegations and other **factual contentions have evidentiary support** or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;. . .
> . . .
> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

For Mr. Garcia, the court does not find persuasive this testimony that he did not read the declaration. Mr. Garcia is not unfamiliar with the judicial process, the pre-petition business operated by Debtors since 1999, during this bankruptcy case, and now as the Plan Administrators/Debtors is a bail bond business. As described in the approved Amended Disclosure Statement, at one time the business was the "largest such business in the area." Disclosure Statement, p. 5:12–14; Dckt. 739. Mr. Garcia cannot operate in that judicially related business and not understand the significance of making testimony under penalty of perjury.

It appears that the best case scenario for Mr. Garcia is that he gave partial information to his attorney, did not bother to read it, and then only asked the attorney if the testimony in the declaration meant "Mr. Garcia wins." When told yes by his attorney, Mr. Garcia made the conscious decision not to read the declaration, "just in case there is something in there the attorneys misunderstood," which if corrected might mean that Mr. Garcia might not win.

> 6. "I have been in a rush in the last few months to get my house sold before the first mortgage Deutsche schedules a trustee sale in order that I can pay my creditor USFI from the proceeds. No real estate broker was ever able to do so."

It is clear that the Plan Administrators/Debtors have a sale they can make, recover 20% to be disbursed through the Plan, and do USFI a "great favor" recovering $120,000.00 for it, in addition to whatever may be disbursed on the unsecured portion of its claim from the 20% carve-out. Instead of fulfilling the obligations as Plan Administrators, the Debtors are driven to a plan/scheme/goal to get keep their home, then sell it to their personal advantage, and take the 20% which is obligated under the confirmed Chapter 11 Plan to be paid to creditors holding general unsecured claims.

CONTINUED HEARING AND ORDER TO SHOW CAUSE

At the conclusion of the prior hearing, counsel for USFI posed a question to the court, "would the court consider granting a motion to sell if it was represented by the Plan Administrators/Debtors." While the court does not give advisory opinions, the court noted that the prior motion was denied without prejudice, leaving the door open for another motion to be represented to the court.

The court, now obviously incorrectly, thought that the parties would consider the comments of the court, the breaches of duty, the inaccurate statements under penalty of perjury, and the court's comments throughout this case (and most recently in connection with the efforts to increase its administrative expense), and would present a motion in which the Plan Administrators/Debtors would perform the plan and fulfill their duties to recover the 20% distribution of sales proceeds for the benefit of the creditors through the Chapter 11 Plan—not to put the 20% in the Debtor's own pockets.

Further, it having been disclosed that Mark Garcia (and possibly Angela Garcia) was a member of the Buyer (which may or may not have been news to USFI), the court thought that the Plan Administrators/Debtors, their counsel, USFI, and other parties in interest would be careful to present a motion and proposed sale in which the Plan Administrators/Debtors fulfilled their fiduciary duties under the confirmed Chapter 13 Plan and did not abuse the use of their powers for self-benefit to the detriment of creditors.

Unfortunately, they have not. Instead, they have merely represented the same motion, using the fallback position stated by the Plan Administrators'/Debtors' counsel that the Plan Administrators/Debtors abandoned any ability to recover the 20% for the benefit of creditors and would just give all of the monies to USFI.

That being the case and there being no demonstrated benefit for the creditors or the Plan Administrators/Debtors fulfilling their duties to perform the plan, there is no reason for the court to approve the sale. USFI can exercise its rights to foreclose on the property—advancing the $500,000.00 to pay the senior lien, pay the foreclosure costs and expenses, pay the property taxes and insurance for a year, and pay the real estate commission for a broker to sell the REO property, and hopefully recover at least $130,000.00 more than eighteen months from now. No good faith, bona fide reason has been shown for the Plan Administrators/Debtors conducting a sale that nets nothing for distribution through the Plan and works to just save USFI from having to exercise its rights in the property.

However, rather than just denying this Motion, the court continues the hearing to 2:30 p.m. on November 16, 2016, specially set to be heard in Courtroom 33 of the Bankruptcy Court in Sacramento, California. The court is ordering appearance of all the parties and their counsel, including a senior representative of USFI with authority to make decisions concerning USFI's claim in this case and the payment of 20% of the net sales proceeds into the Chapter 11 Plan as provided in the Chapter 11 Plan.

The court shall issue a separate order to show cause why; in light of the perjury committed by Mark Garcia, the failure of the Plan Administrators/Debtors acting in their personal financial interests rather than performing the plan, and the contention that counsel for the Plan Administrators/Debtors preparing pleadings, including declarations under penalty of perjury, which contain inaccurate information and not

obtaining accurate information from his clients, or the Plan Administrators/Debtors providing counsel with inaccurate information; the court should not appoint a receiver under applicable California law to perform the confirmed Chapter 11 Plan and perform the fiduciary duties of a plan administrator, appoint a replacement plan administrator if requested by a party in interest, or convert this case to one under Chapter 7 for the appointment of an independent Chapter 7 Trustee fiduciary (not the Chapter 11 Trustee) to recover property and enforce rights of the estate in this bankruptcy case. That Order to Show Cause will be set for hearing at a separate date and time, to afford all parties the opportunity to consider the issues and determine the legal ramifications flowing not only from such proceedings, but testimony they have, and may be included to give under penalty of perjury in connection with this bankruptcy case.

TERMS OF PROPOSED SALE

The proposed purchaser of the Property is Interface Investment Capital, LLC ("Buyer")—of which Movant Mark Garcia is a member and owner—through member and owner Christopher Martin, and the terms of the sale are:

A. Purchase Price of $675,000.00:

1. Estimated payment to Deutsche Bank of $500,000.00,
2. Estimated net proceeds for payment to United States Fire Insurance lien position of $150,000.00, and
3. No Brokerage Fee.

B. Closing date set for December 1, 2016.

C. Seller to pay closing costs for:

1. Preparation of the deed to the Property;
2. Title search, title report, and title insurance policy;
3. Property taxes, fees, and assessments;
4. Any real estate agent's commission;
5. Home loans and other debts on the Property, but not assumed by the Buyer;
6. Judgments, tax liens, or other liens necessary to transfer clean title; and
7. Recording charges for documents necessary to transfer clean title.

D. Buyer to pay closing costs for:

1. Recording documents in Buyer's name,
2. Lenders title insurance premium,
3. New home loan charges or assumption of existing loan charges,
4. Costs associated with financing the purchase of the Property,
5. Notary fees, and
6. All other costs associated with closing unless otherwise stated by the Parties in writing.

E. Each party pays half of escrow fees and half of the Homeowners Association transfer fee.

F. Taxes, assessments, rents, and Homeowners Association dues are to be prorated to Seller up to, but not including, the closing date.

G. Financed entirely by cash.

H. Governed by California law.

CHAMBERS PREPARED ORDER ISSUED

11. 11-91568-E-7 JAD-2 | **ALFRED ALVAJI** **Jessica Dorn** | **MOTION TO AVOID LIEN OF CITIBANK (SOUTH DAKOTA), N.A. 10-3-16 [25]**

Final Ruling: No appearance at the November 10, 2016 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, Chapter 7 Trustee, Creditor, party requesting special notice, and Office of the United States Trustee on October 3, 2016. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Citibank (South Dakota) N.A. ("Creditor") against property of Alfred Alvaji ("Debtor") commonly known as 3788 Jefferson Street, Turlock, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $10,917.16. An abstract of judgment was recorded with Stanislaus County on April 19, 2011, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $207,000.00 as of the date of the petition. The unavoidable consensual liens that total $339,330.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(5) in the amount of $1.00 on Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Citibank (South Dakota), N.A., California Superior Court for Stanislaus County Case No. 649039, recorded on April 19, 2011, Document No. 2011-0033795-00 with the Stanislaus County Recorder, against the real property commonly known as 3788 Jefferson Street, Turlock, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

12. **14-90777-E-7** **DWIGHT/KATHRYN PFAFF** **MOTION TO AVOID LIEN OF CENTRAL STATE CREDIT UNION**
ALF-2 **Ashley Amerio** **10-26-16 [22]**

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

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

Local Rule 9014-1(f)(2) Motion—No Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, creditors, and Office of the United States Trustee on October 26, 2016. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Avoid Judicial Lien 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further.

Upon review of the Motion and supporting pleadings, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion. The defaults of the non-responding parties in interest are entered.

The Motion to Avoid Judicial Lien is denied without prejudice.

This Motion requests an order avoiding the judicial lien of Central State Credit Union ("Creditor") against property of Dwight Pfaff and Kathryn Pfaff ("Debtor") commonly known as 6628 Old Emigrant Trail West No. 12, Mountain Ranch, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $7,443.32. An abstract of judgment was recorded with Calaveras County on May 7, 2014, which encumbers the Property. Exhibit 2, Dckt. 25.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $248,000.00 as of the date of the petition. The unavoidable consensual liens that total $218,645.43 as of the commencement of this case are stated on Debtor's Amended Schedule D. Dckt. 30. This reflects an equity of $30,000.00 over the consensual liens.

Debtor has chosen to claim an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of only $1.00 in the Property as stated under penalty of perjury on Amended Schedule C. Dckt. 29. The court notes that on Original Schedule C (Dckt. 1 at 17–18) Debtor elected to not claim an exemption in this real property.

11 U.S.C. § 522(f)(2)(A)(i)–(iii) provides that a lien will be "considered to impair an exemption to the extent that the sum of the lien; all other liens on the property; and the amount of the exemption that the debtor could claim if there were no liens on the property exceeds the value that the debtor's interest in the property would have in the absence of any liens." California Code of Civil Procedure § 703.140(b)(1) sets the maximum interest in real property at $24,060.00. So, the $7,443.32 lien, the $218,645.43 unavoidable consensual liens, and the $1.00 claimed real property exemption combine to equal $226,089.75.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is equity of $29,000.00 (rounded amount, assuming a $248,000 value, less the $218,645.43 consensual liens and the $1.00 exemption) for payment of the judicial lien for the $7,443.32 judgment.

Debtor has elected to use the California special "bankruptcy exemptions" provided for by the Legislature. These exemptions include the extraordinary bankruptcy style "wildcard" exemption that allows Debtor to allocate the statutory bankruptcy homestead exemption (Cal. C.C.P. § 703.140(b)(1)) to any other assets (Cal. C.C.P. 703.140(b)(5)). The amount of exemption available for a homestead is dependent on how much is used for other assets.

Under the California special "bankruptcy exemptions," a debtor may claim an exemption, "not to exceed twenty-four thousand sixty dollars..." in a residence. Cal. C.C.P. § 703.140(b)(1) The amount is dependent on what the debtor claims, as stated in the statute itself. The exemption is not an automatic amount.

Debtor then can, and has, chosen to use a portion of the $24,060.00 in other non-residence assets through the "wildcard exemption" provided in Cal. C.C.P. § 703.150. Debtor has used part of the homestead exemption to fund the exemption of seven other non-residence assets. Amended Schedule C, Dckt. 29. Apparently, by Debtor's calculation there is only $1.00 of exemption value in the residence property after spreading the exemption around the other non-residence assets. FN.1.

FN.1. As determined by the United States Supreme Court, a debtor may generally claim an exemption *in* an asset. The vast majority of exemptions under California Law (the applicable bankruptcy exemptions in Cal. C.C.P. § 703.140 and the general exemptions in Cal. C.C.P. §§ 704.010 et. seq) are for monetary amounts in assets of the estate. Such assets continue to remain property of the estate until used, sold, or abandoned from the estate. *Schwab v. Reilly*, 130 S. Ct. 2652, 2667, 177 L. Ed. 2d 234 (2010); *Gebhart v. Gaughan (In re Gebhart)*, 621 F.3d 1206, 1210 (9th Cir. 2010). Claiming an exemption, except in very limited circumstances not applicable here, does not exempt the asset, but only the dollar amount claimed as exempt.

It may be that Debtor would argue something to the effect of,

> "Come on judge, you know that I only stated under penalty of perjury that $1.00 was claimed exempt because I hadn't figured out how much of the exemption amount I was going to use on other assets. You can go and look up California Code of Civil Procedure § 703.140(b)(1) to figure out, and state for me, the maximum homestead exemption I could have claimed if I had claimed it.
>
> Then, you can read through the rest of my Amended Schedule C, spend the time assembling the information in a spread sheet and compute for me how much of the § 703.140(b)(1) exemption remained after you have added up all of the amounts I used for the § 703.140(b)(5) exemptions.
>
> Then you, the judge, could *sua sponte* judicially amend my Amended Schedule C and claim for me that maximum amount of exemption that I could have claimed if I had taken the time to compute the maximum amount to be claimed.
>
> Come on judge, don't make me, the debtor, accurately claim my exemptions."

The court acknowledges that the above cynical characterization is done for illustrative purposes only and not because the court thinks that either the Debtor or counsel for Debtor would have intentionally approached the issue this way or would ever say that to a judge. Most likely, the $1.00 amount was claimed thinking that the consensual liens significantly consumed all of the value, so as long as the Debtor claimed at least a nominal amount, there was no legal issue. Fortunately for Debtor, the consensual liens do not consume the value of the property, and he has a significant equity in which he can (but has not yet) claimed a dollar amount exemption. Unfortunately, nobody caught that there was a significant value in excess of the claimed exemption to which the judgment lien has attached.

It is not for the court to assist a party in preparing, presenting, or arguing their pleadings and positions. It is not for the court to rewrite the Schedules to state what the court thinks the Debtor should, or would, actually state under penalty of perjury. That is the job for Debtor and Debtor's counsel.

It appears that the court cannot properly adjudicate the Debtor's request to avoid the judicial lien until Debtor has further amended his Schedule C, if that is something that Debtor and Debtor's attorney determine to be the proper course of action.

Therefore, based upon the exemption of $1.00 claimed, the evidence of the value of the property and the consensual liens, and there appearing to be an error by Debtor in the amount claimed, the court denies the Motion 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 Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

13. 16-90682-E-7 PATRICIA SCHOW
Christian Younger

TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
9-20-16 [11]

Final Ruling: No appearance at the November 10, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and creditors on September 20, 2016. By the court's calculation, 51 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The hearing on the Motion to Dismiss is continued to 10:30 a.m. on December 1, 2016.

Michael McGranahan, the Chapter 7 Trustee, filed the Instant Motion to Dismiss on September 20, 2016. Dckt. 11. The Trustee moves for dismissal based on the Debtor's failure to appear and testify at the Meeting of Creditors held on September 20, 2016. Alternatively, if Debtor's case is not dismissed, the Trustee requests that the deadline to object to Debtor's discharge and the deadline to file motions for abuse, other than presumed abuse, be extended to sixty days after the date of Debtor's next scheduled Meeting of Creditors, which is set for 10:30 a.m. on November 15, 2016. If Debtor fails to appear at the continued Meeting of Creditors, the Trustee requests that the case be dismissed without further hearing.

Patricia Schow ("Debtor") filed a Declaration in Response to Trustee's Motion to Dismiss Chapter 7 case on October 11, 2016. Dckt. 15. Debtor's Declaration indicates that she was unable to attend her Meeting of Creditors on September 20, 2016, because she was ill. Debtor indicates that she will attend her continued Meeting of Creditors set for 10:30 a.m. on November 15, 2016. Unfortunately for the Debtor, a promise to perform is not evidence of such.

The Trustee alleges that the Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Attendance is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay that is prejudicial to creditors and is cause to dismiss the case. 11 U.S.C. § 707(a)(1).

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 7 case filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion to Dismiss is continued to 10:30 a.m. on December 1, 2016.
>
> **IT IS FURTHER ORDERED** that the deadline for filing objections to discharge and motions pursuant to 11 U.S.C. § 707(b) for abuse in filing of the bankruptcy case is extended through and including January 27, 2017.

14. 15-90087-E-7 DIOLINDA MACHADO **MOTION FOR SUMMARY JUDGMENT**
15-9016 Ashley Amerio **9-28-16 [20]**
MACHADO V. MACHADO

Final Ruling: No appearance at the November 10, 2016 hearing is required.

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 Defendant, Debtor's Attorney, and Office of the United States Trustee on September 28, 2016. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

The hearing on the Motion for Summary Judgment is continued to 10:30 a.m. on November 17, 2016, specially set to be conducted in Courtroom 33 of the United States Courthouse, 501 I Street, Sixth Floor, Sacramento, California.

Plaintiff Mary Machado initiated this adversary proceeding against Debtor Diolinda Machado ("Defendant") by filing a complaint on May 15, 2015.

On September 28, 2016, Plaintiff filed the instant Motion for Summary Judgment. The Motion does not comply with Federal Rule of Civil Procedure 7(b), Federal Rule of Bankruptcy Procedure 7007, Local Bankruptcy Rule 9004-1, and the Revised Guidelines for Preparation of Documents. Federal Rule of Civil Procedure 7(b)(1)(B), incorporated in adversary proceedings by Federal Rule of Bankruptcy Procedure 7007, requires that motions "state with particularity the grounds for seeking the order."

Review of Motion Minimum Pleading Requirements

Federal Rule of Civil Procedure 7(b), which is incorporated in its entirety by Federal Rule of Bankruptcy Procedure 7007, states,

> "(b) Motions and Other Papers
>
> (1) In General. A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) **state with particularity the grounds for seeking the order**; and

(C) state the relief sought."

Fed. R. Civ. P. 7(b) [emphasis added]. The same "state with particularity" requirement is included in Federal Rule of Bankruptcy Procedure 9013 for all motions in the bankruptcy case itself.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013 (which contains the same "state with particularity" requirement). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2)), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678–79. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plan statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts that will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] shall state with particularity the grounds therefor, and shall set forth the relief or order sought" (emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's Federal Practice, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977).

Not stating with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Federal Rule of Civil Procedure 7(b) and Federal Rules of Bankruptcy Procedure 7007 and 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try to float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

Grounds State in Motion

Here, Plaintiff has not provided any grounds in her Motion for Summary Judgment, merely unsupported conclusions of law. In the present Motion, the sum total of the grounds stated with particularity consist of:

A. "Plaintiff brings this Motion for Summary Judgment on the grounds that there is no genuine dispute as to any material fact upon which the Defendant could prevail."

B. "The debt owed to the Plaintiff is nondischargeable as a matter of law pursuant to 11 U.S.C. section 523, subdivisions (a)(2)(A), (a)(6), and (a)(7)."

Motion, Dckt. 20. This is the equivalent of pleading, "I say the defendant hurt me, I'm entitled to tort damages."

That the Motion lacks stating grounds with particularity is highlighted by the instruction from Movant for the court to go and canvas: (1) this Motion; (2) the Points and Authorities in Support of the Motion; (3) the Declaration; (4) the Notice of Hearing; (5) the Statement of Undisputed Facts; (6) the Exhibits in Support of the Motion; (5) every other pleadings and papers filed with the court (apparently in every case and adversary proceeding in existence); and (6) whatever further evidence Movant chooses to present at some later date through the hearing on the Motion (with there being no right of the Movant to submit untimely pleadings and evidence without court authorization). Then, implicit in the instruction is that the court is to assemble all of what the court believes to be the Movant's best evidence and arguments, organize them for Movant, state the grounds in a "motion" for Movant that the court believes Movant would state if Movant had complied with Rule 7(b), and then rule on the court's "motion" for Movant.

The court declines the opportunity to do the associate attorney work and assemble motions for the parties. It may be that Movant believes that the seven page Points and Authorities (Dckt. 22) is "really" the motion and should be substituted by the court for the motion. This fails for several grounds. One is that under Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents, the motion and points and authorities are separate documents. The court has not waived that Local Rule for Movant.

Second, while Movant may feel this is a "simple motion," the court does not allow a different application of the rules between attorneys or from "simple" to "complex" motions. The Rules are equally and fairly applied, without attorneys having to guess when they "really" have to follow the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, Federal Rules of Evidence, and the Local Bankruptcy Rules. The simpler the motion, the easier it is for the moving party and counsel to state the grounds with particularity in the motion. The points and authorities are left for just that, the legal authorities, statutes, cases, and argument thereon.

Relief Requested Not Clearly Stated

In the Motion (Dckt. 20), Movant states that she seeks a determination that some debt is nondischargeable. Such debt is not identified. Even reading the Points and Authorities (mashing the Motion and Points and Authorities into a "Mothorities"), the relief—other than "give me a summary judgment"—is unclear. Movant fails to clearly state whether she is requesting that the court issue a judgment stating: (1) that the obligation owing on the state court restitution order is nondischargeable and that such state court judgment (and all post-judgment costs, fees, and interest) is enforced under state law or (2) issue a federal judgment on the debt, replacing any state court judgment/award with the federal judgment, and then leave the post-judgment fees, costs, and interests to be determined under federal law. There is a significant

difference to a federal court issuing an order stating that the obligation owing under the state court judgment is nondischargeable and issue a new federal judgment that supercedes the state court judgment.

Continued Hearing

The failure to comply with Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 is not a repeat occurrence for Movant's counsel. Since enforcing these basic pleading rules in 2010, there have been fewer and fewer "learning experiences" for the court to present to attorneys in open court. Therefore, it is proper to continue this hearing to afford counsel to file a Supplement to the Motion (NOT AN AMENDED MOTION) in which counsel states with particularity the grounds (not the legal conclusions or points and authorities) upon which Movant bases the requested relief. Movant shall also state with particularity the relief requested—a monetary judgment from this court to replace any state court judgment or award, or the specific state court judgment or award to be determined nondischargeable, which the Movant will then enforce through the state court.

The hearing on the Motion is continued to 10:30 a.m. on November 17, 2016, to be conducted in Courtroom 33 of the United States Courthouse, 501 I Street, Sixth Floor, Sacramento. Plaintiff shall file a Supplement to the Motion stating with particularity the grounds and relief requested on or before noon on November 15, 2016.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Summary Judgment filed by Plaintiff having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion for Summary Judgment is continued to 10:30 a.m. on November 17, 2016, to be conducted in Courtroom 33 of the United States Courthouse, 501 I Street, Sixth Floor, Sacramento, California. Plaintiff shall file a Supplement to the Motion stating with particularity the grounds and relief requested on or before noon on November 15, 2016.