UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

November 17, 2016, at 10:30 a.m.

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1. **15-28108-E-11** **WILLARD BLANKENSHIP** **CONTINUED MOTION FOR COMPENSATION BY THE LAW OFFICE OF REYNOLDS LAW CORPORATION FOR STEPHEN M. REYNOLDS, DEBTOR'S ATTORNEY**
RLC-7 **Stephen Reynolds** **8-29-16 [134]**

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on August 29, 2016. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen (14) days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Allowance of Professional Fees is granted.

Stephen Reynolds, the Attorney ("Applicant") for Willard J. Blankenship, the Debtor in Possession ("Client"), makes a Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period October 17, 2015, through October 11, 2016. The order of the court approving employment of Applicant was entered on April 21, 2016. Dckt. 94. Applicant requests fees in the amount of $46,865.00 and costs in the amount of $25.00.

OCTOBER 6, 2016 HEARING

At the hearing, the court continued the matter to 10:30 a.m. on November 17, 2016, to be heard as a final request for fees and expenses in this case. Dckt. 150. The court required supplemental pleadings to be filed and served by November 1, 2016, with replies filed and served by November 10, 2016. FN.1.

FN.1. The court notes that the supplemental Motion for Final Allowance of Fees was filed on November 2, 2016, and does not appear to have been served. Dckt. 156.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including filing a motion to incur debt to restore heat to Debtor's residence; filing an answer to adversary proceeding No. 16-2010; preparing and filing Monthly Operating Reports; representing the Debtor at the Meeting of Creditors; filing an adversary proceeding; negotiating with creditors; drafting pleadings regarding violations of the automatic stay; opposing various motions by creditors; preparing Debtor's Plan and Disclosure Statement; and obtaining Indiana property transferred pre-petition. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Asset Disposition: Applicant spent 7.6 hours in this category.

Case Administration: Applicant spent 37.3 hours in this category. Applicant assisted Client with business operations; financing; preparing Monthly Operating Reports; discussions and meetings with Debtor regarding case strategy; attending status conferences; and attending the meeting of creditors.

Claims: Applicant spent 6.4 hours in this category.

Litigation: Applicant spent 25.3 hours in this category.

Plan Statement: Applicant spent 51.4 hours in this category. Applicant prepared Debtor's plan of reorganization and disclosure statement and negotiated with creditors resulting in the Plan's acceptance.

Significant Motions and Other Contested Matters: Applicant spent 5.9 hours in this category. Applicant prepared motions on relief from stay and fee applications.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. Applicant requests to be compensated for slightly fewer hours than listed in his task billing. 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**
Stephen M. Reynolds	133.90	$350.00	$46,865.00
Total Fees For Period of Application			$46,865.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $25.00 pursuant to this application.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Reimbursable Expense to Hickam & Lorenz, P.C.		$25.00
		$0.00
		$0.00

		$0.00
Total Costs Requested in Application		$25.00

CREDITORS' OPPOSITION

Michael Kletchko and Patrick Ruedin ("Creditors") filed an opposition reserving their right to contest the Instant Motion at the time of hearing. The Creditors believe that a substantial part of the work that Applicant billed for was unnecessary and a result of his own doing. However, no specific opposition is made to the fees requested.

U.S. TRUSTEE'S OPPOSITION

Tracy Hope Davis, the U.S. Trustee, filed an Opposition on November 7, 2016. Dckt. 162. The U.S. Trustee objects to two areas of the requested fees: fees for Monthly Operating Reports ($2,340.00) and fees for travel ($2,370.00).

The U.S. Trustee argues that time spent on creating, revising, and filing monthly operating reports should not be allowed and cites to *In re Root* for support. No. 09-00645-TLM, 2010 WL 4117455, at *3 (Bankr. D. Idaho Oct. 19, 2010) ("While some legal services may certainly be required to assist Debtors in understanding and thereafter meeting their obligations regarding financial accountability, including the requirements of complete and timely-filed [Monthly Operating Reports], there is nothing submitted in or with the Application to justify an approach where Counsel, in full or significant part, actually gathers financial data and prepares the [Monthly Operating Reports]. Counsel is retained to provide legal services, not accounting or clerical assistance, nor to perform administrative duties placed on counsel's clients.").

Additionally, the U.S. Trustee asserts that preparing and submitting monthly operating reports is the task of the Debtor in Possession or the Trustee. *See* 11 U.S.C. §§ 704(a)(8), 1106(a)(1), and 1107(a); *In re Stokes*, No. 09-60265-11, 2009 WL 3062314, at *16 (Bankr. D. Mont. Sept. 21, 2009).

The U.S. Trustee argues that Counsel's time spent traveling from his office to hearings is local travel time and cites several cases where such travel is not compensated. *See In re Ginji Corp.*, 117 B.R. 983, 994 (Bankr. D. Nev. 1990) ("[T]ravel time to the courthouse beyond a minimal time should be included in overhead"); *In re Metro Transp. Co.*, 78 B.R. 416, 420 (Bankr. E.D. Pa. 1987); *In re Tavern Motor, Inc.*, 69 B.R. 138, 144 (Bankr. D. Vt. 1987) ("While we recognize the reality that a lawyer's time is the lawyer's stock-in-trade, we believe that local travel time is an overhead expense built into a lawyer's hourly rate. Accordingly, it has been this Court's policy not to allow for local travel time under one hour, without a special showing.").

Whether non-local travel time is compensable is undecided. *See In re Thomas*, Nos. CC-08-1307-HMoPa, ND 96-12129-RR, 2009 WL 7751299, at *9 (B.A.P. 9th Cir. 2009) (allowing compensation for non-local travel from San Luis Obispo to Santa Barbara); *In re Pacific Express, Inc.*, 56 B.R. 859, 866 (Bankr. E.D. Cal. 1985) (reducing compensation by more than half for non-local travel from New York and Los Angeles to Sacramento).

The U.S. Trustee cites to additional cases where compensation was limited to half, or less, of an attorney's hourly rate for travel time. *See In re Landing, Inc.*, 122 B.R. 701, 704–05 (Bankr. N.D. Ohio 1990) (reducing fees to half of hourly rate due to unproductiveness of travel but noting that a greater amount could be awarded if the travel time were used for preparing for meetings or court appearances); *In re Environmental Waste Control*, 122 B.R. 341, 347 (Bankr. N.D. Ill. 1990) (reducing travel fees to half); *In re Grimes*, 115 B.R. 639, 643, 647 (Bankr. D.S.D. 1990) (reducing travel fees to 25%).

The U.S. Trustee requests that the court disallow the $2,340.00 charged for preparation of Monthly Operating Reports and either disallow the $2,370.00 charged for travel time or reduce it to $1,185.00.

FEES AND COSTS & EXPENSES ALLOWED

Fees

This Chapter 11 case, in which the court has now confirmed a Plan, is an example of the efforts of adversaries, and their counsel, to work toward a common financial goal in a reorganization of the finances that works to the benefit of creditors and Debtor alike. In reviewing the general opposition, it is not clear whether the "he" referred to as some of the work caused by "his own doing" is the Debtor or counsel for the Debtor in Possession. As to the former, as with every debtor, it is the actions, decisions, strategies, and "breaks" along the way of the Debtor that leads to a bankruptcy filing. Those decisions do not place a limitation on the reasonable fees that counsel for a trustee or debtor in possession may be allowed by the court.

In looking at the task billing analysis, the two largest fee categories are the Chapter 11 Plan ($17,990.00) and the Adversary Proceeding Litigation ($8,855.00). In light of the issues, assets to be recovered by the Debtor in Possession (as the fiduciary of the bankruptcy estate), and success, these fees are not unreasonable. In the Process, time was spent constructively working with counsel for Creditors to pre-solve possible issues and recover the transferred property in Indiana. While adding some cost up front, it minimizes what would have been staggering legal expenses later.

When attorneys draft all of the monthly operating reports, courts have noted that "Debtors or their financial professional should prepare such reports, with counsel reviewing and filing them." *In re Vora*, No. 10-30889DM, 2011 WL 5358058, at *2 (Bankr. N.D. Cal. Nov. 7, 2011) (citing *In re Koerkenmeier*, 344 B.R. 603 (Bankr. W.D. Mo. 2006)). Courts do not always disallow them entirely, though. For instance, the court in *In re Vora* reduced the requested $7,477.00 to $4,477.00 because Debtor was paying unsecured creditors in full. *See id.*

Here, it was the Debtor in Possession's responsibility to prepare the monthly operating reports. If he was in capable of doing such, then the Debtor in Possession could seek to employ a book keeper or accountant to assemble the information, as well as explain how the Debtor could serve as the debtor in possession if he did not possess such basic financial skills. The financial information in the monthly operating reports is very basic, there being no business or complex financial transactions. These simple forms do not require an attorney's $350.00 an hour charges. The court disallows the $2,340.00 of fees relating to counsel volunteering to provide book keeping services to the Debtor in Possession.

With respect to the travel time, the court's concern arises because counsel adds an hour of travel time for a thirty-two mile round trip of travel. This appears to be just a "flat fee" charged, not actual time billed. Given the general reasonableness of the fees requested in this case, the court will disallow only 50% of the one-hour-per-trip charge—which disallowed amount totals $1,185.00.

The total allowed fees are computed as follows:

Total Fees Requested	$46,865.00
Disallowed Monthly Operating Fees	($ 2,340.00)
Disallowed 50% of Travel Fees	($ 1,185.00)
Total Allowed Fees	$43,340.00

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. Final Fees in the amount of $43,340.00, pursuant to 11 U.S.C. § 330, are approved and authorized to be paid by the Debtor in Possession from the available funds of the Plan in a manner consistent with the order of distribution under the confirmed Plan.

Costs & Expenses

The Final Costs in the amount of $25.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Debtor in Possession from the available funds of the Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

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

Fees:	$43,340.00
Costs and Expenses	$25.00

pursuant to this Application 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 Stephen Reynolds ("Applicant"), Attorney for the Debtor in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Stephen Reynolds is allowed the following fees and expenses as a professional of the Estate:

Stephen Reynolds, Professional Employed by Debtor in Possession

Fees in the amount of $43,340.00
Expenses in the amount of $25.00,

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

IT IS FURTHER ORDERED that the Plan Administrator is authorized to pay the fees and costs allowed by this Order from the available funds of the Plan in a manner consistent with the order of distribution under the confirmed Plan.

2.	**16-20852-E-11 DNL-1**	**MATHIOPOULOS 3M FAMILY LIMITED PARTNERSHIP J. Luke Hendrix**	**CONTINUED MOTION TO USE CASH COLLATERAL 4-21-16 [40]**

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.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, creditors, and Office of the United States Trustee on November 3, 2016. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion for Authority to Use Cash Collateral is granted.

Mathiopoulos 3M Family Limited Partnership ("Debtor in Possession") filed the instant Motion for Authority to Use Cash Collateral on November 3, 2016. Dckt. 127.

PRIOR MOTIONS FOR AUTHORITY TO USE CASH COLLATERAL

Debtor in Possession has filed Motions for Authority to Use Cash Collateral on the following dates in this case:

A. February 25, 2016. Dckt. 13.

B. April 21, 2016. Dckt. 40.

C. July 7, 2016. Dckt. 60.

D. September 6, 2016. Dckt. 94.

BACKGROUND

The Debtor in Possession owns real property identified as 3105, 3111, 3119, 3125, 3127, 3129, 3133, 3137, 3141, and 3145 Penryn Road, Penryn, California ("Property"). The Property consists of a business center with approximately 30,700 square feet of rentable building space, which the Debtor in Possession rents out to commercial tenants. Dckt. 13.

The Debtor in Possession states that Wells Fargo Bank, N.A. ("Creditor") asserts a first deed of trust and assignment of rents against the Property to secure a promissory note with a balance of approximately $2,900,000.00. Dckt. 13.

Debtor in Possession argues that it is vital and necessary for the continued operation of the business to use cash collateral to pay necessary expenses to preserve the Property, including property taxes, business expenses, and Property upkeep. Dckt. 13.

Debtor in Possession anticipates that by using the cash collateral it will generate post-petition accounts receivable and/or accumulated cash sufficient to provide adequate protection to holders of secured claims. Dckt. 13.

The Debtor in Possession offers a portion of the accounts receivable and accumulated cash it will generate post-petition as replacement collateral to the Creditor, to the extent that the Creditor's collateral is diminished from the Debtor in Possession's use of cash collateral. The replacement liens on post-petition accounts receivable and cash shall be of the same scope, in the same priority, and subject to the same infirmities and defenses as existed pre-petition. Dckt. 13.

The court has issued several prior orders authorizing the use of cash collateral.

CURRENT MOTION

The Debtor in Possession estimates that the regularly reoccurring expenses will be incurred during the period of December 1, 2016, and January 31, 2017.

Debtor in Possession estimates the following expenses that will be incurred during the period of December 1, 2016, and January 31, 2017. The Debtor in Possession indicates that the expenses generally track previously approved amounts.

EXPENSE	**AMOUNT**
Property Insurance	$1,045.41 per month
Pacific Gas and Electric	$300.00 per month (approximate)
Recology Auburn (garbage)	$500.00 per month (approximate)
Telephone for business	$200.00 per month (approximate)
Pest control	$123.60 per month (approximate)
Telephone for Fire and Security	$120.00 per month (approximate)
Life Insurance Policies (4)	$675.00 per month
Property Maintenance, Landscaping, Parking Lot Cleaning	$704.00 per month
Misc (fuel, office supplies, equipment repair, postage, advertisement, etc.)	$1,500.00 per month (approximate)
	_____
Total Cash Collateral Request	$5,168.01 per month

Debtor-in-Possession also provides for proposed use for cash collateral as to non-monthly expenses:

EXPENSE	**AMOUNT**
Placer County Water Agency	$1,500.00 due December 2016 (approximate amount due every two months)
Sewer	$2,275.00 due December 2016 (due every three months)
Stanley Security for Fire Alarm	$101.13 due December 2016 (due every three months)
	_____
Total Cash Collateral Request	$3,876.13 through January 31, 2017

The Debtor in Possession also states that current property taxes are due on December 10, 2016. The amount of those taxes will be either $23,778.81 or $20,441.81 depending on whether South Placer Municipal Utility District removes $3,337.00 that Debtor in Possession asserts should be treated as a pre-petition claim payable under the plan.

APPLICABLE LAW

Pursuant to 11 U.S.C. § 1101, a Debtor in Possession serves as the trustee in a Chapter 11 case when so qualified under 11 U.S.C. § 322. As a Debtor in Possession, the Debtor in Possession can use, sell, or lease property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

> (b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless–
>
> > (A) such sale or such lease is consistent with such policy; or
> >
> > (B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease–
> >
> > > (i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and
> > >
> > > (ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Fed. R. Bankr. P. 4001(b) provides the procedures in which a trustee or Debtor in Possession may move the court for authorization to use cash collateral. In relevant part, Fed. R. Bankr. P. 4001(b) states:

> (b)(2) Hearing
>
> The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

DISCUSSION

In the instant case, the Debtor in Possession is seeking authorization of the court to use cash collateral to pay necessary expenses to preserve the Property and continue ongoing business rental operations. Debtor in Possession assures the court that the business expenses are modest and track expenses that this court has approved previously.

The court may authorize use of cash collateral so long as the creditor is adequately protected. 11 U.S.C. § 363(e). The Debtor in Possession has the burden of proof on the issue of adequate protection. 11 U.S.C. § 363(p)(1). Adequate protection includes providing periodic cash payments to cover the loss in value of the creditor's interest. 11 U.S.C. § 361(1). Additionally, a substantial equity cushion in property provides adequate protection. *See In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984).

Previously, the Debtor in Possession and Creditor filed a stipulation in which the Creditor consented to the Debtor in Possession's use of cash collateral. The adequate protection payment proposed was $13,193.11, beginning March 14, 2016, and continuing thereafter on the fifteenth day of each month through May 2016. Here, Debtor in Possession asserts that it will continue making adequate protection payments of $13,193.11 to Creditor. The court finds that the adequate protection payment is sufficient given the facts of the instant case.

The court authorizes the use of cash collateral, pursuant to the order of the court, for the period December 1, 2016, and January 31, 2017, including the required adequate protection payments and the property tax payment. The court does not pre-judge and authorize the use of any monies for "plan payments" or use of any "profit" by the Debtor in Possession. All surplus Cash Collateral from the Property shall be held in a cash collateral account and separately accounted for by the Debtor in Possession.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Authority to Use Cash Collateral filed by Debtor in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Use Cash Collateral is granted, pursuant to this order, for the period December 1, 2016, and January 31, 2017, that the cash collateral may be used through January 31, 2017, to pay the following expenses, granting the Debtor in Possession a variance of ten percent in any individual line item expense as long as the total amount used does not exceed the total amount allowed:

EXPENSE	**AMOUNT**
Property Insurance	$1,045.41 per month

Pacific Gas and Electric	$300.00 per month (approximate)
Recology Auburn (garbage)	$500.00 per month (approximate)
Telephone for business	$200.00 per month (approximate)
Pest control	$123.60 per month (approximate)
Telephone for Fire and Security	$120.00 per month (approximate)
Life Insurance Policies (4)	$675.00 per month
Property Maintenance, Landscaping, Parking Lot Cleaning	$704.00 per month
Misc (fuel, office supplies, equipment repair, postage, advertisement, etc.)	$1,500.00 per month (approximate)

EXPENSE	**AMOUNT**
Placer County Water Agency	$1,500.00 due October 2016 (approximate amount due every two months)
Sewer	$2,275.00 due December 2016 (due every three months)
Stanley Security for Fire Alarm	$101.13 due December 2016 (due every three months)

IT IS FURTHER ORDERED that Debtor in Possession is authorized to pay property taxes in the amount not to exceed $23,778.81.

IT IS FURTHER ORDERED that the creditors having an interest in the cash collateral are given replacement liens in the post-petition rents in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim, which replacement lien is perfected by the issuance of this order, no further act of creditors required.

IT IS FURTHER ORDERED the Debtor in Possession shall continue to make the monthly adequate protection payments of $13,193.11 to Wells Fargo Bank, N.A.

IT IS FURTHER ORDERED Debtor in Possession waives any right to seek a surcharge of Creditor's interests in the Property, Pre-Petition Collateral, or Post-Petition Property under 11 U.S.C. § 506(c), only for the expenses which are

authorized to be paid with the cash collateral during the period in which Debtor in Possession is authorized to use cash collateral by this order.

IT IS FURTHER ORDERED that if Creditor asserts that an event for the "automatic" termination of the use of cash collateral has occurred, Creditor shall file an *ex parte* motion for order terminating use of cash collateral and supporting pleadings (evidence of the event of termination) and lodge with the court a proposed order terminating the use of cash collateral. Creditor shall immediately serve (electronically and by First Class Mail) the *ex parte* motion and supporting pleadings and provide telephonic notice to counsel for the Debtor in Possession and the U.S. Trustee. If the Debtor in Possession disputes the event of termination, counsel for Debtor in Possession shall notify the court and counsel for Creditor. The court may, upon review the *ex parte* motion set an emergency hearing *sua sponte* or may rule on the *ex parte* motion without hearing.

IT IS FURTHER ORDERED the hearing on the Motion is continued to 10:30 a.m. on January 12, 2017, to consider a supplement to the Motion to extend the authorization to use cash collateral. On or before December 29, 2016, the Debtor in Possession shall file and serve supplemental pleadings for the further use of cash collateral and notice of the January 12, 2017 hearing. Any opposition to the requested use of cash collateral may be presented orally at the hearing.

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

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—Final Hearing.

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

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

The Motion to Approve the Disclosure Statement is denied without prejudice.

NOVEMBER 10, 2016 HEARING

Prior to the first hearing on this Motion, the court continued the matter to 10:30 a.m. on November 17, 2016. Dckt. 82. The court ordered Stephen Reynolds, the attorney for the Debtor in Possession, to appear at the continued hearing.

NO NOTICE PROVIDED

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

The Order Shortening Time for Service required that all creditors be served by October 13, 2016. Dckt. 76. No Certificate of Service has been filed. Accordingly, the Motion for Approval of Disclosure Statement is denied without prejudice. The court granted the first motion, but then had to deny the motion

when nobody appeared to prosecute the motion at the hearing set as requested by the Debtor in Possession. The prior motion was not served on any parties in interest. Civil Minutes, Dckt. 68.

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

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

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

Civil Minutes, p. 6; Dckt. 51.

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

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

There is no Certificate of Service filed, there is no notice of the hearing on November 10, 2016 filed, there is no notice advising parties in interest of the filing deadlines for objections to the proposed disclosure statement as required by the above order shortening time. If the motion to approve disclosure statement

(none filed) and notice of hearing had been timely served, a certificate of service would have been filed no later than October 16, 2016. L.B.R. 9014-1(e)(2).

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

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

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

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

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

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 Approval of the Disclosure Statement filed by the Debtor in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

4. **16-90923-E-12** **J & B DAIRY**
David Johnston

NOTICE OF INTENT TO DISMISS CASE IF DOCUMENTS ARE NOT TIMELY FILED
10-11-16 [4]

No 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.

Correct Notice Provided. The Certificate of Mailing states that the Order Setting Hearing on Notice of Intent to Dismiss was served on Debtor, Debtor's Attorney, Chapter 12 Trustee, and Office of the United States Trustee on November 8, 2016. By the court's calculation, 9 days' notice was provided.

The Order Re: Notice of Intent to Dismiss Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

Notice of Intent to Dismiss Case is xxxxxxxxxxxxxx.

The Clerk of the Court filed a Notice of Incomplete Filing and Notice of Intent to Dismiss Case if Documents Are Not Timely Filed on October 11, 2016. The Notice indicates that the following documents have not been filed with the court:

A. Attorney's Disclosure Statement

B. Schedule A/B—Real and Personal Property

C. Schedule D—Secured Creditors

D. Schedule E/F—Unsecured Claims

E. Schedule G—Executory Contracts

F. Schedule H—Codebtors

G. Statement of Financial Affairs

H. Summary of Assets and Liabilities

On October 24, 2016, the court granted a Motion to Extend Deadlines to File Missing Documents and Extension of Time for Dismissal of Case and extended the deadline to November 4, 2016. Dckt. 14. The court declared that no additional extensions would be awarded.

A review of the docket shows that a Disclosure of Compensation of Attorney has been filed (Dckt. 13), but none of the other documents have been filed.

RESPONSE OF COUNSEL

On November 15, 2016, the Debtor in Possession filed a Status Report. Dckt. 21. No declaration is provided for the facts alleged therein, but given the nature of the reported medical issues reported for counsel, the lack of evidence is not fatal to the prosecution of this case.

What is not clear is whether it is reasonable for current counsel to continue as counsel for the Debtor in Possession, or whether the health issues create a sufficient impairment that new counsel is necessary.

At the November 16, 2016, hearing, it was reported **xxxxxxxxxxxxxxxxxxxxxxxx**.

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 hearing on the Notice of Intent to Dismiss Case if Documents Are Not Timely Filed having been set by the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that **xxxxx**.

5. **16-90923-E-12** **J & B DAIRY**
David Johnston

STATUS CONFERENCE RE: CHAPTER 12 VOLUNTARY PETITION
10-7-16 [1]

Debtor's Atty: David C. Johnston

Notes:

Set by order of the court filed 11/8/16 [Dckt 18] to be heard in conjunction with the hearing on the Clerk's Notice of Intent to Dismiss; Debtor to file a status conference report on or before 11/16/16

6. **15-90087-E-7** **DIOLINDA MACHADO** **CONTINUED MOTION FOR SUMMARY JUDGMENT**
15-9016 **Ashley Amerio** **9-28-16 [20]**

MACHADO V. MACHADO

COUNSEL FOR PLAINTIFF MAY (No Appearance is Required) APPEAR TELEPHONICALLY AT HEARING AND REQUEST THIS MATTER BE CALLED TO ADDRESS ANY CORRECTIONS OR CLARIFICATIONS THAT HE DETERMINES SHOULD BE BROUGHT TO THE COURT'S ATTENTION

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant, Debtor's Attorney, and Office of the United States Trustee on September 28, 2016. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

The Motion for Summary Judgment is granted.

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

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

NOVEMBER 10, 2016 HEARING

At the hearing, the court continued the hearing on the Motion to 10:30 a.m. on November 17, 2016, to be conducted in Courtroom 33 of the United States Courthouse, 501 I Street, Sixth Floor, Sacramento. Plaintiff was ordered to file a Supplement to the Motion stating with particularity the grounds and relief requested on or before 12:00 p.m. on November 15, 2016.

APPLICATION OF COLLATERAL ESTOPPEL

The determination of whether a debt is nondischargeable is a question of federal law, for the federal judge to determine. When the grounds for the asserted nondischargeability are based on a non-bankruptcy court judgment, such as for fraud or willful and malicious injury, the federal courts respect the findings and conclusions of the state court applying the rule of collateral estoppel. In describing the five elements for Collateral Estoppel under California law, the Ninth Circuit Court of Appeals stated,

> "Under California law, collateral estoppel only applies if certain threshold requirements are met:
>
> First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. *Harmon v. Kobrin (In re Harmon)*, 250 F.3d 1240, 1245 (9th Cir. 2001)."

Cal-Micro, Inc. v. Cantrell, 329 F.3d 1119, 1123 (9th Cir. 2003). The party asserting collateral estoppel bears the burden of establishing these requirements. *In re Harmon*, 250 F.3d at 1245.

The party "asserting collateral estoppel carries the burden of proving a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action." *In re Lambert*, 233 Fed. Appx. 598, 599 (9th Cir. 2007). If the Court has a reasonable doubt as to what was actually decided by the prior judgment, it will refuse to apply preclusive effect. *Id.*

Collateral estoppel is a variant of the fundamental *Res Judicata* Doctrine. The Ninth Circuit Court of Appeals addressed the modern application of this Doctrine in *Robertson v. Isomedix, Inc. (In re International Nutronics)*, 28 F.3d 965 (9th Cir. 1994). The court considers four factors in determining whether Res Judicata applies,

> "(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts."

Id. at 970 (citing *Clark v. Bear Sterns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992)).

MOVANT'S SUPPLEMENT TO THE MOTION

Plaintiff filed a Supplement to the Motion for Summary Judgment on November 15, 2016. Dckt. 32. Plaintiff pleads the following grounds with particularity:

A. On March 14, 2008, the District Attorney of Stanislaus County filed a criminal complaint against Defendant, charging her with several crimes, including making a false statement in connection with a financial transaction.

B. On June 3, 2010, Defendant entered a plea of *nolo contendere* to the felony violation of making a false statement in connection with a financial transaction.

C. On June 15, 2015, Judge Silveira of the Stanislaus County Superior Court determined that restitution was owed to Plaintiff.

D. On May 2, 2016, Judge Silveira signed a Restitution Order against Defendant for full restitution of Plaintiff's economic losses with interest at ten percent annually from the date of the order. That restitution amount was $351,303.94 on May 2, 2016.

E. On January 30, 2015, Defendant filed a voluntary petition under Chapter 7 in this court.

F. On May 15, 2015, Plaintiff filed a Complaint to Determine Dischargeability of Debt and sought a determination that the debt is nondischargeable.

Plaintiff seeks a determination from this court that the Restitution Order is nondischargeable under 11 U.S.C. § 523(a)(2)(A), (6), and (7) so that Plaintiff can enforce it through the Superior Court of California. Plaintiff clarifies that she is not requesting this court to replace the Restitution Order with a monetary judgment from this court.

In considering the above grounds, the court first notes the three different bases upon which a determination of nondischargeability are requested:

A. 11 U.S.C. § 523(a)(2)(A), which states:

> "(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by–
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. . . ."

The Motion states that Defendant-Debtor was charged with "various felonies," including California Penal Code § 532a(1), the "making of a false statement in connection with a financial transaction." Supplement to Motion ("STM") ¶ 1, Dckt. 32. Penal Code § 532a(1) it is not a provision the

court is automatically familiar with. It is then asserted that Defendant-Debtor pleaded "nolo contendere" to the violation of Cal. Penal Code § 523a(1). There is no allegation of the effect of such a plea and what necessary findings and conclusions were necessarily required for the entry of such a state court judgement.

However, the Supplement to the Motion further alleges that on June 15, 2015, the Superior Court judge issued a Minute Order determining that restitution was owed by the Defendant-Debtor to the Plaintiff. STM ¶ 3, *Id.* Then, in 2016 another Superior Court judge issued a restitution order by which Defendant-Debtor is obligated to pay plaintiff $351,303.94, plus post-judgment interest. STM ¶ 4, *Id.*

Though not stated in the Supplement to the Motion, Exhibit B is a 2010 Minute Order stating that Defendant-Debtor entered a plea of *Nolo Contendere* to the charge that she violated "PC 523A(1), Felony." Dckt. 25. Based on the plea of *Nolo Contendere*, the court found that Defendant-Debtor was guilty of violating "PC 523A(1), Felony."

It is not alleged in the Supplement to the Motion or the accompanying points and authorities the effect of a plea of *Nolo Contendere* or the collateral estoppel effect of such a plea in a criminal action.

In reviewing WIKIN, CALIFORNIA CRIMINAL LAW, 4TH EDITION, § 292, the court noted the following explanation of the effect of a *Nolo Contendere* plea in California:

> (3) Legal Effect. **The legal effect of a *nolo contendere* plea to a crime punishable as a felony is the same as that of a plea of guilty for all purposes**. In cases other than those punishable as felonies, the plea and any admissions required by the court during any inquiry it makes as to the voluntary nature and factual basis for the plea may not be used against the defendant as an admission in a civil suit based on or growing out of the act on which the criminal prosecution is based. (P.C. 1016(3).) (See *People v. Yartz* (2005) 37 C.4th 529, 542, 36 C.R.3d 328, 123 P.3d 604, 3Cal. Crim. Law (4th), Punishment, § 153 [prior conviction resulting from no contest plea could be used as predicate to sexually violent predator proceeding because predator proceeding is special proceeding of civil nature and not "civil suit" under P.C. 1016(3)]; *Rusheen v. Drews* (2002) 99 C.A.4th 279, 285, 120 C.R.2d 769 [because grand theft auto is punishable as felony, *nolo contendere* plea has same legal effect as guilty plea to straight felony for purpose of civil suit; thus, defendant's plea was admissible even though court reduced crime to misdemeanor and record of conviction was expunged following probation]; *Cahoon v. Governing Bd. of Ventura Unified School Dist*. (2009) 171 C.A.4th 381, 388, 89 C.R.3d 783 ["civil suit" under P.C. 1016 includes administrative proceedings; thus, plea of *nolo contendere* by permanent classified employee to misdemeanor charge of forging prescription for controlled substance did not permit school district to automatically dismiss him under Educ.C. 45123, which requires dismissal of person convicted of controlled substance offenses].)
>
> **(4) Conviction May Not Be Used for Collateral Purpose.** A conviction based on a defendant's plea of *nolo contendere* pursuant to P.C. 1016(3) may not be used for a collateral purpose such as the revocation or suspension of a professional license,

in the absence of a specific statute so authorizing. (See *Cartwright v. Board of Chiropractic Examiners* (1976) 16 C.3d 762, 773, 129 C.R. 462, 548 P.2d 1134 ["when the conviction is based on a *nolo contendere* plea, its **reliability as an indicator of actual guilt is substantially reduced**"]; *Kirby v. Alcoholic Bev. Control App. Bd.* (1969) 3 C.A.3d 209, 83 C.R. 89 [plea of *nolo contendere* in criminal case did not constitute "plea, verdict, or judgment of guilty" under former B. & P.C. 24200(d), at liquor license revocation hearing]; *Los Angeles v. Civil Service Com*. (1995) 39 C.A.4th 620, 627, 632, 46 C.R.2d 256 [evidence of deputy sheriff's plea of nolo contendere to misdemeanor charge of receiving stolen property was not admissible in subsequent disciplinary administrative hearing; following Cartwright].) However, **when authorized by a specific statute**, a plea of *nolo contendere* may serve as the basis for a license revocation or suspension, if the underlying offense bears a substantial relationship to the qualifications, functions, or duties of the licensee. (*Arneson v. Fox* (1980) 28 C.3d 440, 170 C.R. 778, 621 P.2d 817.) (See Ev.C. 1300 [hearsay rule does not make evidence of final judgment of guilt of felony inadmissible in civil action to prove essential fact, even if judgment was based on nolo contendere plea]; 1 Cal. Evidence, (5th), Hearsay, § 272.)

California Penal Code § 1016, 3, [emphasis added] provides, with respect to the possible pleas in a criminal action, the effect of a plea of *Nolo Contendere* is:

§ 1016. Permissible pleas; Effect of plea of nolo contendere; Presumption of sanity
. . .
3. **Nolo contendere**, subject to the approval of the court. The court shall ascertain whether the defendant completely understands that a plea of nolo contendere shall be considered the same as a plea of guilty and that, upon a plea of nolo contendere, the court shall find the defendant guilty. The **legal effect of such a plea, to a crime punishable as a felony, shall be the same as that of a plea of guilty for all purposes.** In cases other than those punishable as felonies, the plea and any admissions required by the court during any inquiry it makes as to the voluntariness of, and factual basis for, the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based.

However, a plea of "guilty" is not afforded collateral estoppel effect as to the issues that would otherwise have been necessarily determined in issuing the judgment.

"The other basis for the trial court's grant of summary judgment was its apparent determination that D.'s plea of no contest to the charge of attempted murder constituted conclusive evidence of the intentionality of her act of stabbing appellant. The trial court's declaration that D.'s plea was "admissible in this action as an admission" of the crime of attempted murder was, or course, a correct statement of the law. (*Interinsurance Exchange v. Flores* (1996) 45 Cal. App. 4th 661, 672 [53 Cal. Rptr. 2d 18] [a plea of nolo contendere is admissible in a subsequent civil action as an admission of the crime].) **However**, because such a plea "may reflect a

> compromise or a choice not to undergo prosecution," **it is not a conclusive admission, and has no collateral estoppel effect.** Thus, **"it does not necessarily establish the underlying factual matters at issue in the civil litigation."** (*Id.* at p. 672.) **To the extent the trial court's grant of summary judgment on respondent's motion was based on the assumption that D.'s plea of *nolo contendere* by itself established the intentionality of her act, it was in error. . . .**"

Kers v. CSE Ins. Group, 106 Cal. App. 4th 368, 395 (Cal. Ct. App. 2002).

Thus, while evidence of an "admission," the state court judgment is not a final determination of such facts and conclusions. Plaintiff is incorrect when she argues in the Points and Authorities that "The Defendant plead nolo contendere to a charge of a violation of California Penal Code section 532a(l), which conclusively proves that she made a misrepresentation, that she knew of the falsity of the statement, and that she did so with an intent to deceive." Points and Authorities, p. 4:24–26.

RESTITUTION DECISION AND ORDER

The Superior Court issued its "Decision Re: Restitution" ("DRR") on June 12, 2015. Exhibit C, Dckt. 25. In that Decision, the Superior Court judge found and determined:

A. "Defendant, Diolinda Machado was previously married to Frank Machado and was the former daughter- in-law of Mary Machado (DOB 05/07/1926), the elder victim in this case." DRR, p. 1:2nd paragraph.

B. "For many years, Diolinda Machado enjoyed a close relationship with her mother-in-law, and Mary Machado was often assisted by her former daughter- in-law. Diolinda Machado helped her mother-in- law with shopping, family events, doctor appointments, and all manner of things that a daughter might do for her widowed mother." *Id.*

C. "In part, through this relationship, Diolinda had access to Mary Machado's financial information, and she had gained the confidence of the victim." DRR, p.1: 3rd paragraph.

D. "At the time of these frauds, Mary Machado was elderly and widowed." *Id.*

E. "Diolinda Machado's spending exceeded her income and she looked to the financial resources available to her mother-in-law as a resource." DRR, p.2: 1st paragraph.

F. "Over the course of several years, Diolinda Machado took financial matters into her own hands. The evidence presented regarding the loans, gifts, unlawful self-help to accounts and credit-worthiness of Mary Machado was a thicket of contradictory versions and failed memories ." DRR, p. 2: 2nd paragraph.

G. "Accounts were closed, annuities were cashed in, loans were taken, until ultimately Diolinda and Frank lost their home and Mary Machado was obligated under a reverse-mortgage to prevent her from losing the home that had been owned free and clear of any debt." *Id.*

H. "Mary Machado testified to the opposite: that she did not know what she was signing or the impact of signing these agreements."

I. "Based upon the totality of the evidence, the court is persuaded that Mary Machado did not appreciate and knowingly consent to these financial transactions, even where her signature appeared, based upon the manipulation of Diolinda Machado." DRR, p. 2: 3rd paragraph.

J. " On June 3, 2010, Diolinda Machado pleaded no contest to, and was guilty of, a felony violation of one count of Penal Code section 532a(1), making a false statement in a writing related to a financial condition, specifically the surrender of a policy to the Lincoln Financial Group." DRR, p. 2: 4th paragraph.

K. "The plea agreement included the obligation to pay restitution on the Lincoln Financial Group payment and the Argent loan. The Fidelity Guarantee Life Annuity was expressly excluded from the restitution. (Plea agreement, RT: 3:12–14.)" *Id.*

L. "The People have proven that restitution is owed for all of Diolinda Machado's conduct related to Mary Machado's accounts, except the truck and the Fidelity Annuity." DRR, p. 3: 1st paragraph.

M. "The Court orders the People to People to prepare a draft order with the current amounts of restitution and fees owed ." *Id.*

N. "In addition to the actual losses, attorney's fees are an allowed amount of restitution. Interest, at 10%, is also allowed from the date the 10% is fixed." DRR, p. 3: 4th paragraph.

Exhibit C, Dckt. 25.

Restitution Order

Pursuant to the above decision, the State Court issued the Restitution Order, dated May 2, 2016. Exhibit D, *Id.* The home loan and the insurance policy losses restitution were ordered in the amount of $336,929.55; and an additional attorneys fees of $14,374.39.

SUMMARY JUDGMENT STANDARD

In an adversary proceeding, summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.

R. Civ. P. 56(a), *incorporated by* Fed. R. Bankr. P. 7056. The key inquiry in a motion for summary judgment is whether a genuine issue of material fact remains for trial. Fed. R. Civ. P. 56(c), *incorporated by* Fed. R. Bankr. P. 7056; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986); 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.11[1][b] (3d ed. 2000).

"[A dispute] is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute [over a fact] is 'material' only if it could affect the outcome of the suit under the governing law." *Barboza v. New Form, Inc. (In re Barboza*), 545 F.3d 702, 707 (9th Cir. 2008) (*citing Anderson*, 477 U.S. at 248).

The party moving for summary judgment bears the burden of showing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To support the assertion that a fact cannot be genuinely disputed, the moving party must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A), *incorporated by* Fed. R. Bankr. P. 7056.

In response to a properly submitted motion for summary judgment, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine dispute for trial. *Barboza*, 545 F.3d at 707 (*citing Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055–56 (9th Cir. 2002)). The nonmoving party cannot rely on allegations or denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery materials, to show that a dispute exists. *Id.* (*citing Bhan v. NME Hosps., Inc*., 929 F.2d 1404, 1409 (9th Cir. 1991)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In ruling on a summary judgment motion, the court must view all of the evidence in the light most favorable to the nonmoving party. *Barboza*, 545 F.3d at 707 (*citing County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001)). The court "generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented." *Agosto v. INS*, 436 U.S. 748, 756 (1978). "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

DISCUSSION

The Defendant-Debtor has not filed any opposition to the Motion, and the ruling on this Motion shall rise or fall on the evidence presented by Plaintiff.

11 U.S.C. § 523(a)(2)(A) Grounds

The court begins with the contention that the restitution award is nondischargeable as "fraud" pursuant to 11 U.S.C. § 523(a)(2)(A). As correctly cited in the Points and Authorities there has be satisfaction of a five element test for such fraud, as stated by the Ninth Circuit Court of Appeals in *Turtle Rock Meadows Homeowners Association v. Slyman* (*In re Slyman*), 234 F.3d 1081 (9th Cir. 2000):

> "Under §523(a)(2)(A) of the Bankruptcy Code, a debt for services obtained by the debtor under 'false pretenses, a false representation, or actual fraud' is nondischargeable. 11 U.S.C. §523(a)(2)(A) (2000). 'The purposes of this provision are to prevent a debtor from retaining the benefits of property obtained by fraudulent means and to ensure that the relief intended for honest debtors does not go to dishonest debtors.' 4 COLLIER ON BANKRUPTCY Par. 523.08[1][a] (15th ed. rev. 2000).
>
> Consistent with these purposes, the Ninth Circuit has consistently held that a creditor must demonstrate five elements to prevail on any claim arising under § 523(a)(2)(A). *See, e.g.*, *Britton v. Price* (*In re Britton*), 950 F.2d 602, 604 (9th Cir. 1991). The five elements, each of which the creditor must demonstrate by a preponderance of the evidence, are: (1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct. *American Express Travel Related Servs. Co. v. Hashemi* (*In re Hashemi*), 104 F.3d 1122, 1125 (9th Cir. 1997); *Citibank (South Dakota), N.A. v. Eashai* (*In re Eashai*), 87 F.3d 1082, 1086 (9th Cir. 1996)."

In a 2016 decision, the United States Supreme Court refined the elements for determination of fraud for § 523(a)(2) to include "fraudulent schemes" for which there may not have been an express "false representation" overtly made to the creditor. *Husky International Electronics, Inc. v. Ritz*, ___ U.S. ___, 136 S. Ct. 1581 (2016). In *Husky*, the fraudulent scheme was one in which the debtor engaged in business, obtained credit to purchase products for his company, the company then sold the products, and then the debtor drained the proceeds from the sale of the products into other entities he controlled. Though the plaintiff could not identify a specific "statement," the conduct of the debtor was sufficient to meet the requirements of 11 U.S.C. § 523(a)(2)(A). This is consistent with the Ninth Circuit ruling in *Turtle Rock* that includes "fraudulent omissions" (such as a borrower not disclosing that he or she does not intend to repay the credit but divert assets from the borrower entity) and "deceptive conduct" (purporting to be operating a business that complies with the general laws and obligations of the jurisdiction).

Plaintiff has established that Defendant entered a plea of *nolo contendere* to a felony crime arising under California Penal Code § 523a(1), which states [emphasis added]:

> § 532a. False financial statements
>
> (1) Any person who shall **knowingly make or cause to be made**, either directly or indirectly or through any agency whatsoever, any **false statement in writing**, with **intent that it shall be relied** upon, **respecting the financial condition**, or means or ability to pay, **of himself or herself**, or any other person, firm or corporation, in whom he or she is interested, or **for whom he or she is acting**, for the purpose of **procuring** in any form whatsoever, either the delivery of personal property, the payment of cash, the making of **a loan or credit**, the extension of a credit, the execution of a contract of guaranty or suretyship, the discount of an account

receivable, or the making, acceptance, discount, sale or endorsement of a bill of exchange, or promissory note, **for the benefit of either himself or herself** or of that person, firm or corporation **shall be guilty of a public offense.**

While the plea of *nolo contendere* and judgment thereon does not have collateral estoppel effect, Defendant-Debtor has not provided the court with any testimony or other evidence to counter her admission (as applicable to the facts alleged) that Defendant-Debtor:

A. Knowingly made or caused to be made;

B. A false statement in writing;

C. With the intent that such false statement be relied upon;

D. Concerning her, or the person for whom she is acting, financial condition or ability to pay;

E. For the making of a loan or extension of credit;

F. For the benefit of the Defendant-Debtor or the person Defendant-Debtor was acting for.

This crime, and the admissions thereto, relate to having made a false statement to some other party to obtain credit.

The Complaint Defendant-Debtor:

A. Falsely and fraudulently forged Debtor's name to documents to obtain monies from life insurance companies from policies owned by Plaintiff.

B. Falsely and fraudulently forged Plaintiff's name on a contract to obtain automobile financing.

C. Falsely and fraudulently forged Plaintiff's name on multiple occasions to obtain monies secured by a loans on Plaintiff's home.

D. Falsely and fraudulently used Plaintiff's bank accounts, including her ATM card, to withdraw $1,091.98 from Plaintiff's bank accounts.

Complaint, Dckt. 1. The "admissions" made in pleading *nolo contendere* do not match up with the acts alleged to be the basis for nondischargeability of debt pursuant to 11 U.S.C. § 523(a)(2)(A). Representations may have been made to third-parties to defraud them out of loans and vehicles, but there are no contentions that such fraud was committed against Plaintiff and that Plaintiff was defrauded out of monies and property.

While not consistent with the allegations in the Complaint (forgeries of signatures), the actual Restitution Decision determines that Plaintiff was the victim of California Penal Code § 523a(1) fraud.

Based on the findings of the California Superior Court, for which the application of collateral estoppel is appropriate, the court grants the Motion for Summary on the first cause of action, determining that the $351,303.94, plus the interest and any related costs and expenses permitted under applicable law for the enforcement thereof are nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

11 U.S.C. § 523(a)(6) Grounds

Plaintiff requests that the restitution obligation also be determined to be nondischargeable as provided in 11 U.S.C. § 536(a)(6) :

> "(6) for willful and malicious injury by the debtor to another entity or to the property of another entity; . . . ."

As addressed by the Ninth Circuit Court of Appeals in *Ormsby v. First Am. Title Co. (In re Ormsby*), 591 F.3d 1199, 1206-1207 (9th Cir. 2010).

> "The Supreme Court in *Kawaauhau v. Geiger (In re Geiger)*, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998), made clear that for section 523(a)(6) to apply, the actor must intend the consequences of the act, not simply the act itself. *Id.* at 60. Both willfulness and maliciousness must be proven to block discharge under section 523(a)(6).
>
> In this Circuit, '§ 523(a)(6)'s willful injury requirement is met only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct.' *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1142 (9th Cir. 2002). The Debtor is charged with the knowledge of the natural consequences of his actions. *Cablevision Sys. Corp. v. Cohen (In re Cohen)*, 121 B.R. 267, 271 (Bankr. E.D.N.Y. 1990); see *Su*, 290 F.3d at 1146 ('In addition to what a debtor may admit to knowing, the bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action.').
> . . .
> 'A malicious injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.' *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1209 (9th Cir. 2001) (internal citations omitted). Malice may be inferred based on the nature of the wrongful act. See *Transamerica Commercial Fin. Corp. v. Littleton (In re Littleton)*, 942 F.2d 551, 554 (9th Cir. 1991). To infer malice, however, it must first be established that the conversion was willful. See *Thiara*, 285 B.R. at 434.

Again, the plea of nolo contendere, when taken as an admission, does not meet the elements for for willful and malicious injury to the Plaintiff or Plaintiff's property. The Complaint alleges that the injury was done to third-parties by the forgeries.

However, the Restitution Decision states that it is the Plaintiff who has suffered the loss of her property due to the Defendant-Debtor's conduct. Though it is unclear to the court how the Plaintiff could be liable for forged documents, the State Court has determined that the Plaintiff has suffered losses relating to the home loans and the insurance policies in the amount of $336,929.55, and attorneys fees of $14,374.39 relating to such losses. The State Court judge expressly determined, "Based upon the totality of the evidence, the court is persuaded that Mary Machado did not appreciate and knowingly consent to these financial transactions, even where her signature appeared, based upon the manipulation of Diolinda Machado." DRR, p. 2: 3rd paragraph. The Restitution Decision clearly concludes that Defendant-Debtor acted intentionally and willfully to take Plaintiff-Debtor's money and assets from her.

The court grants the Motion for Summary Judgment, determining that the $351,303.94, plus the interest and any related costs and expenses permitted under applicable law for the enforcement thereof are nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

11 U.S.C. § 523(a)(7) Grounds

The third basis in the Motion for Summary Judgment for determining that the State Court Restitution Order obligation is nondischargeable is based on 11 U.S.C. § 523(a)(7), which states that an obligation for the following in not dischargeable:

> "(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty–
>
> (A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or
>
> (B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition; . . . ."

The evidence presented does not support a determination that the obligation owing from the Restitution order is a debt "for a fine, penalty, or forfeiture." As discussed in COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 523.13:

> "To come within the terms of subsection (a)(7), the debt must be 'payable to and for the benefit of a governmental unit.' Based on the existence of an explicit exception to discharge for fines and penalties payable to or for the benefit of a governmental unit, one might conclude, by negative implication, that similar obligations payable to private parties, such as punitive damages in civil cases, are dischargeable in chapter 7 cases."

On its face, one could interpret this language to limit the application of 11 U.S.C. § 523(a)(7) to only a "fine," "penalty," or "forfeiture" payable to and for the benefit of a governmental unit. Here, no governmental unit has come forward seeking a determination that such fine, penalty, or forfeiture owed to a governmental unit is nondischargeable. The Plaintiff is the non-governmental unit victim of the Defendant-Debtor.

In *Kelly v. Robinson*, 479 U.S. 36 (1986), the Supreme Court determined that restitution payments, made to a governmental unit for welfare fraud were nondischargeable pursuant to 11 U.S.C. § 523(a)(7). In discussing criminal restitution awards and the purpose they serve, the Supreme Court determined:

> "In our view, neither of the qualifying clauses of § 523(a)(7) allows the discharge of a criminal judgment that takes the form of restitution. The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. **Although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution.** Moreover, **the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant**. As the Bankruptcy Judge who decided this case noted in *Pellegrino*: 'Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose.' 42 B. R., at 133."

Id., 52. The Supreme Court concluded that because criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than a victim's desire for compensation, such restitution orders "operate 'for the benefit of' the State." *Id.*, 53. Therefore, such interests bring the restitution order within 11 U.S.C. § 523(a)(7). While the Ninth Circuit Court of Appeals did not find the statutory construction rigor of the Supreme Court in *Kelly* consistent with the current standard (concluding that to "untether statutory interpretation from the statutory language – has gone the way of NutraSweet and other relics of the 1980s. . .;" the court did not determine that the ruling in *Kelly* had been overturned by the Supreme Court or a subsequent act of Congress. *Scheer v. State Bar (In re Scheer)*, 819 F.3d 1206, 1210 (2016).

The Supreme Court concluding that a criminal restitution order, which ultimately is paid to the victim is nondischargeable (though in *dicta*) and Defendant-Debtor offering no counter argument, the court grants the Motion for Summary Judgment, determining that the $351,303.94, plus the interest and any related costs and expenses permitted under applicable law for the enforcement thereof are nondischargeable pursuant to 11 U.S.C. § 523(a)(7).

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Summary Judgment filed by Plaintiff having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Plaintiff's Motion for Summary Judgment is granted, and it is determined that Defendant-Debtor Diolinda Machado's debt owing to Plaintiff Mary Machado for restitution in the amount of $351,303.94, plus the interest and any related costs and expenses permitted under applicable law for the enforcement thereof are nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A), 11 U.S.C. § 523(a) (6), and 11 U.S.C. § 523(a)(7), and each of them, as separate and independent grounds for nondischargeability of such debt.

Counsel for Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this Order and the Ruling hereon that the obligation owing on the State Court Restitution Order is not discharged. The federal judgment is just a determination of nondischargeability of the State Court Restitution Order and is not a monetary judgment of this court.