UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

November 12, 2020 at 10:30 a.m.

1.	**20-24276-E-7** **AEB-1**	**SUSAN ESTEVEZ** **Andrew Bakos**	**MOTION TO DISMISS DUPLICATE CASE** **10-1-20 [11]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee and Office of the United States Trustee on October 1, 2020. By the court's calculation, 42 days' notice was provided. 14 days' notice is required.

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

The Motion to Dismiss Duplicate Case is granted, and Case No. is 20-24276 is dismissed.

Chapter 7 Debtor, ("Debtor"), seeks dismissal of the instant case on the grounds that this case is a duplicate case that was accidentally filed by Debtor's Counsel.

DISCUSSION

On September 4, 2020, Debtor filed a voluntary Chapter 7 petition, case number 20-24275. Debtor, through his attorney, claims that due to a clerical error, the instant case was filed as a duplicate case, case number 20-24276, also on September 4, 2020.

A review of Case No. 20-24275 shows that the case was filed on September 4, 2020. Additionally, a look at the petition and other documents filed on both cases reflect that they are in fact identical cases. Debtor seeks to maintain Case No. 20-24275 and has continued to prosecute the case.

Thus, the motion is granted, and Case Number 20-24276 is dismissed.

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 Debtor, Susan Elizabeth Estevez ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is granted, and Bankruptcy Case Number 20-24276 is dismissed as being an erroneous duplicate filing for Debtor.
>
> **IT IS FURTHER ORDERED** that the Clerk of the Court is directed to close this case.

2. **20-20507-E-7 DNL-5 2 thru 6** | **SONIC EXPRESS, LLC Gary Zilaff** | **MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH INDERBIR SINGH GURTEJ GILL AND NANAK BHATTI 10-8-20 [169]**

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.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 8, 2020. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Approval of Compromise is granted.

Alan S. Fukushima, the Chapter 7 Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Inderbir Singh, Gurtej Gill, and Nanak Bhatti ("Settlor"). The claims and disputes to be resolved by the proposed settlement are in connection with multiple state court cases.

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 A in support of the Motion, Dckt. 172):

A. The Settlement Agreement is conditioned upon: Bhatti emailing the Joint Statement Regarding Sonic Freight to the persons listed in Exhibit 1 attached to the Settlement Agreement; entry of an order granting this Motion; and the Trustee's receipt of the Settlement Payment. Further, Singh and Gill are to withdraw their proofs of claim with prejudice and all parties must cooperate to secure approval of this settlement.

B. Trustee shall receive a total of $825,000 as follows:

(1) $100,000 deposit within seven (7) calendar days of execution of the Settlement Agreement and

(2) $725,000 jointly payable by Singh and Gill within 21 calendar days of Bankruptcy Court approval.

The Trustee and Bhatti shall cooperate with Singh and Gill's funding of the Settlement Payment with the $345,000 JURISCO cash bond, $100,000 Virdi cash bond, and $150,000 held by Sonic Freight's customers, including J. B. Hunt. Bhatti covenants not to execute on or otherwise enforce the YOLO #429 judgment through the latter of the date on which the bankruptcy court approval motion is decided and the date on which the $725,000 is due to Bhatti.

C. Within 14 calendar days of the Trustee's receipt of the entire Settlement Payment, the Settling Parties will dismiss with prejudice their state court cases and the parties will bear their own attorney fees and costs. Singh's Proofs of Claim 5-1 and 6-1 shall be deemed withdrawn upon bankruptcy court approval of the Settlement Agreement.

D. Within 14 calendar days of the latter of the Trustee's receipt of the entire Settlement Payment and completion of all the Dismissals, the Trustee shall pay $725,000 to Law Offices of Mahesh Bajoria Client Trust Account in full and final settlement of all claims that have been asserted or could be asserted against the Bankruptcy Estate, including Proofs of Claim 1-1 and 3-1, withdrawal of which shall be promptly filed by Bhatti upon receipt of good funds.

E. The Trustee shall release Bhatti, the Bhatti Affiliates, Singh, Gill, and those Singh/Gill Affiliates that join in the Singh/Gill Affiliates Release. The Trustee's release shall not apply to any of the Debtor's attorneys, including the Litigation Attorneys. Bhatti and the Bhatti Affiliates shall release the Trustee, the Debtor, Singh, Gill, and those Singh/Gill Affiliates that join in the Singh/Gill Affiliates Release. Bhatti and the Bhatti Affiliates shall irrevocably disclaim all past or present ownership interest, if any, in the Debtor and the Singh/Gill Affiliates, including without limitation Sonic Freight. Singh, Gill, and the Singh/Gill Affiliates shall release the Trustee, the Debtor, Bhatti, and the Bhatti Affiliates. Singh, Gill, and the Singh/Gill Affiliates shall irrevocably disclaim all ownership interest, if any, in the Bhatti Affiliates.

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 Constr.)*, 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 Comm. for Indep. S'holders 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); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Probability of Success

Trustee states this factor supports approval of the Settlement Agreement because the likelihood of success in the State Court Cases is complex and uncertain. Indeed, the Settlement Agreement would resolve multiple disputed and uncertain issues.

Difficulties in Collection

Trustee states this factor is neutral as Trustee is unaware of any collection issues.

Expense, Inconvenience, and Delay of Continued Litigation

Trustee states this factor supports approval of the Settlement Agreement as the law favors compromise over litigation. *In re Blair*, 538 F.2d 849, 851 (9th Cir. 1976). Resolution through an appellate court in this matter would likely take years to complete and would come at great expense. Settlement would avoid this alternative and also resolve all filed unsecured claims in Debtor's case.

Paramount Interest of Creditors

Trustee argues this factor weights in favor of the Settlement Agreement in that it was negotiated in good faith, is fair and reasonable, and results in all filed unsecured claims in Debtor's case being resolved either through agreed payment or voluntary withdrawal. Trustee would therefore be able to move forward with closing this case and the parties could avoid further delay.

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 Movant to purchase or prosecute the property, claims, or interests of the estate 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 the Settlement Agreement would avoid unnecessary delay and expense and would resolve ongoing disputes between the parties. 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 Alan Fukushima, 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 for Approval of Compromise between Inderbir Singh, Gurtej Gill, and Nanak Bhatti 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 A in support of the Motion (Dckt. 172).

3. **20-20507-E-7 DNL-6** | **SONIC EXPRESS, LLC** **Gary Zilaff** | **MOTION FOR COMPENSATION FOR ALAN S. FUKUSHIMA, CHAPTER 7 TRUSTEE(S)** **10-8-20 [175]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 8, 2020. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is ~~granted~~.

Alan S. Fukushima, the Chapter 7 Trustee, ("Applicant") for the Estate of Sonic Express, LLC ("Client"), makes a Request for the Allowance of Fees and Expenses in this case. Fees are requested for the period January 30, 2020, through November 12, 2020.

The compensation as calculated under 11 U.S.C. § 326(a) totals $47,000.00. Dckt. 175.

Further, Applicant has agreed to cap his request for compensation at $20,000.00. *Id*. However, the prayer for relief requests $57,000.00 in compensation. *Id*. The court assumes that the correct amount is the reduced amount of $20,000.00 and thus, drafts this tentative ruling under that amount, and further assumes that the prayer for relief for $57,000.00 was a clerical error.

At the hearing, **xxxxx**

STATUTORY BASIS FOR FEES

11 U.S.C. § 330(a)

> (1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103 —
>
> > (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and
> >
> > (B) reimbursement for actual, necessary expenses.

In considering the allowance of fees for a professional employed by a trustee, the professional must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)).

In considering the compensation awarded to a bankruptcy trustee, the Bankruptcy Code further provides:

> (7) In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326.

11 U.S.C. § 330(a)(7). The fee percentages set in 11 U.S.C. § 326 expressly states that the percentages are the maximum fees that a trustee may received, and whatever compensation is allowed must be reasonable. 11 U.S.C. § 326(a).

Benefit to the Estate

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

billing judgment with regard to the services provided because the court's authorization to employ a trustee to work in a bankruptcy case does not give that trustee "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that Applicant's services for the Estate include participating in the BDRP sessions, consulting with a certified public accountant regarding the tax implications of the settlement agreements, communicating extensively with attorneys representing various creditors, attending meetings and conferences with creditors and their counsel, and examining proofs of claims and determining the validity of the proofs of claims. The court finds the services were beneficial to Client and the 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 reviewed the petition, schedules, and related documents, examined proofs of claims and determined their validity, reviewed the mail, and prepared forms 1, 2, and 3 as required by the U.S. Trustee for successive six-month periods.

Financial: Applicant consulted with his certified public accountant regarding the tax implications of the settlement agreements, and prepared monthly bank reconciliations and proper accountings of all assets and disbursements made. Additionally, Applicant selected and employed the accountant, prepared the final accounting and maintaining a proper bond, and reviewed past tax returns for possible carry over losses and refunds.

Communications: Applicant communicated extensively with attorneys representing various creditors, attended meetings and conferences with creditors and their counsel, participated in the BDRP sessions, and communicated extensively with general counsel.

Applicant requests the following fees:

25% of the first $5,000.00	$1,250.00
10% of the next $45,000.00	$4,500.00
5% of the next $825,000.00	$41,250.00
Calculated Total Compensation	**$47,000.00**
Plus Adjustment	$0.00
Total Maximum Allowable Compensation	$47,000.00
Less Previously Paid	$0.00
Total First and Final Fees Requested	$20,000.00

FEES ALLOWED

The court finds that the requested fees are reasonable pursuant to 11 U.S.C. § 326(a) and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $20,000.00 are approved pursuant to 11 U.S.C. § 330 and are authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

The Chapter 7 Trustee services include participating in the BDRP sessions, consulting with a certified public accountant regarding the tax implications of the settlement agreements, communicating extensively with attorneys representing various creditors, attending meetings and conferences with creditors and their counsel, and examining proofs of claims and determining the validity of the proofs of claims.

This case required significant work by the Chapter 7 Trustee, with full amounts permitted under 11 U.S.C. § 326(a), to represent the reasonable and necessary fees allowable as a commission to the Chapter 7 Trustee.

Applicant is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$20,000.00
Costs and Expenses	$0.00

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 Alan S. Fukushima, the Chapter 7 Trustee, ("Applicant") having been presented to the

court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Alan S. Fukushima is allowed the following fees and expenses as trustee of the Estate:

Alan S. Fukushima, the Chapter 7 Trustee

Fees in the amount of $20,000.00
Expenses in the amount of $0.00,

IT IS FURTHER ORDERED that the Chapter 7 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.

4. **20-20507-E-7** **SONIC EXPRESS, LLC** **MOTION TO DISMISS CASE**
DNL-8 **Gary Zilaff** **10-8-20 [185]**

Final Ruling: No appearance at the November 12, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on October 8, 2020. By the court's calculation, 35 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). 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 respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The hearing on the Motion to Dismiss is continued to 10:30 a.m. on December 10, 2020.

CONTINUANCE OF NOVEMBER 12, 2020 HEARING

On November 10, 2020, the Chapter 7 Trustee filed an ex parte Application requesting the court to continue the hearing. The Trustee requests the continuance so that he may confer further with the U.S. Trustee regarding the Motion. The court notes that a comprehensive settlement of the "warring partings" relating to this case and Debtor was approved by the court.

REVIEW OF MOTION

The Chapter 7 Trustee, Alan S. Fukushima ("Trustee"), seeks dismissal of the case on the grounds pursuant to 11 U.S.C. § 305(a) provides that a case may be dismissed after a notice and hearing if the interests of creditors and the debtor would be better served by such dismissal. Trustee asserts that assuming the court grants the four motions (DNL-5: Motion to Approve Compromise; DNL-6: Motion for Compensation of Trustee; DNL-7: Motion for Compensation of Trustee's Counsel; and ASF-2: Motion for Compensation of Accountant) to be heard on November 12, 2020, the Debtor's case will be fully administered with all filed unsecured claims in the Debtor's case being resolved either through an agreed payment or voluntary withdrawal.

Continuance Request

The Chapter 7 Trustee filed a Notice of Continued Hearing on the Motion to Dismiss the case on October 27, 2020. Dckt. 212. Trustee seeks to continue the November 12, 2020 hearing to December 10, 2020 at 10:30 a.m. The court has not entered an order continuing the hearing. Pursuant to Local Rule 9014-1(j),

> (j) Continuances. Continuances of hearings must be approved by the Court. A request for a continuance may be made orally at the scheduled hearing or in advance of it if made by written application. A written application shall disclose whether all other parties in interest oppose or support the request for a continuance. Failure to comply with this provision may be grounds for denial of the motion without prejudice.

On November 10, 2020, Trustee filed a Motion to Continue the Hearing. Dckt. 216. Trustee again requests the November 12, 2020 hearing be continued to December 10, 2020 at 10:30 a.m. to allow for Trustee and the U.S. Trustee, Tracy Hope Davis, time to confer regarding the instant motion.

The court continued the hearing.

DISCUSSION

The Bankruptcy Code provides:

> (a)The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—
>
> (1)the interests of creditors and the debtor would be better served by such dismissal or suspension;

11 U.S.C. § 305(a)(1).

Here, it seems that before the court may make a determination on whether this case should be dismissed, the United States Trustee and the Chapter 7 Trustee need time to confer further regarding the continued prosecution of this case.

5. **20-20507-E-7 ASF-2** **SONIC EXPRESS, LLC** **Gary Zilaff** **MOTION FOR COMPENSATION FOR GABRIELSON & COMPANY, ACCOUNTANT(S)** **10-8-20 [163]**

Final Ruling: No appearance at the November 12, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 8, 2020. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

Gabrielson & Company, the Accountant ("Applicant") for Alan S. Fukushima, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period February 28, 2020, through October 6, 2020. The order of the court approving employment of Applicant was entered on March 4, 2020. Dckt. 10. Applicant requests reduced fees in the amount of $20,000.00.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the professional exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

> (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?

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

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

A review of the application shows that Applicant's services for the Estate include reviewing Debtor's financial and accounting records, reviewing historical tax return filing in support of preparation of 2019 income tax returns, assisting Trustee on accounting, financial, and tax issues at a mediation meeting, and performing administrative functions. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Financial and Accounting Records: Applicant spent 27.9 hours in this category. Applicant assisted trustee and counsel in reviewing and analyzing historical banking, financial, and accounting records involving debtor operations and operating performance, including meetings and a consultation with trustee, counsel, debtor representatives and counsel, and creditor representatives.

Tax Return Filings: Applicant spent 12.3 hours in this category. Applicant assisted trustee and counsel in reviewing historical federal and state tax return filings and tax information in support of preparation of 2019 income tax returns.

Mediation: Applicant spent 12.5 hours in this category. Applicant advised trustee and counsel on accounting, financial, and tax issues at a mediation meeting involving the Debtor and Creditor representatives.

Administrative Functions: Applicant spent 2.4 hours in this category. Applicant prepared an accountant declaration and related employment documents for trustee review. Additionally, Applicant prepared first and final fee application, including description of tax and accounting services.

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**
Michael Gabrielson	55.1	$395.00	$21,764.50
	0	$0.00	$0.00

Total Fees for Period of Application	$21,764.50

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $127.42 pursuant to this application.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Copying	$0.10 per page	$28.70
Mileage	$0.575 per mile	$92.00
Postage		$6.72
		$0.00
Total Costs Requested in Application		$127.42

FEES AND COSTS & EXPENSES ALLOWED

Fees

Applicant seeks to be paid a single sum of $20,000 for its fees and costs incurred for Client. First and Final Fees and Costs in the amount of $20,000.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 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 Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees and expenses $20,000.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Gabrielson & Company ("Applicant"), Accountant for Alan S. Fukushima, the Chapter 7 Trustee, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

Gabrielson & Company, Professional employed by the Chapter 7 Trustee

Fees and expenses in the amount of $20,000.00,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

6. **20-20507-E-7** **SONIC EXPRESS, LLC**
DNL-7 **Gary Zilaff**

MOTION FOR COMPENSATION BY THE LAW OFFICE OF DESMOND, NOLAN, LIVAICH & CUNNINGHAM FOR J. RUSSELL CUNNINGHAM, TRUSTEES ATTORNEY(S)
10-8-20 [179]

Final Ruling: No appearance at the November 12, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 8, 2020. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

Desmond, Nolan, Livaich, & Cunningham, the Attorney ("Applicant") for Alan S. Fukushima, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period March 4, 2020, through October 7, 2020. The order of the court approving employment of Applicant was entered on March 11, 2020. Dckt. 20. Applicant requests fees in the amount of $59,759.97 and costs in the amount of $240.03.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

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

A review of the application shows that Applicant's services for the Estate include settlement efforts, asset analysis and recovery, litigation and contested matters, claims administration and objections, general case administration, discovery, research, drafting of employment and fee applications, tax matters, and a relief from stay. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Settlement Efforts: Applicant spent 70.4 hours in this category.

Asset Analysis and Recovery: Applicant spent 45.5 hours in this category.

Litigation and Contested Matters: Applicant spent 27.8 hours in this category.

Claims Administration and Objections: Applicant spent 2.9 hours in this category.

Case Administration: Applicant spent 3.2 hours in this category.

General Case Administration: Applicant spent 14.9 hours in this category.

Discovery: Applicant spent 26.2 hours in this category.

Tax Matters: Applicant spent 0.8 hours in this category.

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
Russell Cunningham	122.80	$425.00	$52,190.00
Jennifer Carver	8.20	$75.00	$615.00
Benjamin Tagert	48.40	$175.00	$8,470.00
Nicholas Kohlmeyer	12.30	$275.00	$3,382.50
	0	$0.00	$0.00
Total Fees for Period of Application			$64,657.50

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $240.03 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Copying		$55.20
Postage		$24.70
Bank of America- Gurtej Gill		$67.83
Wells Fargo Bank Document Production		$92.30
Total Costs Requested in Application		$240.03

Unfortunately, the Motion and supporting documents do not state the per item cost of copying nor a description of the $67.83 expense. Because the billing only provides "Bank of America-Gurtej Gill" for the $67.83 expense, the court cannot determine what this expense was for.

In digging through the pages and pages of properly detailed time and billing records, the court identifies that there was ongoing discovery of Bank of America records in May 2020 around the date there was the $67.83 advance for "Bank of America-Gurtej Gill." Exhibit A; Dckt. 183 at 10. The dollar amount being modest, it appears that it relates to the costs of pursuing that discovery.

For the photo copies, at a $0.10 per page copy charge, that would be 552 pages copied. Not an unreasonable amount. The court allows it - This Time - presuming a copy charge of $0.10 per page. In the future, if such information is not provided, the court may "assume" a higher fee and cut the copy charges or disallow them in their entirety.

Additionally, Applicant has also reduced their fees from the actual amount due to a lower amount, which effectively accounts for any higher copy fee, if one was used without explanation as to it being the actual cost.

FEES AND COSTS & EXPENSES ALLOWED

Reduced Rate

Applicant seeks to be paid a single sum of $60,000.00 for its fees and expenses incurred for Client. First and Final Fees and Costs in the amount of $60,000.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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 $59,759.97 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

First and Final Costs in the amount of $240.03 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 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 Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees and Expenses $60,000.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Desmond, Nolan, Livaich, & Cunningham ("Applicant"), Attorney for Alan S. Fukushima, the Chapter 7 Trustee, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Desmond, Nolan, Livaich, & Cunningham is allowed the following fees and expenses as a professional of the Estate:
>
> Desmond, Nolan, Livaich, & Cunningham, Professional employed by the Chapter 7 Trustee

Fees and Expenses in the amount of $60,000.00,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

7. 20-24123-E-11 FWP-12 7 thru 9

RUSSELL LESTER
Tom Willoughby

CONTINUED MOTION TO ASSUME AND MODIFY FARM LEASE AND APPROVE PROCEDURE FOR SIMILAR ORDINARY COURSE FARM LEASES
10-26-20 [226]

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)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Receiver, creditors holding the twenty largest unsecured claims], creditors, parties requesting special notice, and Office of the United States Trustee on October 26, 2020. By the court's calculation, 3 days' notice was provided.

The Motion to Shorten Time was granted by the court on October 26, 2020. Dckt. 221. The court set the hearing for October 29, 2020. *Id*.

The Motion to Assume and Modify Farm Lease and Approve Procedure for Similar Ordinary Course Farm Lease was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing conditional opposition was stated.

The Motion to Assume and Modify Farm Lease and Approve Procedure for Similar Ordinary Course Farm Lease is xxxxx.

Russell Wayne Lester, an individual, dba Dixon Ridge Farms, serving as the Debtor in Possession in this Chapter 11 case, moves for an order approving the modification of a farming lease, for

which the Debtor was the lessor, and to authorize Debtor in Possession to enter into similar post-petition ordinary course of business farming leases without further court order. The Declaration of Russell Wayne Lester, the Debtor in Possession was filed in support of the Motion. Dckt. 230.

As to the modification of a lease, Debtor in Possession specifically request the court allow Debtor to assume and modify the farming lease to allow the estate to lease out an addition of approximately 140 more acres to be farmed during the 2021 farming season. Debtor is the Lessor of 451 acres of farm land located in Solano County to J.H. Meek & Sons. The land under the terms of the Lease is subject to Prudential's deed of trust.

The Debtor in Possession also requests authority to enter into similar farm leases without further court order, but with the consent of Debtor in Possession's two largest creditors (Prudential Life Insurance Company of America and the First Northern Bank of Dixon). The Debtor in Possession anticipates collecting more net proceeds than if the Debtor in Possession grows hay on the fields again in 2021.

Debtor in Possession's Declaration

Debtor in Possession testifies that it is in the best interest of the bankruptcy estate to enter into the lease modification with the same tenant after considering the alternative uses for that specific property in 2021 and that the agreement will result in approximately $228,575 to be collected under the terms of the lease for the 2020 farming season. Dckt. 230, ¶¶ 6-8.

Debtor in Possession testifies that there is already one possible lease for tomato farming and a copy of the draft lease is provided as Exhibit 2 (Dckt. 229). *Id.*, ¶ 9. The lease is for a period of one year commencing on October 26, 2020 and terminating at the close of harvest 2021. Dckt. 229, ¶ 2. The Debtor in Possession is to receive 15% of gross receipts from the tomato crop as payment. *Id.* ¶ 3.

In his Declaration Debtor in Possession argues that, in his best business judgment, approval of the of modification of the lease and authorization to engage in similar leases is in the best interest of the bankruptcy estate and all its creditors as a whole. *Id.* ¶ 3.

APPLICABLE LAW

11 U.S.C. § 365 deals with executory contracts and unexpired leases. For the purpose of this Motion, Section 365 provides in relevant part:

> (A) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

In the Ninth Circuit, courts apply the business judgment rule when reviewing a decision to reject (and presumably to assume) an executory contract or lease. *See Agarwal v. Pomona Valley Med. Group, Inc. (In re Pomona Valley Med. Group, Inc.)*, 476 F.3d 665 (9th Cir. 2007). In *Agarwal*, the Ninth Circuit applied the best business judgment rule in evaluating a motion to reject an executory contract. *Id.*, at 670.

Most courts have applied a "business judgment" test to trustees' decisions to assume or reject contracts or leases. *Cor 5 Route Co. v. Penn Traffic Co. (In re Penn Traffic Co.)*, 524 F.3d 373, 383, 59 C.B.C.2d 1205 (2d Cir. 2008); *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 29 C.B.C.2d 1341 (2d Cir. 1993); *PG&E Corp. v. FERC (In re PG&E Corp.)*, 2019 Bankr. LEXIS 1820, at *43 (Bankr. N.D. Cal. June 12, 2019); *In re The Great Atl. & Pac. Tea Co., Inc.*, 544 B.R. 43, 48 (Bankr. S.D.N.Y. 2016); *In re Old Carco LLC*, 406 B.R. 180 (Bankr. S.D.N.Y. 2009).

In *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 29 C.B.C.2d 1341 (2d Cir. 1993), the Court of Appeals for the Second Circuit expanded upon its prior decision in *In re Minges*, 602 F.2d 38 (2d Cir. 1979), and explained the court's role in the assumption/rejection process "as [one of] an overseer of the wisdom with which the bankruptcy estate's property is being managed by the trustee or debtor-in-possession, and not, as it does in other circumstances, as the arbiter of disputes between creditors and the estate." 4 F.3d 1095, 1099, 29 C.B.C.2d 1341, 1347. The court found that "a bankruptcy court reviewing a trustee's or debtor in possession's decision to assume or reject an executory contract should examine [the] contract and the surrounding circumstances and apply its best 'business judgment' to determine if it would be beneficial or burdensome to the estate to assume it." *Id.*; *see In re Tayfur*, 2015 U.S. App. LEXIS 4309 (3d Cir. Mar. 18, 2015) (not precedential) (denying landlord's motion to reject oil and gas lease since lessee would continue to have possessory rights); *Sabine Oil & Gas Corp. v. Nordheim Eagle Ford Gathering, LLC (In re Sabine Oil & Gas Corp.)*, 550 B.R. 59, 74 (Bankr. S.D.N.Y. 2016), aff'd, 2018 U.S. App. LEXIS 13975 (2d Cir. May 25, 2018) (unpublished); *In re The Great Atlantic & Pac. Tea Co., Inc.*, 544 B.R. 43, 48 (Bankr. S.D.N.Y. 2016).

DISCUSSION

Here, Debtor in Possession has demonstrated sound business judgment reasons for assuming the farming lease with J.H. Meek & Sons. Debtor in Possession has explained to the court that assuming this lease and modifying to add 140 more acres to be farmed is a better alternative as it will allow Debtor to collect more net proceeds that if the land was used grow hay as it usually is.

Upon review of Movant's request and cause shown, the court finds that it is in the best interest of Debtor, creditors, and the Estate to authorize Movant to assume and modify the Farming Lease with J.H. Meek & Sons for the addition of approximately 140 more acres to be farmed during the 2021 farming season.

November 12, 2020 Hearing

At the hearing, xxxxxxxxxxxxxx

8. **20-24123-E-11 GMJ-1** **RUSSELL LESTER** **Tom Willoughby** **MOTION FOR APPROVAL OF CUSTODIAN'S REPORT AND ACCOUNTING** **10-9-20 [196]**

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.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on October 9, 2020. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

The Motion for Approval of Custodian's Report and Accounting 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 Custodian's Report and Accounting is granted, with the court approving the accounting as required pursuant to 11 U.S.C. § 543(b)(2), and the automatic stay is modified to allow Donald Howell to seek discharge as receiver and exoneration of his bond as receiver.

No other relief is granted.

Donald Howell ("Movant") requests approval of his Report and Accounting submitted as Exhibit A and requests that an order be entered determining that:

> (1) Movant's administration was proper and that all disbursements made were reasonable, and
>
> (2) Movant is discharged from all liability incident to his office as Receiver in the state court actions and as Custodian following commencement of the Chapter 11 case.

The legal basis for the requested relief is 11 U.S.C. § 543(b)(2). The Motion states that from June 12, 2020 through August 28, 2020, Movant served as the State Court appointed receiver over

certain assets and operations of the Debtor Russell Lester.

In the Motion, Movant details his services as receiver of the Debtor's assets before this case was filed.

While Movant's attorneys provides detailed allegations of what Movant did, no declaration under penalty of perjury is provided by Movant. There is a document titled "Custodian's Report and Accounting" that is signed by Movant under penalty of perjury. It may be that this "exhibit" is intended to be the testimony in support of the Motion.

Debtor in Possession's Limited Comments

Debtor in Possession filed Limited Comments on October 29, 2020 stating that while not opposing the approval of the Custodian's Report and Accounting, Debtor in Possession informs the court that Debtor in Possession has not had the time or funds to investigate whether there are any claims against the Receiver for pre-petition services and requests the court examine the limits of the court's jurisdiction to grant discharges to non-debtors. Dckt. 239, ¶¶ 1-2.

Debtor in Possession's concerned with Movant's request for discharge of liability as granting of discharge may raise a flag. Debtor in Possession points that *In re Weldon*, the case cited by Movant, involved a state court receiver who sought discharge of liability of both pre- and post-petition services and the bankruptcy court granted discharge of liability only for post-petition services and refused to grant the receiver a discharge for pre-petition services. *Id.,* ¶ 3. Therefore, Debtor in Possession is not opposed to granting a discharge of liability for post-petition services. *Id.,* ¶ 4.

Response of Movant

On November 3, 2020, Movant filed a Reply. In it, Movant states that his counsel and counsel for the Debtor in Possession have agreed to the entry of an order:

1. Approving the final report, with the exception of the discharge of Movant;

2. Movant will seek State Court (the appointing court) approval of his discharge as a receiver and exoneration of his bond under state law;

3 Movant shall be paid his fees out of the reserved established by the Bankruptcy Court's turnover order, Dckt. 94; and

4. This court issue an order modifying the stay to allow the State Court to conduct the hearings on and enter order(s) for approval of Movant's final report and accounting, and to discharge the Movant as the receiver and exonerate his bond under applicable State law.

Dckt. 245.

APPLICABLE LAW

Federal law concerning a state court appointed receiver or "custodian" when a bankruptcy

case is filed is found in 11 U.S.C. § 543, which deals with the turnover of property by a custodian. This begins with 11 U.S.C. § 543(a) which addresses property of the bankruptcy estate that is created upon the commencement of a bankruptcy case.

> (a) A custodian with knowledge of the commencement of a case under this title concerning the debtor may not make any disbursement from, or take any action in the administration of, property of the debtor, proceeds, product, offspring, rents, or profits of such property, or property of the estate, in the possession, custody, or control of such custodian, except such action as is necessary to preserve such property.

11 U.S.C. § 543(a). Once the bankruptcy case is filed, federal law curtails most of the non-bankruptcy court appointed receiver or custodian's powers.

Federal law continues, imposing specific duties and obligations on a receiver or custodian once a bankruptcy case is filed.

> (b) A custodian shall—
>
> (1) deliver to the trustee any property of the debtor held by or transferred to such custodian, or proceeds, product, offspring, rents, or profits of such property, that is in such custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case; and
>
> (2) file an accounting of any property of the debtor, or proceeds, product, offspring, rents, or profits of such property, that, at any time, came into the possession, custody, or control of such custodian.

11 U.S.C. § 543(b). In addition to turning over property of the bankruptcy estate to the bankruptcy trustee or the Debtor in Possession, federal law imposes an accounting requirement for a receiver or custodian for what occurred pre-petition with respect to property of the debtor.

The Bankruptcy Code then further requires in 11 U.S.C. § 543(c) that the bankruptcy judge shall address the following:

> (c) The court, after notice and a hearing, shall—
>
> (1) protect all entities to which a custodian has become obligated with respect to such property or proceeds, product, offspring, rents, or profits of such property;
>
> (2) **provide for the payment of reasonable compensation for services** rendered and costs and expenses incurred by such custodian; and
>
> (3) **surcharge such custodian**, other than an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, for any **improper or excessive disbursement**, other than a disbursement that has been made in accordance with applicable law or that has been approved, after notice and a hearing, by a court of

competent jurisdiction before the commencement of the case under this title.

While stating the above in the mandatory, in 11 U.S.C. § 543(d) Congress has given the bankruptcy judge the discretion to abstain from some of these provisions:

> (d) After notice and hearing, the bankruptcy court—
>
> (1) may excuse compliance with subsection (a), (b), or (c) of this section if the interests of creditors and, if the debtor is not insolvent, of equity security holders would be better served by permitting a custodian to continue in possession, custody, or control of such property, and
>
> (2) shall excuse compliance with subsections (a) and (b)(1) of this section if the custodian is an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, unless compliance with such subsections is necessary to prevent fraud or injustice.

Additionally, the Supreme Court has in Federal Rules of Bankruptcy Procedure 6002 provide for dealing with the accounting by a prior custodian of property of the estate. For the purpose of this Motion, Rule 6002 provides:

> (A) Any custodian required by the Code to deliver property in the custodian's possession or control to the trustee shall promptly file and transmit to the United States trustee a report and account with respect to the property of the estate and the administration thereof.
>
> (B) On the filing and transmittal of the report and account required by subdivision (a) of this rule and after an examination has been made into the superseded administration, after notice and a hearing, the court shall determine the propriety of the administration, including the reasonableness of all disbursements.

DISCUSSION

Movant alleges that after having been court-appointed as a Receiver over certain assets and operation of Debtor in Possession Russell Lester ("Debtor in Possession"), Movant has performed all of the duties he was directed to undertake in the order approving his appointment. He reviewed financial documents; identified funds to be collected; submitted reports wired proceeds and performed various activities which preserved the value of the Debtor in Possession's assets and protected the interests of creditors. Dckt. 198, Exhibit A, Custodian Report, ¶¶ 7 - 10. Additionally, Movant argues that he took care not to do anything that would harm or interfere with Debtor in Possession's efforts to refinance. *Id.*, ¶ 11.

Movant requests to be discharged from all liability while acting as Receiver. Movant points the court to *In re Weldon F. Stump & Co.*, 337 B.R. 636 (Bankr. N.D. Ohio 2005), for the proposition that the bankruptcy court has the authority to discharge a receiver-turned-custodian from liability incident to the post-petition custodianship and the pre-petition receivership. As noted by Debtor in Possession, in that case the court dealt with a receiver that after requesting discharge from all liability

(pre-petition and post-petition services), the court found that the receiver was entitled to discharge for post-petition services but not for pre-petition services.

The court was concerned that even if the bankruptcy court had the authority under 28 U.S.C. § 1334 to grant such a discharge of liability for the pre-petition services, the court should consider "respect for federalism" and applied important considerations in this regard:

> (1) the extent to which state law issues predominate over bankruptcy issues, (2) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (3) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (4) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (5) the substance rather than form of an asserted 'core' proceeding, (6) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, and (7) the presence in the proceeding of nondebtor parties. *Id.* What all these considerations seek to accomplish is to properly account for and weigh those federal and state interests [*640] which, in the abstention context, are pitted against the other. *See, e.g., Webb v. B. C. Rogers Poultry, Inc.*, 174 F.3d 697, 700-01 (5th Cir.1999).

In re Weldon F. Stump & Co., 337 B.R. 636, 639-40 (Bankr. N.D. Ohio 2005). The court found that within this legal framework the court was to present deference to state law, the receiver having been appointed by the state court and to whom she was to report, and as such found the bankruptcy court was at a disadvantage to make pre-petition services assessments. *Id.*, at 640. Further observing that it would be unfair to the receiver or the debtor for the bankruptcy court to hear grievances for which there was a already a perfectly viable state forum. *Id.*

As addressed above, on November 3, 2020, Movant filed a Reply (Dckt. 245) addressing Debtor in Possession's concerns and informing the court that Debtor in Possession and Movant have agreed to the entry of an order

Decision

As one could well imagine, the interplay between federal bankruptcy law and state receivership law can clash in these situations. This can be exacerbated when parties are attempting to "use" this clash as an opportunity to leverage the other side to give up otherwise valid rights and interests.

Fortunately, the Parties and their respective counsel are not seeking to do the latter, but working to comply with federal law and respect the State Court process by which Movant has worked to fulfill his obligations and duties. As was evident from the start of this bankruptcy case, the Parties have worked to make the federal-state law overlay work properly. This has also worked to contain administrative costs and expenses concerning the receivership morphing into the bankruptcy estate.

The agreement presented to the court by these Parties is reasonable and respects both the federal and state judicial process.

First, the court approves Movant's Final Report, but does not discharge Movant or release

Movant of any liabilities. Movant's accounting is in the form of the Final Report filed as Exhibit A. Dckt. 198. Movant's Accounting/Report includes copies of the Inventory of Property and bank statements. Exhibit 6C to the Final Report (Dckt. 198, beginning at 94) is the Inventory. Exhibit 6D to the Final Report (*Id*., beginning at 103) is the Market Analysis of the walnut inventory. Exhibit 8 (*Id.*, beginning at 177) is the July 23, 2020 inventory of Movant in the State Court proceeding. Exhibit 9 to the Final Report (*Id.*, beginning at 191) is Movant's August 25, 2020 filed Supplemental Inventory filed in the State Court proceeding.

Exhibit 6 to the Final Report (*Id*., beginning at 53) is Movant's July 28, 2020 filed First Report to in the State Court proceeding and Exhibit 7 (*Id*., beginning at 112) is the Movant's August 25, 2020 filed Second Report in the State Court proceeding. These Reports include very detailed information concerning the conduct of Movant in fulfilling his duties as receiver and actions taken with respect to the then property of the Debtor. Included as part of the Second Report is information concerning loss of property of the Debtor due to fire and the prosecuting of the insurance claims by Movant.

While the active parties in interest are limited in number, each are sophisticated and represented by knowledgeable counsel. No oppositions have been filed with respect to the substance of the information provided for purposes of the 11 U.S.C. § 543(b) accounting provided by Movant. The court approves Movant's Final Report filed as Exhibit A, Dckt. 198 as complying with the requirements of 11 U.S.C. § 543(b).

The court further modifies the Automatic Stay to allow for Movant to:

> (1) Pursue and the State Court judges to enter final orders and judgments discharging Movant as the court appointed receiver, and
>
> (2) Exonerate Movant's bond as receiver.

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 Approval of Custodian's Report and Accounting filed by Donald Howell ("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 Movant's Final Report filed as Exhibit A, Dckt. 198, is approved as complying with the requirements of 11 U.S.C. § 543(b).
>
> **IT IS FURTHER ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are modified to allow Movant to, the State Court judges and justices to enter final orders and judgments, for Movant's:
>
> (1) Request for final orders and judgments discharging Movant as the court appointed receiver,

(2) Exoneration of Movant's bond as receiver, and

No other or additional relief is granted.

9.	**20-24123-E-11** **GMJ-2**	**RUSSELL LESTER** **Tom Willoughby**	**MOTION FOR ADMINISTRATIVE EXPENSES** **10-9-20 [200]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on October 9, 2020. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Fees and Expenses of Donald Howell, as the pre-petition appointed receiver and Administrative Expenses is ~~granted~~.

Donald Howell ("Movant") requests payment of administrative expenses in the amount of $37,852.55, incurred during the period of June 12, 2020 to September 8, 2020, and attorney fees and costs for Christopher E. Seymour in the amount of $49,799.16, incurred during the period of June 12, 2020 to September 24, 2020. [FN. 1] Movant requests a total of $87,651.71 in administrative expenses. [FN. 2]

FN. 1: Mr. Seymour anticipates further fees and costs up to $7,500 in connection with this motion, the Motion to Approve the Custodian's Report, a State Court status conference set fort October 30, 2020. Mr. Seymour will provide a description of services for any fees sought in addition to the ones presented

through this Motion at the hearing.

FN. 2: The administrative expenses as calculated under 11 U.S.C. §§ 503(b)(3)(E), 503(b)(4), and 543(c)(2) totals $87,651.71. Dckt. 200. However, the prayer for relief requests $37,852.55 in compensation. *Id*. The Court assumes that the correct amount is $87,651.71 and thus, drafts this tentative ruling under that amount, and further assumes that the prayer for relief for $37,852.55 was a clerical error.

Debtor in Possession's Non-Opposition

Russell Wayne Lester ("the Chapter 11 Trustee") filed a Non-Opposition to Receiver's Motion for Allowance and Payment of Custodian's Chapter 11 Administration Claim on October 29, 2020. Dckt. 241.

Movant's Fees as Receiver

Movant seeks payment in the amount of 37,852.55 for providing the following duties as the custodian of the assets in the receiver estate and as the court appointed receiver in the Solano County Superior Court case entitled *First Northern Bank of Dixon v. Russell Lester, et. al.*:

A. The assets secured by the First Northern Bank's loan were inventories, all cash related to the estate was identified and transferred to the Receiver's trust accounts, and potential bulk buyers of the walnut industry were identified.

B. The receiver determined what funds were the property of the estate and collected such funds, and blocked the Debtor in Possession from accessing the cash of the estate.

C. The receiver stopped the Debtor in Possession's use of all personal property, with the exception of the processing and sorting equipment, and inspected the property regularly.

D. The receiver analyzed and monitored the walnut market to ensure that the Debtor in Possession's ongoing processing of the in-shell product added value to the estate.

E. The receiver conducted inspections and attended a status conference.

F. The receiver undertook the process of sale of the walnut inventory, and the sale of the chattel equipment.

G. The receiver ensured that first Northern Bank's ability to access, inventory, and value its collateral was not interrupted by any action of the Debtor.

H. As a result of a fire, the receiver corresponded with the Debtor and the insurance company to determine the maximum amount, that if paid, were assets of the Receivership Estate.

I. Consultations with counsel on legal issues regarding locating and collecting assets for the receivership estate and negotiations relating to a protocol for sale of the inventory collateral and preparing documents relating to the proposed sale of the equipment collateral

Movant's billing records for his services as the receiver are Exhibit 11 to Movant's Final Report filed as Exhibit A in support of this Motion. Dckt. 204. The billing records report:

Receiver Hours

163.10 hours x $225.00.....$36,697.50

Expenses.....$927.35

These amounts total $37,624.85.

There is an additional item on the last page of the time and expense records which states:

Total: 396.00

Rate: $0.575

Billing: $227.20

The $227.20 is the product of 396 times $0.575. It is not clear what this amount is and the basis for what is being requested. Presumably, this could be for photo copies. Generally, the recoverable cost for photocopies of $0.10, unless there is evidence that the actual cost is higher.

At the hearing, **xxxxxxx**

The court allows Movant $36,697.50 as his reasonable fees as the receiver, $927.35 as expenses for his bond and lodging, and **xxxxxxx** for **xxxxxxx**

Movant's Counsel as Receiver Fees and Costs Requested

Christopher E. Seymour ("Counsel"), the Attorney for Donald Howell, the receiver ("Client") Requests payment of Fees and Expenses as administrative expenses. Fees are requested for the period June 3, 2020 through September 23, 2020. Counsel requests fees in the amount of $49,400.00 and costs in the amount of $399.16.

Section 503(b)(4) of the Bankruptcy Code accords reasonable compensation for professional services rendered by an attorney...whose expense is allowable under subparagraph (E) of paragraph (3) of this subsection..."

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

General Case Administration: Counsel reviewed drafts of Order Appointing Receiver, communicated with the receiver regarding receiver documentation and strategy, and reviewed Russell Wayne Lester's opposition to receiver confirmation.

First Report of the Receiver: Assisted with drafting and revisions to the First Report of Receiver; analyzed possible contempt application for failure to comply with receiver order; and communicated with the receiver regarding the First Report of Receiver.

Second Report on Receiver: Assisted with drafting and revisions to the Second Report of Receiver and worked on the proposed sale order and stipulation.

The fees requested are computed by Counsel 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**
Christopher E. Seymour, Partner	119.50	$410.00	$48,995.00
Suzanne Carroll, Paralegal	2.70	$150.00	$405.00
	0	$0.00	$0.00
Total Fees for Period of Application			$49,400.00

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $399.16 pursuant to this application.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Overnight Mail		$196.16
Mileage	$0.58 per mile	$203.00
		$0.00
Total Costs Requested in Application		$399.16

The court allows $49,400.00 in fees and $399.16 in expenses for Christopher E. Seymour as counsel for Movant as receiver.

This court having allowed the fees and expenses for Movant as receiver and Christopher E.

Seymour as counsel for Movant as receiver, the court further authorizes Movant to pay the allowed amounts from the $96,344.11 "Receiver's Reserve" authorized to be held by Movant pursuant to this court's September 8, 2020 Order (Dckt. 94).

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Administrative Expense filed by Donald Howell ("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 pursuant to 11 U.S.C. § 503(b)(3)(E) and (4) , and 11 U.S.C. § 543(c)(2):
>
> > (1) Donald Howell, the State Court appointed receiver in *First Northern Bank of Dixon v. Russell W. Lester, et al.*, California Superior Court for the County of Solano, No. FCS054698, is allowed $36,697.50 in fees and ~~$927.35~~ in expenses; and
> >
> > (2) Christopher E. Seymour, the counsel for Donald Howell serving as receiver, is allowed ~~$49,400.00~~ in fees and $399.16 in expenses for representing Donald Howell as receiver.
>
> **IT IS FURTHER ORDERED** that Donald Howell is authorized to pay the above allowed fees and expenses from the $96,344.11 "Receiver's Reserve" authorized by this court's September 8, 2020 Order (Dckt. 94), and to then disburse to Russell Lester, the Debtor in Possession, in amounts in the Receiver's Reserve in excess of the above allowed fees and expenses.

10. 19-25248-E-7 COACT DESIGNWORKS MOTION TO SELL
DNL-3 Jason Rios 10-7-20 [74]

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.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on October 7, 2020. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion to Sell Property is granted.

The Bankruptcy Code permits Alan Fukushima, the Chapter 7 Trustee, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Here, Movant proposes to sell the bankruptcy estate's 20% interest in Sacramento ESC Suite 20 Consortium LLC ("Property").

The proposed purchaser of the Property is Sacramento ESC Suite 20 Consortium LLC ("LLC"), and the summarized terms of the sale are (the full terms are provided in the Sale Agreement, Exhibit B, Dckt. 77):

A. Subject to the Bankruptcy court's approval, LLC will purchase the bankruptcy estate's 20% interest in the Property for the sum of $60,000.00.

B. $6,000.00 deposit to be paid within seven (7) calendar days of the execution of the agreement and $54,000.00 within seven (7) calendar days of the final order of the Bankruptcy court's approval.

C. All of the bankruptcy estate's right, title, and interest in the Property shall be deemed transferred to the LLC upon the Trustee's receipt in good funds of the entire Purchase price.

D. Any overbidder shall be subject to the terms of the LLC's operating agreement, specifically regarding the remaining members' approval and consent rights.

DISCUSSION

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the sale has a valid business justification and is in the best interest of the bankruptcy estate.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Alan Fukushima, 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 Alan Fukushima, the Chapter 7 Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Sacramento ESC Suite 20 Consortium LLC or nominee ("Buyer"), the bankruptcy estate's 20% interest ("LLC"), on the following terms:
>
> A. The Property shall be sold to Buyer for $60,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit B, Dckt. 77, and as further provided in this Order.
>
> B . The Chapter 7 Trustee is authorized to execute any and all documents reasonably necessary to effectuate the sale.

11. 19-22653-E-7 REECE/RODINA VENTURA MOTION TO SELL
DNL-15 Peter Macaluso 10-7-20 [342]
11 thru 12

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.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on October 7, 2020. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion to Sell Property is granted.

The Bankruptcy Code permits Geoffrey Richards, the Chapter 7 Trustee, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Here, Movant proposes to sell the personal property commonly known as 2008 Harley Davidson Road Glide ("Property").

The proposed purchaser of the Property are the Debtors, and the terms of the sale are:

A. Property to be sold for $6,700.00. This amount is to be paid through a $3,325.00 credit, on account of the exemption Debtors have claimed pursuant to Cal. Code. Civ. Proc. § 704.010, and $3,375.00 due within seven (7) calendar days of execution of the Agreement.

B. The Agreement is subject to court approval and overbidding. Trustee to the motion for approval afer having first received the full purchase price.

Overbidding Procedures

Trustee requests the approval of overbid procedures that would require a proposed overbidder to provide Trustee with a cashier's check in the amount f $7,700.00 and proof of funds of an additional

$5,000.00. Trustee requests that any further overbidding proceed in increments of at least $1,000.00.

DISCUSSION

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the sale approximates the Property's fair market value and Trustee's proposed sale to Debtors avoids the expense incurred from employing an auctioneer to liquidate the Property.

Movant has estimated that a 15 percent broker's commission from the sale of the Property will equal approximately $1,150.00. As part of the sale in the best interest of the Estate, the court permits Movant to pay the broker an amount not more than 15 percent commission.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Geoffrey Richards, 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 Geoffrey Richards, the Chapter 7 Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) through the use of an auctioneer ("Buyer"), the Property commonly known as a 2008 Harley Davidson Road Glide ("Property"), on the following terms:
>
> A. The Property shall be sold via auctioneer for approximately $7,680.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 345, and as further provided in this Order.
>
> B. The Chapter 7 Trustee is authorized to execute any and all documents reasonably necessary to effectuate the sale.
>
> C. The Chapter 7 Trustee is authorized to pay a broker's commission in an amount not more than 15 percent of the actual purchase price upon consummation of the sale.

12. **19-22653-E-7** **REECE/RODINA VENTURA**
DNL-16 **Peter Macaluso**

MOTION TO EMPLOY TRANZON ASSET STRATEGIES AS AUCTIONEER, AUTHORIZING SALE OF PROPERTY AT PUBLIC AUCTION AND AUTHORIZING PAYMENT OF AUCTIONEER FEES AND EXPENSES
10-15-20 [348]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on October 15, 2020. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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

The Motion to Employ is granted.

The Motion to Sell Property by Auction is granted.

Geoffrey Richards ("Trustee") seeks to employ Tranzon Asset Strategies ("Auctioneer") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of Auctioneer to conduct an auction of certain property of the estate and authority to sell such property at auction.

Trustee argues that Auctioneer's appointment and retention is necessary to conduct an auction of a 2008 Mercedes Benz C300 ("Vehicle"). Under the Agreement, Auctioneer is to store the Vehicle, advertise, and conduct an online auction. Subject to court approval, Trustee will provide

Auctioneer a $750.00 flat fee as compensation.

Lonny R. Papp, a Tranzon Asset Strategies, testifies that Tranzon Asset Strategies has agreed to serve as auctioneer in this case for a flat fee of $750.00, the fee is reasonable, and an auction would be the best method to liquidate the vehicle. Lonny R. Papp testifies he and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

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

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

Taking into account all of the relevant factors in connection with the employment and compensation of Auctioneer, considering the declaration demonstrating that Auctioneer does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Tranzon Asset Strategies as Auctioneer for the Chapter 7 Estate on the terms and conditions set forth in the Fee Agreement filed as Exhibit A, Dckt. 352.

Approval of the commission is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

Trustee's Request for Authority to Conduct Auction

The Bankruptcy Code permits Trustee to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Here, Trustee proposes to sell the personal property identified as: 2008 Mercedes Benz C300, VIN #2145 ("Vehicle").

Trustee proposes the sale be made via online auction with Tranzon Assert Strategies as the Auctioneer. Trustee states that the Property is not encumbered and proceeds, net of selling costs, will inure to the estate.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 6004(h) stays an order granting a motion to sell for fourteen days after the order is entered, unless the court orders otherwise. Trustee requests that the court grant relief from the Rule as adopted by the United States Supreme Court because the Trustee wishes to conduct the proposed sale as quickly as possible and keep administrative expenses to as minimum.

Trustee has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure

6004(h), and this part of the requested relief is granted.

DISCUSSION

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the Property is not encumbered, and proceeds will inure to the estate after accounting for selling costs.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by Geoffrey Richards ("Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted, and Trustee is authorized to employ Tranzon Asset Strategies as Auctioneer for Trustee on the terms and conditions as set forth in the Fee Agreement filed as Exhibit A, Dckt. 352.
>
> **IT IS FURTHER ORDERED** that Trustee is authorized to sell at auction pursuant to 11 U.S.C. § 363(b) the property of the Estate identified as: 2008 Mercedes Benz C300, VIN #2145, ("Vehicle").
>
> **IT IS FURTHER ORDERED** that compensation in the amount of $750.00 flat fee to be paid by the Trustee as authorized. The above fees are subject to the provisions of 11 U.S.C. § 328.
>
> **IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.
>
> **IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 6004(h) is waived for cause.

13. 16-21585-E-11 FWP-44 | **AIAD/HODA SAMUEL** Pro Se | **MOTION TO CONTINUE CASE ADMINISTRATION, AS TO JOINT DEBTOR** **10-19-20 [1496]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 11 Trustee, and Office of the United States Trustee on October 19, 2020. By the court's calculation, 24 days' notice was provided. 14 days' notice is required.

The Motion to Continue Administration of the Case under Chapter 11 was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 11 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Continue Administration of the Case under Chapter 11 is granted.

The Chapter 11 Trustee and Plan Administrator, Scott M. Sackett ("Movant"), seeks an order approving the motion to continue the administration of this case under Chapter 11 for the deceased Debtor, Hoda Samuel, in order to complete the administration of this case pursuant to the Plan for the benefit of the estate's creditors and completion of the bankruptcy process This motion is being filed pursuant to the following Federal Rules of Bankruptcy Procedure 1016, 7018, 7025 and 9014(c), and Local Bankruptcy Rule 1016-1(a).

Debtor filed for relief under Chapter 13 on March 15, 2016. On September 27, 2018, Debtor's Chapter 13 Plan was confirmed. Dckt. 1246. On August 21, 2020, Debtor Hoda Samuel passed away.

DISCUSSION

Federal Rule of Bankruptcy Procedure 1016 provides that, in the event a debtor passes away in a case "pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further

administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Consideration of dismissal and its alternatives requires notice and opportunity for a hearing. *Hawkins v. Eads (In re Eads)*, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991). As a result, a party must take action when a debtor in Chapter 13 dies. *Id*.

Federal Rule of Bankruptcy Procedure 7025 incorporates Federal Rule of Civil Procedure 25, which provides that "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." *Hawkins v. Eads*, 135 B.R. at 384.

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16th Edition, § 7025.02, which states:

> Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005** and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.
>
> The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**

> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004 . . . .**

(emphasis added); *see also Hawkins v. Eads*, *supra*. While the death of a debtor in a Chapter 13 case does not automatically abate due to the death of a debtor, the court must make a determination of whether "[f]urther administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." FED. R. BANKR. P. 1016. The court cannot make this adjudication until it has a substituted real party in interest for the deceased debtor.

LOCAL BANKR. R. 1016-1 permits a movant, in a single motion, to request for the substitution for a representative, the authority to continue the administration of a case, and waiver of post-petition education requirement for entry of discharge.

Here, Scott M. Sackett, the Chapter 11 Trustee and Plan Administrator, has provided sufficient evidence to show that administration of the Chapter 11 case is possible and in the best interest of creditors after the passing of the debtor. The Motion was filed within the ninety-day period specified in Federal Rule of Bankruptcy Procedure 1016, following the filing of the Suggestion of Death. Dckt. 1496. Based on the evidence provided, the court determines that further administration of this Chapter 11 case is in the best interests of all parties, and that Chapter 11 Trustee and Plan Administrator, Scott M. Sackett may continue to administer the case on behalf of the deceased debtor, Hoda Samuel. The court grants the Motion to Substitute Party.

At the hearing, the court addressed with Aiad Samuel, the surviving spouse and co-debtor in this case, whether a successor to the late Hoda Samuel would be appointed. The court was advised, **xxxxxxx**

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 Substitute After Death filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Scott M. Sackett, the Chapter 11 Trustee and Plan Administrator, is allowed to continue the administration of this Chapter 11 case pursuant to Federal Rule of Bankruptcy Procedure 1016.

FINAL RULINGS

14. 20-90210-E-11 AF-3 **JOHN YAP AND IRENE LOKE** **CONTINUED MOTION TO VALUE COLLATERAL OF THE BANK OF NEW YORK MELLON, THE PNC FINANCIAL SERVICES GROUP, INC. AND PERSOLVE, LLC**
4-9-20 [33]

Final Ruling: No appearance at the October 1, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's in Possession, Creditor, parties requesting special notice, and Office of the United States Trustee on April 9, 2020. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion to Value Collateral and Secured Claim 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 court having entered its Order Valuing the Secured Claim of Bank of New York Mellon at $900,000.00, Dckt. 139, the Matter is removed from the Calendar.

Joinder of Multiple Parties One Contested Matter

The present Motion (a Contested Matter as provided in Federal Rule of Bankruptcy Procedure 9014) seeks relief pursuant to 11 U.S.C. § 506(a) against two different persons concerning two different claims. While in an adversary proceeding Federal Rule of Civil Procedure 20, as incorporated into Federal Rule of Bankruptcy Procedure 7020) permits the joinder of multiple parties in one adversary proceeding if there is a common question of law or fact to all defendants, Federal Rule of Bankruptcy Procedure 7020 is not automatically incorporated into contested matter practice. Fed. R. Bankr. P. 9014(c).

However, the court may, and does in this Contested Matter, make Federal Rule of Bankruptcy Procedure 7020 and thereby Federal Rule of Civil Procedure 20 applicable to allow for the permissive

joinder of Creditors Bank of New York Mellon, PNC Financial Services Group, Inc., Dreambuilder Investment, LLC, and Persolve, LLC as respondent parties herein.

REVIEW OF MOTION

The Motion to Value filed by John Hst Yap and Irene Laiwah Loke ("Debtor in Possession") to value two secured claims. The Motion is accompanied by Debtor in Possession's declaration. Declaration, Dckt. 35.

Debtor is the owner of the subject real property commonly known as 1106 Lovell Avenue, Campbell, California ("Property"). Debtor seeks to value the Property at a fair market value of $900,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The valuation of property that secures a claim is the first step, not the end result of this Motion brought pursuant to 11 U.S.C. § 506(a). The ultimate relief is the valuation of a specific creditor's secured claim.

11 U.S.C. § 506(a) instructs the court and parties in the methodology for determining the value of a secured claim.

> (a)(1) An **allowed claim of a creditor** secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, **is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property**, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a) (emphasis added). For the court to determine that creditor's secured claim (rights and interest in collateral), that creditor must be a party who has been served and is before the court. U.S. Constitution Article III, Sec. 2 (case or controversy requirement for the parties seeking relief from a federal court).

IDENTITY OF CREDITORS TO HAVE SECURED CLAIMS VALUED

The Motion states that there are two mortgages/deeds of trust recorded against the Property and a judgment lien. These encumbrances are identified by the Debtor in Possession as follows.

Senior Deed of Trust

The First Deed of Trust is stated to have originated with Countrywide Home Loans, Inc. in the amount of $565,000.00. A copy of the Countrywide Deed of Trust is provided as Exhibit 1. Dckt.

36. The Motion then states that this note and deed of trust were assigned to The Bank of New York Mellon, fka The Bank of New York, as Trustee for the Certificate Holders of CWALT, Inc., Alternative loan Trust 2007-OH2, Mortgage Pass-Through Certificates, Series 2007, and that Mellon NewRez LLC, dba Shellpoint Mortgage Servicing for Bank of New York Mellon, as trustee.

No proof of claim has been filed by The Bank of New York Mellon, as Trustee.

Second Deed of Trust

The Motion then identifies a Second Deed of Trust securing an obligation originally owed to National City Bank in the original amount of ($154,950.00). The Motion then states PNC Financial Services Group, Inc. acquired National City Bank.

The Motion then goes further, stating that a company named Dreambuilder Investments, LLC claims to hold ownership of the note secured by the Second Deed of Trust.

Debtor in Possession asserts that this claim is at least ($131,152.00).

No documents showing any assignments or transfers of the deed of trust have been filed.

No proof of claim has been filed for this debt.

The identity of the actual creditor whose claim is to be valued has not been made by the Debtor in Possession.

Judgment Lien

The third obligation encumbering the Property is identified as the judgment lien of Persolve, LLC, which is stated to be in the approximate amount of ($36,670.64). This judgment lien is junior in priority to the two deeds of trust, having been recorded on December 31, 2014.

Proof of Claim No. 1-1 has been filed by Persolve, LLC, asserting an unsecured claim in the amount of ($53,535.09).

OPPOSITION

Creditor The Bank of New York Mellon ("Mellon") filed an Opposition. Dckt. 59. First, Creditor opposes on the basis that Debtor's valuation amount is based on a verbal price opinion after review of the Property, without including a formal written broker's Price Opinion or Appraisal. *Id*. at p. 2. Creditor has obtained a Broker's Price Opinion ("BPO") valuing the Property at $1,280,000 as of April 2, 2020. *Id*. Thus, Creditor argues the value of the Property is a material fact in dispute, and requests the opportunity to have an interior inspection verified appraisal. *Id*.

Next, Creditor opposes to the extent that the motion seems to improperly value the Property as of the bankruptcy filing date as opposed to at or near confirmation. *Id*. at p. 3. Debtor's value does not include an "as of" date, and Debtor has not filed a proposed Chapter 11 Plan. *Id*. Creditor points out that a valuation in a Chapter 11 case should be done at or near the time of confirmation. *Id*.

Third, Creditor reserves its right to object to any subsequently filed Chapter 11 Plan based on the Absolute Priority Rule, the violation of 11 U.S.C. 1123(b)(5), lack of feasibility, bad faith, and any other grounds that may exist to object to the Plan.

Lastly, Creditor also reserves the right to make an election under 11 U.S.C. 1111(b). *Id*.

DISCUSSION

Creditor The Bank of New York Mellon, as trustee, the senior in priority first deed of trust, secures a claim with a balance of approximately $978,867.00. Schedule D, Dckt. 22. Creditor PNC's second deed of trust secures a claim with a balance of approximately $154,950.00. *Id*. Creditor Persolve, LLC has a judgment lien against the Property in the amount of $32,671.00.

The Motion states that Debtor in Possession requested that a local Realtor provide an opinion as to value of the Property. The Realtor, Regina Zabarte, stated (to an unidentified person) that the property has a value of $900,000. The Debtor in Possession believes that Ms. Zabarte's opinion is accurate. The Debtor in Possession conducted additional research from other third parties identified as Zillow.com and Redfin.com.

There is a significant missing piece to the puzzle - who is the creditor who actually holds the note secured by the second deed of trust. It could be PNC Financial Services Group, Inc. Or, it could be Dreambuilder Investments, LLC. No evidence of the record title is provided and it appears that no discovery has been done for Debtor in Possession to identify the real party in interest.

Declaration of Nancy Weng

On May 29, 2020, Debtor filed the Declaration of Nancy Weng, Esq. Dckt. 74. Ms. Weng testifies that both National City Bank and The PNC Financial Services Group, Inc. were properly served. She further testifies that she spoke with Attorney for PNC, Ms. Jennifer Wong, who acknowledged that while her office represented PNC in several cases, it was impossible for her or the client to identify whether they owned the particular note in the instant case without counsel being assigned. Ms. Weng testifies that thus far no counsel has been assigned to this case to represent the second lienholder and no proof of claim has been filed.

Ms. Weng has done her due diligence and has reviewed title, the recorder's office and Debtor's billing statements. She has also researched the FDIC website showing that PNC acquired National City Bank without government assistance and a copy of this information is filed as Exhibit A (Dckt. 75). Ms. Weng has also researched the Federal Research showing that PNC Bank is a "wholly-owned indirect subsidiary of the PNC Financial Services Group, Inc., and a copy of the research is attached as Exhibit B (Dckt. 75). While the title report Ms. Weng reviewed only lists National City Bank as the originating lender with no recorded assignments to PNC or any other entity, her research indicates that National City Bank merged with PNC Bank in 2009. Thus, she caused service to both via certified mail. She has not received any correspondence or heard from either National City Bank or PNC.

JULY 16, 2020 HEARING

At the July 16, 2020 hearing, the Debtor in Possession and Bank of New York Mellon reported that they have worked out a stipulation resolving this matter and specifying agreed plan treatment terms. They requested a continuance so they could finalize the terms and documentation.

SEPTEMBER 10, 2020 HEARING

At the hearing, Counsel for Debtor reported that the parties are near finalizing a stipulation resolving this, and requested a continuance to 10:30 on October 1, 2020.

OCTOBER 1, 2020 HEARING

On September 28, 2020, the Debtor in Possession and Bank of New York Mellon filed a Request to continue this matter while they document a consensual agreement to this dispute. Dckt. 133. The Debtor in Possession and the Bank working diligently to address these issues, the hearing is continued to 10:30 a.m. on November 12, 2020.

OCTOBER 30, 2020 STIPULATION AND ORDER

Parties Debtor and The Bank of New York Mellon filed a Stipulation on October 30, 2020 where the parties have stipulated to the following (the full terms of the Stipulation are set forth in the Stipulation filed as Dckt. 138):

1. The market value of the subject real property commonly known as 1106 Lovell Avenue, Campbell, California is valued at $900,000.00.

2. Creditor's claim is not modified and the Creditor's claim shall not be modified unless and until the Debtors' chapter 11 Plan of Reorganization is confirmed.

3. Creditor retains the right to make an 11 U.S.C. § 1111(b) election so that its claim may be treated as fully secured under Debtors' Chapter 11 Plan and retains the right to object to confirmation of the Debtors' Chapter 11 Plan.

4. The Debtors will not propose a Chapter 11 Plan, or any amendment or modification of a Chapter 11 Plan that modifies the value without the express written consent of Creditor, or by Motion or Noticed hearing.

The court filed an order regarding the Stipulation on November 2, 2020. Dckt. 139. The parties having agreed that the Debtor's motion is resolved as to Creditor The Bank of New York Mellon, the matter is removed from the calendar.

15. **20-22812-E-7** **LORI REED** **MOTION FOR COMPENSATION FOR**
BLF-3 **Mary Anderson** **LORIS L. BAKKEN, TRUSTEES ATTORNEY(S)**
10-8-20 [43]

Final Ruling: No appearance at the November 12, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 8, 2020. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

Loris L. Bakken of the Bakken Law Firm, the Attorney("Applicant") for Kimberly J. Husted, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period July 11, 2020 through November 12, 2020. The order of the court approving employment of Applicant was entered on July 20, 2020. Dckt. 26. Applicant requests fees in the amount of $5,775.00 and costs in the amount of $63.65.

APPLICABLE LAW

Reasonable Fees

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

the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

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

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

A review of the application shows that Applicant's services for the Estate include providing legal advice and rendering legal services to the Chapter 7 Trustee regarding general case administration and strategies on how to handle the property of the estate, and assisted the Trustee in the sale to Debtor of the estate's nonexempt interest in real property. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 3.3 hours in this category. Applicant prepared a fee agreement, employment application, and a fee application.

Sale to Debtor of Estate's Nonexempt Equity in Real Property: Applicant spent 13.2 hours in this category. Applicant entered into negotiations with Debtor for a sale to Debtor of the estate's nonexempt interest in the real property. Additionally, Applicant prepared the sale agreement, prepared and filed the motion for court approval of the sale, and assisted the title company in resolving issues in connection with the closing.

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**
Loris L. Bakken	16.50	$350.00	$5,775.00
	0	$0.00	$0.00
Total Fees for Period of Application			$5,775.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $63.65 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Copying	$0.10 per page	$31.40
Postage		$32.25
		$0.00
Total Costs Requested in Application		$63.65

FEES AND COSTS & EXPENSES ALLOWED

Fees

Hourly Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $5,775.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

First and Final Costs in the amount of $63.65 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 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 Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$5,775.00
Costs and Expenses	$63.65

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Loris L. Bakken of the Bakken Law Firm ("Applicant"), Attorney for Kimberly J. Husted, the Chapter 7 Trustee, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Loris L. Bakken of the Bakken Law Firm is allowed the following fees and expenses as a professional of the Estate:

Loris L. Bakken of the Bakken Law Firm, Professional employed by the Chapter 7 Trustee

Fees in the amount of $5,775.00
Expenses in the amount of $63.65,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.