

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Modesto, California

November 21, 2013 at 10:30 a.m.

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1. [13-90901-E-12](#) ANDREW NAPIER MOTION FOR COMPENSATION FOR
SAC-10 Scott A. CoBen SCOTT A. COBEN, DEBTOR'S
ATTORNEY(S), FEES: \$10,000.00,
EXPENSES: \$0.00
10-7-13 [[188](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, and Office of the United States Trustee on October 7, 2013. By the court's calculation, 45 days' notice was provided. 28 days' notice is required.

Final Ruling: The Final Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the 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 First and Final Application for Fees is granted. No appearance required.

FEES REQUESTED

Scott A. Coben & Associates, Counsel for the Debtor, seeks compensation in this case of a fixed fee of \$10,000.00 with \$5,000.00 paid by the Debtor pre-petition and the balance to be paid through the Chapter 12 plan as an administrative expense.

Description of Services for Which Fees Are Requested

Before the Case is Filed: Counsel agreed to,

November 21, 2013 at 10:30 a.m.

1. Meet with the Debtor to review the Debtor's debts, assets, liabilities, income, and expenses.
2. Counsel the Debtor regarding the of filing either a chapter 7, 12, 13, discuss both procedures with the Debtor, and answer the Debtor's questions.
3. Timely prepare and file the Debtor's petition, plan, lists, statements, schedules, required documents and certificates.
4. Review with the Debtor the completed petition, plan, lists, statements, schedules, required documents and certifications, as well as all amendments thereto, whether filed with petition or later.
5. Explain which payments will be made directly to creditors by the Debtor and which payments will be made through the Debtor's chapter 12 plan.
6. Explain to the Debtor how, when, and where to make the chapter 12 plan payments.
7. Explain to the Debtor that the attorney is being engaged to represent the Debtor for all purposes in the case, except adversary proceedings.
8. Explain to the Debtor how and when the attorney's fees and chapter 12 trustee's fees are determined and paid.
9. Advise the Debtor of the necessity to maintain appropriate insurance including equipment insurance and liability, collision, and comprehensive insurance on vehicles securing loans or leases.

After the Case is Filed: Counsel agrees to,

1. Advise the Debtor of the requirement to attend the §341(a) meeting of the creditors and instruct the Debtor as to the date, time and place of the meeting. In joint cases, inform the Debtor that both spouses must appear.
2. Appear at the §341(a) meeting of creditors with the Debtor.
3. Timely serve the Debtor's plan on the chapter 12 trustee.
4. Timely provide to the chapter 12 trustee the Domestic Support Obligation Checklist (form EDC 3-088), Class 1 Checklist (form EDC 3-086), and Authorization to Release Information to Trustee Regarding Secured Claims Being Paid By the Trustee (form EDC 3-087) required by Local Bankruptcy Rule 3015-1(b)(6).

5. Timely respond to objections to plan confirmation and, where necessary, prepare, file, and serve an amended plan.
6. Prepare, file, and serve necessary modifications to the plan which may include suspending, lowering, or increasing plan payments.
7. Prepare, file and serve any necessary amended statements and schedules and any change of address, in accordance with information provided by the Debtor.
8. Object to improper or invalid claims, if necessary, based upon documentation provided by the Debtor.
9. Prepare and file a proof of claim, when appropriate, if a creditor fails to do so.
10. Prepare, file, and serve motions to modify the plan after confirmation, when necessary.
11. Prepare, file, and serve motions to buy, sell, or refinance property, when appropriate.
12. Prepare, file, and serve any other motion that may be necessary to appropriately represent the Debtor in the case.
13. Timely respond to all motions filed by the chapter 12 trustee, and represent the Debtor in response to other motions filed in the case including, but not limited to, motions for relief from stay.
14. Where appropriate, prepare, file, serve, and set for hearing motions to avoid liens on real or personal property and motions to value the collateral of secured creditors.
15. Represent the Debtor at a discharge hearing, if required.
16. Provide such other legal services as are necessary for the administration of the Debtor's case before the Bankruptcy Court.

The fixed fee will not include representation in appeals; court filing fees; court reporter fees for transcripts; or fees of expert witnesses.

Counsel argues that the Debtor agreed before this case was filed that Counsel would charge a fixed fee of \$10,000.00 to be paid \$5,000.00 pre-petition and the balance through the plan. To date, a motion to confirm the Chapter 12 plan was denied and a motion to confirm first amended plan was granted. The Debtor failed to attend the first meeting of creditors, but appeared at the continued hearing.

FEES ALLOWED

The court finds that the fixed fee reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$10,000.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 12 case.

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

Attorneys' Fees	\$10,000.00
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For a total final allowance of \$10,000.00 in Attorneys' Fees in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Scott A. Coben & Associates is allowed the following fees and expenses as a professional of the Estate:

Scott A. Coben & Associates, Counsel for the Estate Applicant's Fees Allowed in the amount of \$ 10,000.00. The allowed fees shall first be paid from the \$5,000.00 pre-petition retainer paid by the Debtor, which counsel is authorized to disburse from his trust account, and balance of \$5,000.00 paid by the Chapter 12 Trustee as provided in the confirmed Plan in this case.

2. [12-93104-E-7](#) JOHN/GIGI LAROCO
HSM-5 Robert L. Goldstein

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF HEFNER, STARK &
MAROIS, LLP FOR AARON A. AVERY,
TRUSTEE'S ATTORNEY(S), FEES:
\$9,946.50, EXPENSES: \$63.25
10-14-13 [[69](#)]

DISCHARGED 3-19-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on October 14, 2013. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

Final Ruling: The First and Final Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the 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 First and Final Application for Fees is granted. No appearance required.

FEES REQUESTED

Hefner, Stark & Marois, LLP, Counsel for the Gary Farrar, Chapter 7 Trustee, makes a First and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period January 22, 2013 through the November 21, 2013. The order of the court approving employment of counsel was entered on February 6, 2013.

Description of Services for Which Fees Are Requested

Recovery of Avoidable Transfers and Other Assets: Counsel spent 23 hours in this category, including .3 hour billed at no charge. Counsel describes the tasks performed as analyzing legal and factual issues related to Avoidable Transfers including fraudulent transfers, and advising and representing the Trustee in connection with Avoidable Transfers. Counsel also prepared a settlement agreement regarding Avoidable Transfers and

recovery of Tax Refunds. Lastly, Counsel drafted and obtained approval of Compromise Motion.

General: Counsel spent 5.3 hours in this category, including .1 hour billed at no charge. Counsel described the tasks performed as advise and represent Trustee in connection with general case matters, prepare Motion to Extend the Deadline to object to Debtor's Claims of Exemption and related stipulations.

Employment and Compensation: Counsel spent 5.5 hours in this category. Counsel described the tasks performed as initiating the case, and preparing the employment application for counsel and counsel's compensation application.

DISCUSSION

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.

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 as legal 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 legal services undertaken 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 [legal fee] tab 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 is obligated to consider:

- (a) Is the burden of the probable cost of legal 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 Counsel's services rendered a successful administration of the estate including recovery of avoidable transfers and assets as well as resolving issues related to tax refund. The Trustee recovered \$47,774.54 for the benefit of the estate and its creditors. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The average hourly rates for the fees billed in this case are \$294.28.00/hour for counsel (hourly rates ranged from \$295 to \$300). The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$9,946.50 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of \$63.25 for copies and faxes. The total costs in the amount of \$63.25 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Attorneys' Fees	\$9,946.50
Costs and Expenses	\$ 63.25

For a total final allowance of \$10,009.75 in Attorneys' Fees and Costs in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Hefner, Stark & Marois, LLP, is allowed the following fees and expenses as a professional of the Estate:

Hefner, Stark & Marois, LLP, Counsel for Chapter 7 Trustee Applicant's Fees Allowed in the amount of \$9,946.50
Applicants Expenses Allowed in the amount of \$63.25,

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

3. [13-90806-E-7](#) DAVID/MAELENA SMITH
GFG-7 Keith R. Wood

CONTINUED MOTION TO CONVERT
CASE FROM CHAPTER 7 TO CHAPTER
13
9-13-13 [[18](#)]

CONT. FROM 10-10-13

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

Correct 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 September 13, 2013. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Convert has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's decision is to grant the Motion to Convert. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

PRIOR HEARING

The Debtors seek to convert this case from Chapter 7 to Chapter 13. The Bankruptcy Code authorizes a one-time, near absolute right of conversion from Chapter 7 to Chapter 13. 11 U.S.C. § 706(a); see also *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007).

TRUSTEE'S OPPOSITION

Trustee Michael D. McGranahan, Chapter 7 Trustee opposes Debtor's attempt to convert the present case. Trustee argues that under 11 U.S.C. § 1307(c)(2) Debtor does not qualify for conversion because:

- A. Debtors have engaged in a pattern and practice of bad faith through amendments of their schedules;
- B. Debtors' declaration (for Mr. Smith) and their supporting documents filed for conversion do not demonstrate they will be able to have a viable or confirmable Chapter 13 Plan based

on the nonexempt assets which must be distributed to creditors;

- C. Debtors' notice of conversion is ambiguous and confusing in that it purports to both require and not require a response to the supporting motion by creditors and other parties in interest.

In presenting his analysis of the bankruptcy case to date, the Trustee directs the court's attention to the following specific acts and conduct of the Debtors.

First, when the case was filed the Debtor was unemployed, receiving unemployment insurance income of \$1,948.50 a month and the Co-Debtor was employed and receiving income of \$3,233.98 a month. Schedule I, Dckt. 1. The court's review of Schedule identifies that the Co-Debtor's gross income is \$4,659.22 a month, from which there are extensive deductions, including \$216.67 for "Hartford def comp," \$88.12 for COLA contribution, and \$1,133.58 for "Hartford loan."

Schedule B filed by the Debtors lists a "Pension Account with The Hartford" having a value fo \$112,112.83. On Schedule C this is listed as exempt pursuant to California Code of Civil Procedure § 703.140(b)(10)(E), which applies to a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor or any dependant of the debtor. Dckt. 1 at 14 and 17. No debt is listed on Schedule F for a loan taken out from "The Hartford."

The Trustee points out that based on Schedules I and J, filed by the Debtors under penalty of perjury, their expenses so exceed their income that they are currently running a negative (\$2,062.02) a month cash flow. Dckt. 1 at 28-29 and 30. Though it is stated in the Motion, the Debtors have offered no evidence as to what employment the Debtor may have obtained and have not provided declarations stating the post-petition changes in their income and expenses. FN.1

FN.1. On Schedule I the Debtor list 5 dependants, consisting of 3 minor children (ages 10, 17, and 17), an adult son (age 20), and the Co-Debtor's mother (age 79). Though listed as dependants, the Debtors fail to disclose what income or benefits that either the adult son or the mother receive and have available to contribute to this family unit if they are being claimed as dependants. On Form 22A the Debtors state that their debts are primarily non-consumer. Dckt. 1 at 51. In response to Question 18 of the Statement of Financial Affairs, the Debtors state that their business was "Santa Fe Investments & Improvements," which was to "fix & flip business that turned into landlord" which operated from 2005 to 2011. Dckt. 1 at 38.

Second, and this may well be the impetus of the conversion, the Trustee states that he has been actively administering this case, assembling assets of the estate consisting of at least three vehicles with nonexempt equity totaling \$13,675.00 and nonexempt equity in the Debtors' home which the Trustee values at \$83,000.00. Based on these values, the Trustee

projects that a Chapter 13 Plan would need to be funded by the Debtors with monthly plan payments of \$1,611.25 to \$2,361.25 a month, exclusive of Chapter 13 Trustee administrative expenses.

The Trustee asserts that the Debtors misrepresented the value of the Chiburis Court property in their schedules, stating that it had a value of \$247,500.00 and was subject to a lien of \$267,911.00. Then, the Debtors amended the schedules to restate the value to be \$247,500.00 to \$260,000.00. They then decreased the amount of the secured claim from \$267,911.00 to \$132,911.00. This decrease in the secured debt was identified as a decrease in the secured debt owed to the Debtors' son.

Each of the times the Debtors states, and then restated, without explanation, the increases and decreases, they did so under penalty of perjury. The Trustee asserts that the Debtors' valuation of the Chiburis Court property is "misleading," asserting that his investigation that the property has a value of at least \$340,000.00 (being a 3,340 square foot home, and projecting a value of \$100.00 a square foot).

DISCUSSION

A "bankruptcy judge may override a Chapter 7 debtor's conversion right based on a finding of bad faith." *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 379 (2007). The authority to convert is left to the discretion of the bankruptcy court. *Id.* at 377. In determining whether the debtor's conversion involved bad faith, "a bankruptcy judge must review the totality of the circumstances." *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994). Under the "totality of the circumstances" test, the court examines whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or filed his Chapter 13 petition or plan in an inequitable manner. *Id.* Debtor's history of filings and dismissals is relevant in determination of "bad faith." *Id.*

The Trustee is correct, when parties make statements under penalty of perjury they have significance. When parties recant such statements with new, different fact statements, the court is left unsure as to when the person is telling the truth and when they are saying whatever "helps win the case," unless a plausible explanation is provided for the change. It is troubling when values of assets bob about. It is even more troubling when a debt "owed" to a family member insider is stated at one amount (which coincidentally allows the debtor to make it appear property is over encumbered), and then when the Trustee begins looking about, it changes.

The statements under penalty of perjury by the Debtors include the following, in chronological order.

Document and Date Filed	Value of the Property	Claims Secured by the Property	Exemption Claimed in the Property	Andrew Smith Claim Secured by 2 nd Deed of Trust
April 26, 2013 Schedule A	\$247,500	(\$267,911)		
April 26, 2013 Schedule D				(\$175,000)

April 26, 2013 Schedule C			\$0	
August 14, 2013 Schedule A	\$260,000	(\$132,911)		
August 14, 2013 Schedule C C.C.P. § 704.950 (declared homestead)			(\$100,000)	
August 19, 2013 Schedule D				(\$40,000)

On August 21, 2013, the Chapter 7 Trustee filed his Notice of Assets and the Clerk's Office issued a Notice to File Claims (Dckt. 16).

In September 13, 2013, the present motion was filed. Dckt. 18. The Debtor's provided their declaration in support of the Motion. Dckt. 21. However, in the Declaration the Debtors fail to provide their testimony under penalty of perjury. Rather, they (intentionally or unintentionally) merely state that they make their statements only "respectfully submitted." Their signature block (for which there are "/s/ signatures") is orphaned on a page separate and apart from any of the respectfully stated comments made by the Debtors.

As addressed by the Supreme Court the rights of a debtor to convert or dismiss a Chapter 13 case are almost absolute. However, the overriding factor goes to the core of bankruptcy proceedings. With the ability to get great benefits from bankruptcy, debtors must proceed in good faith, providing candid, honest information. The Ninth Circuit Court of Appeals most recently review this concept in *Danielson v. Flores (In re Flores)*, ___ F.4th ___, 2013 U.S. App. LEXIS 18413 (9th Cir. 2013), stating,

"Finally, our interpretation of § 1325(b)(1)(B) is consistent with the policies that underlie the Bankruptcy Code and the BAPCPA amendments. "The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama v. Citizens Bank*, 549 U.S. 365, 367, 127 S. Ct. 1105, 166 L. Ed. 2d 956 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286, 287, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991))."

The Collier on Bankruptcy discussion of Marrama notes there being a simple, practical reason for the conversion right to 13 being "almost absolute," if converted it is the bankruptcy judge who will consider whether it should be reconverted to a Chapter 7 due to the debtor's conduct. 6 COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 706.02.

At this juncture, the conduct of the Debtors raises significant credibility and truthfulness issues. The court has to question, "what is the value of the property?," "what are the liens against the property?," "how do the Debtors not know and misstate the amount of the debt owed to their son?," and "how are the Debtors going to fund a plan without any positive income?" Possibly *bona fide*, good faith answers exist to these questions, but the Debtors have mutely failed to provide them.

The court would be well justified to maintain this as a Chapter 7 case and provide the Debtors and their counsel with exactly what they sought - the extraordinary relief of a Chapter 7 case and the bankruptcy trustee proceeding with an orderly liquidation of their assets. Such would be of no surprise to the Debtors.

However, the court afforded the Debtors the opportunity to prove their good faith and ability to prosecute a Chapter 13 case. The court continued the hearing and required the following,

- A. On or before November 7, 2013, the Debtors shall file and serve on the Chapter 7 Trustee, counsel for the Chapter 7 Trustee, and the U.S. Trustee, an independent third party valuation of the 3700 Chiburis Court, Modesto California property.
- B. On or before November 7, 2013 the Debtors shall file and serve on the Chapter 7 Trustee, counsel for the Chapter 7 Trustee, and the U.S. Trustee, an accounting for the loan made by their son Andrew Smith, copies of all loan documents (including deed of trust), documentation of the monies paid to or for the Debtors which comprise the loan, and statement of when the monies were loaned, interest computation, and payments made by or for the benefit of the Debtors.
- C. That the Debtors shall, as a condition of converting the case, pay through their Chapter 13 Plan the full amount of the Chapter 7 Trustee's fees and expenses and the fees and expenses of counsel for the Chapter 7 Trustee based on the assets which would have been administered by the Chapter 7 Trustee. These administrative expenses shall be in addition to the amount which the Debtors are otherwise required to pay to creditors and Chapter 13 Trustee administrative expenses in the Chapter 13 case.

DEBTOR'S SUPPLEMENTAL PLEADINGS

Debtors filed a supplemental Declaration on November 7, 2013, stating that since filing the Chapter 7 petition, they have had a significant change in income, with Debtor David Smith gaining full time employment will gross income \$8,333.66. Debtors state at the time of filing they believed their home to be worth \$247,500.00, based on the purchase price of the residence in 2011. Debtor obtained an independent valuation, which determined the value of the real property at \$375,000.00- \$395,000.00. Based on this valuation, the Debtors believe the value of the home is significantly greater than initially stated on the petition. Debtors have filed an amended Schedule A valuing the property at \$395,000.00.

Debtors further state that when originally purchasing the home, their son was to loan them \$175,000.00 but could only lend them \$40,000.00 just before purchasing. This was the cause of the confusion as they were not clear with their attorney the amount of the loan. The Deed of Trust was mistakenly made out for \$175,000.00 but the promissory note was for

\$40,000.00 attached to the Deed of Trust. The balance on the loan, as of November, 2013, is \$35,279.92.

Debtors testify that when they filed the Chapter 7 petition, their credit report listed numerous debts that they were no longer legally responsible for, including mortgages from properties that were subject to foreclosure. Debtors state they were advised to include the full amounts of the loans as they showed on our credit report, as this would make it easier to remove the debts if a dispute ever arose with the credit bureau. Debtors state they have filed an amended Schedule F correcting the balances.

Debtors state they though they have made mistakes on the petition, they have been forthcoming with the Trustee and have filed amendments to correct any mistakes. Debtors testify that they did not intend to mislead the court. Debtors state that should they be permitted to convert the case to one under Chapter 13, they would be able to pay 100% of the unsecured claims and would pay the full amount of the Chapter 7 Trustee's fees and expenses.

Based on a review of the file, the amended documents provided by the Debtors, the testimony of the Debtors and the condition that the Chapter 7 Trustee's fees and expenses be paid through the Chapter 13 plan, the court grants the Motion to Convert.

In converting the case to one under Chapter 13, the court has relied upon the representations of the Debtors that they will prosecute the Chapter 13 case, perform the Chapter 13 Plan, properly provide for payment of creditor claims, and pay the Chapter 7 administrative expense. Failure to do so shall be grounds for the Chapter 13 Trustee, U.S. Trustee, or other party in interest seeking to have the case reconverted to one under Chapter 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 to Convert 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 Convert is granted and the case is converted to a proceeding under Chapter 13 of Title 11, United States Code.

IT IS FURTHER ORDERED that the Chapter 7 Trustee's fees, the maximum amount computed based on a projected amount which would have been distributed by the Trustee in a Chapter 7 case, shall be paid through the Chapter 13 Plan as an administrative expense.

IT IS FURTHER ORDERED that failure to prosecute the Chapter 13 case, perform the Chapter 13 Plan, properly

provide for payment of creditor claims, and pay the Chapter 7 administrative expense. Failure to do so shall be grounds for the Chapter 13 Trustee, U.S. Trustee, or other party in interest seeking to have the case reconverted to one under Chapter 7.

4. [11-94410-E-11](#) **SAWTANTRA/ARUNA CHOPRA** **MOTION TO SELL**
HSM-13 **Robert S. Marticello** **10-25-13 [639]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 24, 2013. By the court's calculation, 28 days' notice was provided, 21 days' notice is required.

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (2) and Federal Rule of Bankruptcy Procedure 2002(a) (2). Consequently, the creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Sell Property.

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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Bankruptcy Code permits the Trustee to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b). Further, 11 U.S.C. Section 363 permits the Trustee to sell property free and clear of liens if such interest is in bona fide dispute. 11 U.S.C. §§ 363(f) (4).

Here, the subject of this Motion is all bankruptcy estate's right, title, and interest in :

(1) "Personal Assets": all items of tangible personal property located at 6978 Hillcrest Drive, Modesto, CA, consisting of the household goods and furnishings, books, pictures and other art objects, etc., wearing apparel, furs

and jewelry, and other items generally described or identified in Items Nos. 4, 5, 6 and 7 of Debtors' Amended Schedule B filed on June 10, 2013;

(2) "Home Equity": the equity, if any, in real property located at 6978 Hillcrest Drive, Modesto, CA identified in Debtors' Amended Schedule A filed June 10, 2013; and

(3) "Vehicles": the five vehicles identified in Item No. 25 of Debtors' Amended Schedule B.

Subject to the Purchase Agreement and overbidding, the assigned purchase price for the above assets are (1) \$52,415.00 for the "Personal Assets"; (2) \$40,000.00 for the "Home Equity"; and (3) \$5,000.00 for the "Vehicles."

Value of the Assets

The Trustee will sell the above property to the Debtors for the sum of \$97,415.00 or such higher sum as the Debtors or other persons may bid at the hearing of this Motion. The Trustee concluded that based on his investigation, the purchase price of \$97,415.00 is a fair price for the assets in question. Regarding the Personal Assets, the Trustee concluded that \$72,080.00 is a reasonable price after a personal tour, discussions with the Debtors, and review of the Debtor's insurance coverage for the Personal Assets. The Debtors has exempted \$19,480.00 of the Personal Assets, leaving \$52,600.00 in equity. The assigned \$52,415.00 purchase price is reasonable since it is only \$185 less than the valuation.

The purchase price of the Home Equity is obtained by the Debtors' valuation (\$79,000.00, the Trustee has determined to be high after consulting with his real estate consultant) of their residence in their Amended Schedule A less the amount of lines secured against the Debtors' Residence. The liens includes but not limited to a first deed of trust in the amount of \$385,413.05 and judgment debt in excess of \$2,000,000.00 owed to Bank of the West or its assignee. In addition, the Trustee has determined that the estate's ability to administer the Debtors' Residence and generate net sales proceeds is highly speculative. Therefore the \$40,000.00 is reasonable even though the judgment is secured by other properties and subjects to certain credits.

The Purchase Price allocable to the Vehicles is based on Debtors' valuations, exemptions, secured claims and lease status of the vehicles. Vehicles appear to have been leased except for the 2007 Cadillac and the 2007 Mercedes. The Estate is not maintaining the lease payments on the payments and one or more of the leased vehicles have been returned to the lessor. One remaining Vehicle, the Cadillac Escalade, is over-encumbered. Trustee believes that the other remaining vehicle, the 2007 Mercedes has been repossessed. In light of the above facts, the Trustee concluded that the sum of \$5,000.00 for the estate's remaining interest in the Vehicles is reasonable.

Further, the Trustee contends that the overbidding will provide an additional opportunity for the estate to test the market for the values of

the Assets. The Proposed sale will enable the Trustee to recover substantial value to the state for the benefit of the creditors, pending the continued administration of the Excluded Property, without having to further administer the assets. Therefore, the proposed sale reduce further administration of the above assets, thereby avoiding what may be significant additional fees and expenses.

Discussion of Section 363(f)

Trustee asserts that Bank of the West ("BOW") has filed several secured claims against the Debtors' residence. The Debtors' residence will remain subject to Hillcrest Deed of Trust and the Abstract of Judgment (See Purchase Agreement, § 5). The Motion does not affect the liens asserted by BOW.

Moreover, the assets are being sold free and clear of any lien, claim, encumbrance, or interest arising from any judgments obtained by BOW. The only relevant assets are the Personal Assets described in No. 1 of Exhibit A to the Purchase Agreement and the Vehicles described in No. 3 of Exhibit A to the Purchase Agreement ("Personal Property"). The sale of the Personal Property is appropriate under 11 U.S.C. § 363(f)(4) because such liens are in bona fide dispute. First, any liens arising from the Abstract of Judgment do not encumber the Personal Property. Second, the Abstract of Judgment, the Judgment Lien, and the ORAP Lien were recorded during the 90-day period (October 1, 2011 to December 30, 2011).

The Trustee has provided overbidding procedures, if required.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate. The Motion to Permit Debtor to Sell Property is granted, subject to the court considering any additional offers from other potential purchasers at the time set for the hearing for the sale of the property.

A minute order substantially in the following form shall be prepared and issued by the court:

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

The Motion to sell property filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Gary Farrar, the Chapter 11 Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) and (f) to nominee ("Buyer"), the properties described as:

1. "Personal Assets": all items of tangible personal property located at 6978 Hillcrest Drive, Modesto, CA, consisting of the household goods and furnishings, books, pictures and other art objects, etc., wearing apparel,

furs and jewelry, and other items generally described or identified in Items Nos. 4, 5, 6 and 7 of Debtors' Amended Schedule B filed on June 10, 2013;

2. "Home Equity": the equity, if any, in real property located at 6978 Hillcrest Drive, Modesto, CA identified in Debtors' Amended Schedule A filed June 10, 2013; and

3. "Vehicles": the five vehicles identified in Item No. 25 of Debtors' Amended Schedule B.

on the following terms:

1. Sell the sale assets to the Debtors on the terms and conditions set forth in the Purchase Agreement to the successful overbidders on the sale assets, or components thereof, at the hearing on the Motion, free and clear of the BOW/Triunfo Acquisition One liens identified above, but subject to any or all other liens and encumbrances.
2. Sell the sale assets, or components thereof, on an "as is," and "with all faults," basis, with no representation or warranties, express or implied, with respect to the sale assets, with the Debtors responsible for all taxes due or owing in connection with the sale assets or which become due and owing in connection with the sale thereof.
3. Execute and deliver any and all documents that may be appropriate and/or necessary to consummate the sale.
4. Retain the sale proceeds for distribution as provided by the court in a subsequent order.

5. [11-93411](#)-E-11 SANJIV/SHEENA CHOPRA
RMY-38 Robert M. Yaspan

MOTION FOR LEAVE TO ALLOW
CREDITOR EDENATHAN, LLC TO
AMEND ITS PLAN BALLOTS AND TO
ALLOW DEBTORS TO TABULATE THE
AMENDED BALLOTS
11-7-13 [[850](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on November 7, 2013. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion for Leave to Allow Creditor to Amend Ballot was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion for Leave to Allow Creditor to Amend Ballot. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtor-in-Possession filed a "Joint Motion of Edenathan, LLC and Debtor for Leave to Allow Creditor Edenathan, LLC to Amend Its Plan Ballots and to Allow Debtors to Tabulate the Amended Ballots." While the Motion states it is a "joint" motion with Edenathan, LLC, only Robert M. Yaspan and Joseph G. McCarty, Attorneys for Debtors-in-Possession, have signed the Motion. Dckt. 850.

The court notes that Steven Morris, an attorney for Edenathan, LLC, filed a declaration which states that he submitted two timely ballots on behalf of his client, with the space on the ballots that identified the classes in which it was voting was inadvertently left blank. Dckt. 852. However, the Declaration does not state that this motion was filed "jointly" and Mr. Morris' signature does not appear on any of the other supporting pleadings.

Federal Rule of Bankruptcy Procedure 3018(a) provides that for "cause shown" and after noticed hearing the court may permit a creditor to

change or withdraw their vote. As long as the reason for the vote change is not tainted, the change of vote should usually be permitted, but the court must ensure only that the change is not improperly motivated. 9 COLLIER ON BANKRUPTCY ¶ 3018.01 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.) Rule 3018(a) provides that the bankruptcy court may, but not necessarily must, permit a creditor to change its cast ballot, certainly implying that the court is vested with discretion in making its decision. *Beal Bank USA v. In re Windmill Durango Office, LLC (In re Windmill Durango Office, LLC)*, 481 B.R. 51, 63 (B.A.P. 9th Cir. 2012).

At the hearing for Confirmation of the Second Amended Plan, this court made clear that a serious question exists as to the votes for and against confirmation. The court noted,

From reviewing the extensive narrative of the ballots submitted, the copies of the ballots, and the failure of the Debtors in Possession to set forth a simple table of ballots, it could well appear that such was done to create confusion with the court as to who actually voted, the amount of claim they asserted, the class in which they would properly vote, and the correct tabulation of the ballots actually cast.

The Second Amended Plan now before the court expressly creates a separate class for the Edenathan unsecured claim for \$2,511,600 (with proof of claim filed for \$2,730,000, with \$218,400 to be paid in Class 3). Pursuant to an agreement with Edenathan, it is to receive an 8% dividend on its claim, which is the same percentage as other creditors with general unsecured claims. Eight percent of the \$2,730,000 claim is \$218,400.00.

Edenathan is not part of the Class 3 Claims, the Debtor in Possession Second Amended Plan expressly excluding that claim. However, the tabulation of ballots set forth in counsel's declaration expressly misrepresents not only the classification of this claim, but attempts to double count it. There is no basis for the court inferring that such misrepresentation was inadvertent. This raises significant good faith issues for these Debtors in Possession and whether they can now meet the minimum requirement of proposing and prosecuting a Chapter 11 Plan, and prosecuting the Chapter 11 case in good faith.

Civil Minutes, Dckt. 834. The court also stated that in light of the questionable tabulation of ballots, the Debtors-in-Possession must file a simple tabulation of ballots in the form of a chart, identifying the creditors, the actual ballots timely delivered to counsel for the Debtors in Possession, the vote, the amount of their claim, and the date.

At the hearing, the court made clear that if the ballots were to be amended or changed, that the Creditor holding the right to vote must be the one to seek relief from the court, not the Debtors-in-Possession. Nevertheless, Debtor-in-Possession filed this "joint" motion for another

party in interest, Edenathan, LLC, to amend its ballot. Debtors-in-Possession do not have standing to alter the voting rights of creditors.

The Motion states that it should be granted to correct "an inadvertent error in failing to identify the classes in Edenathan's ballots." In seeking this relief, "Edenathan" (which is not the party filing the motion, is not seeking to amend its ballots for a "tainted" reason.

This is incorrect. As addressed earlier, the Debtor in Possession attempted to "gloss over" Edenathan's claim, trying to throw \$2,730,000 in one class and then an additional \$218,400 in another class to be paid 100% of the second claim. It appears that Edenathan did not know how to vote its claim and merely provided blank ballots to the Debtors in Possession to work whatever they needed to do to confirm a plan which appears to double pay Edenathan. Counsel for Edenathan provides no explanation as to why or how an experienced bankruptcy attorney would turn over blank, executed ballots to counsel for a debtor in possession.

Edenathan's blank ballot, voting to be double paid, does in fact taint the voting and the Debtors' in Possession Motion is denied. The court denies it without prejudice to Edenathan filing a motion, to be heard at the confirmation hearing, seeking to have its ballots allowed. Any such motion filed by Edenathan shall have as exhibits copies of the proposed ballots, fully competed, executed by an authorized signatory of Edenathan, and be for the dollar amounts which Edenathan believes that it is entitled to vote under the Plan. The ballots provided as exhibits shall be legible, not of the poor quality as filed in support of the Debtors' in Possession's Motion. Exhibits 3 and 4, Dckt. 854.

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 Leave to Allow Creditor to Amend Ballot 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 is denied as to the Debtors in Possession. This denial is without prejudice to Edenathan, LLC filing a motion for authorization to amend its ballots or file untimely ballots.

6. [11-93411](#)-E-11 SANJIV/SHEENA CHOPRA
RMY-39 Robert M. Yaspan

MOTION FOR DEBTOR AND FOCUS UP,
LLC AND DAVID KNAPP'S JOINT
MOTION FOR LEAVE TO ALLOW
CREDITOR TO FILE ITS PLAN
BALLOTS AFTER THE VOTING
DEADLINE AND TO ALLOW DEBTOR TO
TABULATE THE LATE BALLOTS
11-7-13 [[840](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, parties requesting special notice, and Office of the United States Trustee on November 7, 2013. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion for Leave to Allow Creditor to File Ballot After Voting Deadline was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion for Leave to Allow Creditor to File Ballot After Voting Deadline. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtor-in-Possession filed a "Joint Motion for Leave for Creditor to File its Plan Ballots After the Voting Deadline and to Allow Debtors to Tabulate the Amended Ballots." While the Motion states it's a "joint" motion with Focus Up, LLC and David Knapp, only Robert M. Yaspan and Joseph G. McCarty, Attorneys for Debtors-in-Possession, have signed the Motion. Dckt. 850. The court notes that David Knapp, owner and manager for Focus Up, LLC, filed a declaration which states that he did not know he had to send a ballot and was not aware of the voting deadline due to illness. Dckt. 844. However, the Declaration does not state that this motion was filed "jointly" and Mr. Knapp's signature (or that of his Counsel) does not appear on any of the other supporting pleadings.

Federal Rule of Bankruptcy Procedure 3018(a) provides that for "cause shown" and after noticed hearing the court may permit a creditor to change or withdraw their vote. As long as the reason for the vote change is not tainted, the change of vote should usually be permitted, but the court must ensure only that the change is not improperly motivated. 9 COLLIER ON BANKRUPTCY ¶ 3018.01 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.) Rule 3018(a) provides that the bankruptcy court may, but not necessarily must, permit a creditor to change its cast ballot, certainly implying that the court is vested with discretion in making its decision. *Beal Bank USA v. In re Windmill Durango Office, LLC (In re Windmill Durango Office, LLC)*, 481 B.R. 51, 63 (B.A.P. 9th Cir. 2012).

At the hearing for Confirmation of the Second Amended Plan, this court made clear that a serious question exists as to the votes for and against confirmation. The court noted,

From reviewing the extensive narrative of the ballots submitted, the copies of the ballots, and the failure of the Debtors in Possession to set forth a simple table of ballots, it could well appear that such was done to create confusion with the court as to who actually voted, the amount of claim they asserted, the class in which they would properly vote, and the correct tabulation of the ballots actually cast.

Civil Minutes, Dckt. 834. The court also stated that in light of the questionable tabulation of ballots, the Debtors-in-Possession must file a simple tabulation of ballots in the form of a chart, identifying the creditors, the actual ballots timely delivered to counsel for the Debtors in Possession, the vote, the amount of their claim, and the date.

At the hearing, the court made clear that if the ballots were to be amended or changed, that the Creditor holding the right to vote must be the one to seek relief from the court, not the Debtors-in-Possession. Nevertheless, Debtor-in-Possession filed this "joint" motion for another party in interest, Focus Up, LLC and David Knapp, to allow its ballot to be late-filed. Debtors-in-Possession do not have standing to alter the voting rights of creditors.

A declaration prepared by counsel for the Debtors in Possession has been signed by David Knapp. Mr. Knapp states that illness precluded him from timely providing a ballot to counsel for the Debtors in Possession. The court, taking into consideration Mr. Knapp's illness, grants leave to file a ballot. The ballot which has been filed as Exhibit 4, Dckt. 845 is illegible. The ballot, which shall be legible, for Focus Up, LLC shall be executed and received by counsel for the Debtors in Possession, by December 3, 2013.

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 Leave to Allow Creditor to File Ballot After Voting Deadline 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 is granted and Focus Up, LLC is authorized to execute and deliver to counsel for the Debtors in Possession, on or before December 3, 2013, a ballot voting on the proposed Chapter 11 Plan.

7. [13-91315-E-7](#) **APPLEGATE JOHNSTON, INC.** **MOTION TO ABANDON**
MDM-3 **George C. Hollister** **10-29-13 [266]**

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

Correct Notice Provided. The Proof of Service filed on October 29, 2013, states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, other parties in interest, and Office of the United States Trustee. By the court's calculation, 23 days' notice was provided. 14 days' notice is required.

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

The court's tentative decision is to grant the Motion to Abandon Real Property. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

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

A. 2011 Honda Civic, VIN # 2HGFA1F3XBH531155 ("Property A")

- B. 2011 Honda Civic, VIN # 2HGFA1F30BH548837 ("Property B")
- C. 2011 Honda Civic, VIN # 2HGFA1F39BH521121 ("Property C")
- D. 2012 Honda Civic LX, VIN # 19XFB2F57CE310144 ("Property D")
- E. 2012 Toyota Tacoma Cab, VIN # 5TFUX4EN2CX008928 ("Property E")
- F. 2013 GMC Yukon, VIN # 1GKS2CE08DR277093 ("Property F")
- G. Two storage containers (San Jose Environmental)
- H. One storage container (Defender's Lodge, San Jose)
- I. Miscellaneous hand tools (Bogard Construction, San Jose)
- J. Bobcat/trailer, office trailer, 2 containers and tools (Sausal, San Lorenzo)
- K. Office Equipment and Furniture

The values and encumbrances on property A, B, C, D, E, F (Vehicles) are listed as follows according to the Trustee's Declaration:

PROPERTY	VALUE	DEBT
A	\$9,800	\$11,000
B	\$9,800	\$11,000
C	\$9,800	\$11,000
D	\$11,000	\$14,000
E	\$19,000	\$23,000
F	\$32,000	\$53,000

Since the debt secured by the property exceeds the sales price, and the negative financial consequences to the Estate from retaining the property, the court determines that the property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

In addition, regarding property G, H, I, J (Job-Site Equipment), the Trustee states the properties have no net value to the estate. The containers have a value of approximately \$500 each; however, the cost to pick up the containers and transport them back to the auction site in Modesto, is estimated to be at least \$500. The tools have an estimated value of \$2-3,000; Bogard Construction has refused to turn over these tools and have removed them to their facility in San Jose. Likewise, Sausal Corp. has refused to turn over assets in its possession. Accordingly, the containers, and miscellaneous tools, have no net value to the estate. It should be noted that a significant amount of equipment has been picked up from the various job sites throughout the Bay Area and Central Valley, to be sold at auction. Moreover, All of the Job-Site Equipment is subject to one or more liens and encumbrances, including the lien(s) of WestAmerica Bank ("WAB"), rendering the equipment of no net value to the estate.

Regarding property K (Office Equipment and Furniture), the Trustee and his auctioneer has already inspected the office located at 1016 12th Street, Modesto, California and determined that it had insufficient value to warrant the expense of picking up, transporting and selling at auction. The Office Equipment and Furniture includes the following properties: 24 desks (most are modules or desktops only), miscellaneous (est. 15) office chairs (those not included in auction sale), 18 tower (desk) computers, 32 keyboards, 19 laptop computers, 24 telephones, 3 copiers (leased), 37 file and storage cabinets, 6 printers, 1 conference table, 2 folding tables, 5 framed pictures, 10 partitions. In addition: miscellaneous office equipment and supplies, including step ladder, eraser boards, mini-refrigerator, shop vac, fire extinguishers, hole punch, label maker, heat sealer, and other small items. The item-counts given above are accurate to the best of the trustee's ability given the time constraints involved in preparing the inventory. The Trustee has a hand-drawn inventory of office equipment and furniture that can be made available upon request. All of the Office Equipment and Furniture is subject to one or more liens and encumbrances, rendering the property of no net value to the estate.

A minute order substantially in the following form shall be prepared and issued by the court:

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

The Motion to Abandon Property filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is granted and that the properties identified as:

- A. 2011 Honda Civic, VIN # 2HGFA1F3XBH531155 ("Property A")
- B. 2011 Honda Civic, VIN # 2HGFA1F30BH548837 ("Property B")
- C. 2011 Honda Civic, VIN # 2HGFA1F39BH521121 ("Property C")
- D. 2012 Honda Civic LX, VIN # 19XFB2F57CE310144 ("Property D")
- E. 2012 Toyota Tacoma Cab, VIN # 5TFUX4EN2CX008928 ("Property E")
- F. 2013 GMC Yukon, VIN # 1GKS2CE08DR277093 ("Property F")
- G. Two storage containers (San Jose Environmental)
- H. One storage container (Defender's Lodge, San Jose)
- I. Miscellaneous hand tools (Bogard Construction, San Jose)

during the covered period in an amount equal to the claim amount. Movant also states that pursuant to Paragraph 15 of the Premium Finance Agreement, it is entitled to recover its attorneys fees and costs. Movant incurred \$7,917.50 in attorneys' fees and \$409.18 in costs (for a total of \$8,326.68) in connection with its prosecution of relief from stay and related matters, and continues to incur attorneys' fees and costs prosecuting the instant Motion.

TRUSTEE'S OPPOSITION

Michael D. McGranahan, Chapter 7 Trustee opposes the motion, arguing that Movant asks this court to hold that a secured pre-petition creditor is entitled to an administrative claim if its collateral depreciates during the case. Trustee argues that Section 507 is only implicated if the creditor first obtains an adequate protection order, which did not occur in this case.

Trustee states that Movant does not have an administrative claim under 11 U.S.C. § 507(b) because adequate protection was not obtained first. However, it does not appear Movant is seeking claim under 11 U.S.C. § 507(b).

Trustee also argues that Movant does not have an administrative claim under 11 U.S.C. § 503(b)(1) because it did not provide a post-petition benefit to the estate. Trustee states that the loan was made and the claim incurred pre-petition and therefore cannot qualify as an administrative claim. Trustee states that Movant's argument that its failure to seek immediate relief from stay, which benefitted the estate and converted its prepetition claim into a postpetition claim, is not supported by authority.

Lastly, the Trustee argues that Movant has not established grounds for retroactive adequate protection, and that even if it had, the claim is grossly overstated. Movant seeks 76 days of retroactive adequate protection. Trustee states that Movant's initial hearing on its motion for relief was 37 days after the commencement of the case and represents the amount of time Movant was prevented from exercising its state law remedies. Trustee calculates this at \$495.18 per day, totaling \$18,321.66. Trustee states that Movant is not entitled to attorney fees as adequate protection.

WESTAMERICA BANK'S OPPOSITION

Creditor Westamerica Bank ("Creditor") opposes the Motion on the basis that Movant has not carried its burden to show entitlement to an administrative expense in any amount based on its pre-petition loan to the Debtor. Creditor also argues that the attorney fees spent by Movant's Counsel did not directly and substantially benefit or preserve the bankruptcy estate and are not party of any administrative claim. Creditor argues that Movant has not shown there is any unencumbered cash available to pay in full priority claims in this case or that there is a source of unencumbered cash to pay administrative claims. Creditor asserts that the only existing cash in the estate constitutes its or other creditor's cash collateral and Movant has no standing to surcharge its collateral.

MOVANT'S REPLY

Movant filed a reply, stating that it does not seek (i) to surcharge the Bank as it agrees only the Trustee has standing to assert surcharge claims, or (ii) a super-priority claim under Section 507. Movant argues that it seeks the economic loss it sustained, as expressed and supported by the Motion. Movant acknowledges that payment of its administrative claim may be subject to either further Court order and/or availability of unencumbered funds.

DISCUSSION

11 U.S.C. § 503 provides in pertinent part,

- (a) An entity may file a request for payment of an administrative expense;
- (b) After notice and a hearing, there shall be allowed administrative expenses ... including --
 - (1) (A) the actual, necessary costs and expenses of preserving the estate...

An administrative expense claim has priority over other unsecured claims. *Microsoft Corp. v. DAK Industries, Inc. (In re DAK Industries, Inc.)*, 66 F.3d 1091, 1094 (9th Cir. 1995). "Certainly, only post-petition debts can be treated as administrative expenses; pre-petition debts may not be granted administrative-expense priority." *In re Kadjevich*, 220 F.3d 1016, 1019 (9th Cir. 2000) (emphasis in original); 4 COLLIER ON BANKRUPTCY ¶ 503.06[2] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.)

The court applies a two-part test to determine whether a claim is entitled to administrative expense priority under section 503(b)(1)(A); first, it must arise from a transaction with the bankruptcy estate, and second, it must have directly and substantially benefitted the estate. *In re DAK Industries, Inc.*, 66 F.3d at 1094. The burden of proving an administrative expense claim is on the claimant. *Id.* The bankruptcy court has broad discretion to determine whether to grant such a claim and the actual, necessary costs and expenses of preserving the estate must be construed narrowly. *In re Palau*, 139 Bankr. 942, 944 (9th Cir. BAP 1992), *aff'd*, 18 F.3d 746 (9th Cir. 1994).

Here, Movant has not met its burden of proving an administrative expense claim. First, it is undisputed that the claim arose pre-petition, as the loan was made and the claim incurred pre-petition. Second, the primary purpose of section 503 is to induce entities to do business with a debtor after bankruptcy by insuring that those entities receive payment for services rendered. *In re DAK Indus.*, 66 F.3d at 1097. In this case, Movant was not induced to do business with the Debtor-in-Possession post-petition. Movant sought and obtained relief from the automatic stay so that it could resort to its collateral. The court granted that relief, as it would for any other creditor who seeks relief from the stay.

Therefore, the motion is denied.

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 Administrative Expense filed by AFCO Acceptance Corporation 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.

9. [13-91315-E-7](#) APPLGATE JOHNSTON, INC.
WFH-6 George C. Hollister

CONTINUED MOTION TO APPROVE
SURCHARGE AGREEMENT WITH
WESTAMERICA BANK FOR COSTS AND
EXPENSES INCURRED IN SELLING
DEBTOR'S ASSETS
9-12-13 [[132](#)]

CONT. FROM 10-10-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on September 12, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to grant the Motion to Approve Surcharge Agreement. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

PRIOR HEARING

Michael D. McGranahan, the Chapter 7 Trustee moves for an order allowing the Trustee to enter into a surcharge agreement with WestAmerica Bank for costs and expenses incurred in selling Applegate Johnson, Inc.'s assets.

Trustee states he has filed a Motion to Sell Assets Free and Clear of Liens concurrently with this motion. WestAmerica Bank asserts a lien on many, but not all the assets pursuant to a security agreement. The Trustee states that he, his counsel and Huisman Auctions' efforts to gather and sell WestAmerica Bank's collateral will benefit WestAmerica Bank and that these are reasonable and necessary costs associated with the sale of the equipment.

Trustee states that he has reached an agreement with WestAmerica Bank to surcharge the sale proceeds. The Agreement provides that the Debtor's estate will receive 20% of the net proceeds from the sale of

collateral - which will be the gross proceeds, less the commission and expenses paid to Huisman Auctions and the approved fees of Wilke Fleury Hoffelt Gould & Birney, LLP for services related to the equipment and the sale.

CREDITOR AFCO ACCEPTANCE CORPORATION

Creditor AFCO Acceptance Corporation opposes the motion on the grounds that the Trustee has not shown evidence of Westamerica Bank's claim against the property and that the motion and declaration do not address the secured claim or that a surcharge agreement was not attached to the motion.

Creditor argues that the Bank, the attorneys and the auctioneer should not be paid before it, as Creditor provided insurance policies that remained in place, at its expense, from the petition date. Creditor argues that it should not be excluded from being reimbursed for the premiums associated with the policies it financed.

The court denies the evidentiary objections filed by Creditor against the Chapter 7 Trustee, as they are all made on the Chapter 7 Trustee's personal knowledge.

WESTAMERICA BANK'S RESPONSE

Westamerica Bank responds to AFCO's objection, stating it has not stated any legal authority to suggest that the Court should disturb the Trustee's reasoned and reasonable business judgment in requesting authority to enter into a proper surcharge agreement with the Bank to confer benefits to the bankruptcy estate.

TRUSTEE'S REPLY

The Trustee filed a reply, stating that none of the issues raised by Creditor AFCO provide a basis to deny the motion to enter into a surcharge agreement related to the sale of a secured creditor's collateral.

Trustee also states that on September 25, 2013, Westamerica Bank filed Proof of Claim No. 35-1, which is supported by a commercial security agreement, UCC Financing Statement and continuation statements, all which establish their first-priority security interest in the accounts, equipment, machinery and tools. The Trustee stated he received some of these documents during negotiations and is satisfied that Westamerica Bank has a valid security interest in the assets being sold that will generate the sales proceeds at issue in the surcharge agreement.

Trustee states that if AFCO is asserting an administrative claim, it must file a proper motion and obtain a court order allowing such administrative claim.

Trustee also argues that even if the court allowed such administrative expense of AFCO, it does not have authority to pay such an expense with Westamerica's collateral because in order to use such cash collateral, the Trustee needs the secured creditor's consent or a court

order. 11 U.S.C. § 363(c)(2). Trustee states that Westamerica indicated it will not consent to any surcharge relating to AFCO's claim.

The Trustee believes that the surcharge agreement benefits the estate.

DISCUSSION

11 U.S.C. § 506(c) provides that a creditor's collateral shall be surcharged reasonable and necessary "costs and expenses of preserving, or disposing of, [property securing a claim] to the extent of any benefit to the holder of such claim,..." Three conditions must be satisfied: (I) the expenses are "necessary" to preserve or dispose of the collateral, (ii) they are "reasonable," and (iii) the incurrence of the expenses provided a "benefit" to the secured creditor. 4-506 COLLIER ON BANKRUPTCY ¶ 506.05 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.)

Furthermore, an administrative claimant does not have an independent right to seek payment of its claim under section 506(c) from property encumbered by a secured creditor's lien since the statute reserves that right to the trustee. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000).

Here, Creditor AFCO does not raise bona fide objections to the Motion. Rather, its objections are that it suffered damage during the period that it had to wait to get relief from the automatic stay. This occurred because AFCO contends that its collateral (the termination return of premiums) declined during the period it was seeking relief from the stay. AFCO obtained the collateral it wanted to secure the pre-petition financing. Complaining that its choice of collateral was not the best is not grounds to deny a good faith settlement to determine a § 506(c) surcharge. FN.1.

FN.1. The fallacy of AFCO's position is show by the phrasing of its objection. "Where is AFCO's money? Why is AFCO not being paid the premiums for insurance policies that protected not only the estate and estate assets, but also the Bank's alleged collateral." Opposition, pg. 5:2-4. The simple answer is that AFCO is not an insurance company and was not insuring the property. Rather, it was a finance company that provided financing to the Debtor. AFCO had collateral for its loan and has realized on that collateral. That collateral is the "money" that AFCO bargained for when it made the loan. It has recovered that money as permitted by its security agreement and the Bankruptcy Code.

The creditor Westamerica Bank and the Chapter 7 Trustee have monetized the benefit for the estate incurring the cost and expense related to maintaining and selling the Property. Only those expenses that preserve, or are incurred in disposing of, the collateral fall within the purview of section 506(c), and then only to the extent that they are necessary and provide a benefit to the secured party.

The agreement allows the Estate to recover the auction expenses and legal expenses relating to the personal property in which Westamerica Bank asserts its lien. In addition to recovering these costs, the Estate will

also receive 20% of the sales proceeds. The recovery of these costs, plus an additional 20% of the net sales proceeds is consistent with the provisions of 11 U.S.C. § 506(c) which allow the surcharge for "the reasonable, necessary costs and expenses of preserving, or disposing of, such property [the collateral] to the extent of any benefit of the holder of such claim..."

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 Surcharge Agreement with Westamerica Bank for Costs and Expenses Incurred in Selling Debtor's Assets filed by 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 is granted and the auction proceeds from the sale of the personal property securing the claim of Westamerica Bank is surcharged in the following amounts:

- A. The fees and expenses authorized by the court to be paid to Huisman Auctions for the sale of personal property subject to the lien of Westamerica Bank;
- B. The attorneys' fees authorized by the court to be paid to Wilke, Fleiry, Hoffelt, Gould & Birney, LLP, as counsel for the Trustee, for services relating to the sale of the personal property subject to the lien of Westamerica Bank; and
- C. 20% of the net proceeds from the sale of the personal property subject to the lien of Westamerica Bank. Net proceeds shall be computed by subtracting from the gross proceeds of the sale of such personal property the auction fees and costs and the attorneys' fees provided in this order.

10. [13-91729-E-7](#) THOMAS/CECILIA MCCAULEY CONTINUED MOTION TO AVOID LIEN
BSH-1 Brian S. Haddix OF DISCOVER FINANCIAL SERVICES,
LLC
9-30-13 [9]

CONT. FROM 10-31-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on respondent creditors on September 30, 2013. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to grant the Motion to Avoid a Judicial Lien. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

PRIOR HEARING

The hearing on the Motion to Avoid a Judicial Lien was continued due to inadequate service. In the Proof of Service, the Debtors only showed that they served the Creditor, and not the U.S. Trustee and Chapter 7 Trustee.

Debtor served the U.S. Trustee and the Chapter 7 Trustee on November 5, 2013. Dckt. 20.

A judgment was entered against the Debtor in favor of Discover Bank for the sum of \$8,327.68. The abstract of judgment was entered against Debtors in Stanislaus County on January 27, 2012. That lien attached to the Debtor's residential real property commonly known as 13321 Sky Line Blvd, Waterford, California.

The motion is granted pursuant to 11 U.S.C. § 522(f) (1) (A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$124,000.00 as of the date of the petition. The unavoidable consensual liens total \$321,679.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b) (5) in the amount of \$1.00 in Schedule C. The

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

ISSUANCE OF A COURT DRAFTED ORDER

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the judgment lien of Discover Bank, Stanislaus County Superior Court Case No. 666454, Document No. 20120007257, recorded on January 27, 2012, with the Stanislaus County Recorder, against the real property commonly known as 13321 Sky Line Blvd, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

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

Correct Notice NOT Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) and Office of the United States Trustee on October 28, 2013. By the court's calculation, 24 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Reconsider has not been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f) (1) (ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's tentative decision is to deny the Motion to Reconsider without prejudice. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Trustee filed this Motion to Reconsider pursuant to Local Rule 9014-1(f) (1). According to Local Rule 9014(f) (1), 28 days' of notice is required. However, the Trustee filed this Motion on October 28, 2013, which is only 24 days' before the hearing. Incorrect service serves as an independent ground to deny Trustee's Motion.

If the parties agree to waive service or the Trustee requests leave to shorten time, the court will issue the following tentative ruling:

Michael D. McGranahan, Chapter 7 Trustee, asks the Court to reconsider its order granting debtor's application for waiver of the filing fee, pursuant to Federal Rule of Civil Procedure 59.

The debtor herein filed her chapter 7 petition on September 9, 2013. On or about September 9, 2013 debtor filed her application for waiver of the filing fee; on October 10, the court held a hearing on debtor's application; on October 15, debtor attended her 341 Meeting of Creditors; on October 18 the Court entered its order granting debtor's application for waiver of filing fee.

At the 341 Meeting of Creditors, Trustee states that he learned the information provided to the court in debtor's application was inaccurate, namely, her income is higher than reported, and exceeds the HHS Poverty Guidelines. Trustee argues that had this information been available to the court, the debtor's application would have been denied. Furthermore, due to the timing of the hearing on the application versus the 341 Meeting, it was not possible for the trustee to discover this information prior to the hearing. Trustee states that where the debtor lists her gross income as \$2,018.00 on Sch. I, this is in fact her net income, as reflected on her pay stubs and bank statements.

Pay stubs covering a representative period, 6/30/13 to 7/27/13, are provided as Exhibit A, and show net income for the period of \$2,093.45. Debtor also receives \$500/month in alimony/child support, therefore, her net monthly income is actually at least \$2,518.00. She claims, however, income of only \$2,358.00 on her application for waiver of filing fee. Debtor has two dependents. The HHS Guidelines of income for a family of three is \$2,441.25, which is less than her net monthly income.

DISCUSSION

Federal Rules of Civil Procedure Rule 60(b), as made applicable by Bankruptcy Rule 9024, governs the reconsideration of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

Red. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993). The court uses equitable principals when applying Rule 60(b). See 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Fed. R. Civ. P. 60(b)(6), is “a grand reservoir of equitable power to do justice in a particular case.” *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id.* at 863 n.11.

A condition of granting relief under Rule 60(b) is that the requesting party show that there is a meritorious claim or defense. This does not require a showing that the moving party will or is likely to prevail in the underlying action. Rather, the party seeking the relief must allege enough facts, which if taken as true, allows the court to determine if it appears that such defense or claim could be meritorious. 12 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶¶ 60.24[1]-[2] (3d ed. 2010); *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

Additionally, when reviewing a motion under Civil Rule 60(b), courts consider three factors: “(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default” *Falk*, 739 F.2d at 463.

The court’s policy is to not conduct a hearing on a fee waiver request until after the First Meeting of Creditors has been completed. The court in error scheduled the hearing on the fee waiver

for October 10, 2013, which pre-dated the October 18, 2013 First Meeting of Creditors. It is critical to the judicial process that the bankruptcy trustee be afforded the opportunity to conduct the First Meeting of Creditors and test the Debtor's stated financial information for the court to conduct a meaningful review of an application for a fee waiver.

Therefore, the motion is granted and the Civil Minute Order granting the Chapter 7 Filing Fee Waiver, Dckt. 18 is vacated. The Application for Fee Waiver shall be reheard at 1:30 p.m. on December 19, 2013.

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 Reconsider filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Reconsider is granted and Civil Minute Order granting the Chapter 7 Filing Fee Waiver, Dckt. 18 is vacated.

IT IS FURTHER ORDERED that the hearing on the Application for Fee Waiver shall be conducted at 1:30 p.m. on December 19, 2013.

12. [12-90836-E-7](#) **PATRICIA DAY**
[13-9023](#) **Pablo A. Tagre**
FARRAR V. DAY

**MOTION FOR ENTRY OF DEFAULT
JUDGMENT**
10-24-13 [27]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on October 24, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here the moving party failed to use a Docket Control Number. This is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

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

The court's tentative decision is to grant the Motion for Entry of Default Judgment. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Gary Farrar, Chapter 7 Trustee and Plaintiff in this Adversary Proceeding seeks a Default Judgment against Defendant Patricia Jean Day based on the Debtor's failure to disclose an asset of the bankruptcy estate.

Plaintiff states Defendant was duly served with the Adversary Proceeding Cover Sheet, Summons and Notice of Status Conference in an Adversary Proceeding, Complaint for Revocation of Discharge, Order to Confer on Initial Disclosures and Setting Deadlines, Notice of Availability of Bankruptcy Dispute Resolution Program, and General Order 98-5 in Re: Complaints filed against Pro Se Debtors, by regular mail on July 1, 2013, in accordance with Bankruptcy Rule of Procedure 7004.

Defendant's original deadline within which to file a responsive pleading to the Complaint was July 29, 2013. Defendant filed a Declaration of Debtor in Response to Trustee's Revocation of Discharge on July 26, 2013. She has filed no Answer as required by the court's minute order of September

5, 2013. Pursuant to Civil Minute Order of September 5, 2013 Defendant was ordered to file an amended answer on or before October 7, 2013. Defendant has failed to file an amended answer to the Complaint.

By order filed October 16, 2013, the court entered Debtor's default in this adversary proceeding and issued procedures for the filing of this Motion.

Plaintiff became aware that Defendant-Debtor had an interest in the real property in the Province of Alberta, County of Athabasca, Canada. Plaintiff argues that the discharge of the Debtor on July 2, 2012, was obtained through the fraud of the Debtor in that the Debtor was aware that she has an interest in the Property at the commencement of this case, which was not disclosed on her schedules or Statement of Financial Affairs, and was concealed from the Bankruptcy Court and the Trustee, thereby preventing the Trustee from administering the asset. 11 U.S.C. § 727(d)(1) provides that the Court shall revoke a discharge if it was obtained through the fraud of the Debtor, and the requesting party did not know of the fraud until after the granting of such discharge. Trustee states the intentional failure to advise the Trustee and the Court of a realized asset of the estate constitutes fraud in fact and such fraud would have prevented the entry of the discharge had it been known and timely brought to the attention of the Court.

Trustee states that the conduct of the Debtor in knowingly and fraudulently failing to report the acquisition of estate property or entitlement thereto, or to deliver or surrender such Property to the Trustee herein, constitutes a basis to revoke the Debtor's discharge pursuant to 11 U.S.C. § 727(d)(2).

DEFENDANT'S LETTER

The court notes, that while not linked with this motion, on October 31, 2013, Defendant-Debtor filed a Change of Address and an update on the status of the case. Dckt. 35. Defendant-Debtor states she has not been able to acquire new legal counsel and she has paid her prior counsel with the last of her funds. Defendant-Debtor states she is confused and does not know what she is required to do. Defendant-Debtor states that her siblings are moving in a Court of Queen's Bench of Alberta to remove her name from the title and she is unsure how this will affect her case. Defendant-Debtor states she is also suffering from medical issues. Defendant-Debtor asks the court to advise her with her options.

DISCUSSION

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.* at 770.

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 Moore's Federal Practice - Civil ¶ 55.31 (Daniel R.

Coquillette & Gregory P. Joseph eds. 3rd ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which the court may consider in exercising its discretion include:

- (1) the possibility of prejudice to the plaintiff,
- (2) the merits of plaintiff's substantive claim,
- (3) the sufficiency of the complaint,
- (4) the sum of money at stake in the action,
- (5) the possibility of a dispute concerning material facts,
- (6) whether the default was due to excusable neglect, and
- (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471-72 (citing 6 Moore's Federal Practice - Civil ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.)).; *In re Kubick*, 171 B.R. at 661-662.

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. *See id.* at 775.

Pursuant to 11 U.S.C. § 727(d)(2), the court shall revoke a discharge granted if the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, knowingly and fraudulently failed to report the acquisition of or entitlement to such property or to deliver such property to the trustee. It is not sufficient merely to show that the debtor failed to report the acquisition of property; the plaintiff must show that the debtor "knowingly and fraudulently" failed to report. 6 COLLIER ON BANKRUPTCY ¶ 727.17 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.) The plaintiff may prove knowing and fraudulent behavior by showing that the debtor had access to the omitted information and either knew that failure to disclose it would be seriously misleading or that the debtor acted so recklessly as to imply fraudulent intent. *Fokkena v. Klages (In re Klages)*, 381 B.R. 550 (B.A.P. 8th Cir. 2008). A debtor's intent may be inferred from all the surrounding circumstances where the debtor's pattern of conduct supports a finding of fraudulent intent. *Id.* at 554.

Here, the Trustee has shown proper grounds to revoke the Debtor's discharge pursuant to 11 U.S.C. § 727(d)(2). The conduct of the Debtor in knowingly and fraudulently failing to report the acquisition of estate property or entitlement thereto, or to deliver or surrender such Property to the Trustee herein, is sufficient basis to revoke the Debtor's discharge pursuant to 11 U.S.C. § 727(d)(2). Debtor was aware that she has an interest in the Property at the commencement of this case, which was not disclosed on her schedules or Statement of Financial Affairs, and was concealed from the Bankruptcy Court and the Trustee. Debtor's letter stating that she does not

know what to do is not a sufficient defense to this Motion for Entry of Default Judgment. 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 for Entry of Default Judgment filed by 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 for Entry of Default Judgment is granted. The court shall enter judgment revoking Defendant-Debtor Patricia Jean Day's discharge.

Counsel for Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this order.

13. [13-91937-E-7](#) **JASON/DALENE DAVIS** **MOTION TO COMPEL ABANDONMENT**
JAD-1 **Jessica A. Dorn** 10-31-13 [9]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, all creditors, and Office of the United States Trustee on October 31, 2013. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Compel Abandonment was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (2). Consequently, the creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Compel Abandonment. 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. If the court's tentative ruling becomes its final

ruling, the court will make the following findings of fact and conclusions of law:

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

- | | |
|------------------------------------|------------|
| 1. Business supplies and equipment | \$3,400.00 |
| 2. 2000 Chevrolet 3500 | \$3,403.00 |
| 3. Accounts receivables | \$658.00 |

Debtor asserts the business property is subject to three claims of exemption in the amounts of \$3,400.00 for business supplies and equipment, \$3,403.00 for the 2000 Chevrolet 3500, and \$658.00 for the accounts receivables.

Since the exemption the property claimed by the Debtor exceeds the value of the property, and the negative financial consequences of the Estate retaining the property, the court determines that the property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

A minute order substantially in the following form shall be prepared and issued by the court:

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

The Motion to Abandon Property filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is granted and that the business property identified as:

- | | |
|------------------------------------|------------|
| 1. Business supplies and equipment | \$3,400.00 |
| 2. 2000 Chevrolet 3500 | \$3,403.00 |
| 3. Accounts receivables | \$658.00 |

on Schedule B are abandoned to Jason and Dalene Davis, the Debtors, by this order, with no further act of the Trustee required.

14. [10-91946-E-7](#) STEFANIE TEODORIU
SLF-5 Pro Se

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF THE SUNTAG LAW
FIRM FOR DANA A. SUNTAG,
TRUSTEE'S ATTORNEY(S), FEES:
\$12,000.00, EXPENSES: \$0.00
10-24-13 [[85](#)]

DISCHARGED 9-7-10

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 24, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The First and Final Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the 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 First and Final Application for Fees is granted. No appearance required.

FEES REQUESTED

The Suntag Law Firm ("Counsel"), Counsel for the Chapter 7 Trustee, makes a First and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period April 1, 2013 through date of application. The order of the court approving employment of counsel was entered on April 25, 2013.

Description of Services for Which Fees Are Requested

General Case Administration: Counsel spent 12.20 hours in this category. Counsel described the tasks performed as preparing employment application, corresponding with creditors, and preparing application for compensation.

Motion to Reopen Bankruptcy Case: Counsel spent 2.85 hours in this category. Counsel described the tasks performed as filing Motion to Reopen

Bankruptcy to include product liability claims relating to prescription drug the Debtor was using.

Employment of Special Litigation Counsel in the Lawsuit: Counsel spent 11.65 hours in this category. Counsel described the tasks performed as assisting the Trustee in retaining Mr. Allen as his special litigation counsel including preparing a Motion for Authorization to Employ Mr. Allen.

Compromise of Products Liability Lawsuits: Counsel spent 34.10 hours in this category. Counsel described the tasks performed as reviewing settlement agreement for Mr. Allen for a multi-district product litigation. Counsel also prepared motion to compromise and presented the settlement documents to the Court to review in camera.

Special Counsel's Fee Application: Counsel spent 12.20 hours in this category. Counsel described the tasks performed as preparing Mr. Allen's fee application and appearing at the hearing on Mr. Allen's fee application.

DISCUSSION

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 as legal 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 legal services undertaken 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 [legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

- (a) Is the burden of the probable cost of legal 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 Counsel's services rendered a successful administration of the estate, settlement of the products liability lawsuits, and retention of special counsel for the Trustee. The Trustee states the settlement amount, which is confidential, is being held by the Trustee and Counsel will be prepared to state this amount to the Court *in camera* at the hearing. Counsel represents that the amount is sufficient to pay all known administrative expenses in full and all unsecured creditors in full and to return a surplus to the Debtor.

Much of the fees, 34.10 hours (roughly \$8,008.50), were incurred in the compromise of the products liability lawsuit. Exhibit A, Summary Sheet, Dckt. 88. However, it appears that Mr. Allen and his law firm handed the litigation (and received fees from that settlement). Counsel had a much more limited roll. Counsel reviewed the terms of the settlement, prepared motion to compromise and at the hearing, presented the settlement documents to the Court to review *in camera*. The remainder of the time appears to be research and discussion how Counsel could seek bankruptcy court approval of the settlement with sufficient information to comply with Rule 9019 while maintaining the required confidentiality of the settlement agreement.

The court notes that Counsel reduced its fees, which totaled \$15,001.50, and only requests \$12,000.00 in fees (a reduction of approximately \$3,000.00). This reduction should account for the high amount of fees charged for the products liability lawsuit, which Counsel did not litigate.

FEES ALLOWED

The court finds that the fees are reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$15,001.50 and costs of \$49,64. However, Counsel has reduced the compensation for legal services rendered to \$12,000. The total attorneys' fees in the amount of \$12,000.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Attorneys' Fees	\$12,000.00
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For a total final allowance of \$12,000.00 in Attorneys' Fees in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that The Suntag Law Firm is allowed the following fees and expenses as a professional of the Estate:

The Suntag Law Firm, Counsel for the Estate
Applicant's Fees Allowed in the amount of \$12,000.00

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

15. [11-94146-E-11](#) DOMINIC/MARIA DEPALMA
Naresh Channaveerappa

CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
12-2-11 [[1](#)]

Debtors' Atty: Naresh Channaveerappa

Final Ruling: The Status Conference is continued to 10:30 a.m. on December 19, 2013, to be heard in conjunction with the motion to dismiss this case. No appearance at the November 21, 2013 Status Conference is required.

Notes:

Continued from 10/10/13 to be heard in conjunction with other motions on the calendar.

Operating Report filed: 10/24/13

[WFH-17] Application for Second Interim Allowance of Fees and Costs of Wilke, Fleury, Hoffelt, Gould & Birney, LLP filed 10/31/13 [Dckt 388], set for hearing 11/21/13 at 10:30 a.m.

[WFH-19] Trustee's Plan of Reorganization Dated November 7, 2013, filed 11/7/13 [Dckt 397]

[WFH-19] Disclosure Statement filed 11/7/13 [Dckt 398], set for hearing 12/19/13 at 3:30 p.m.

[DJP-1] Stipulation to Continue Farmers & Merchant Bank of Central California's Motion for Order Dismissing Chapter 11 Case filed 11/7/13 [Dckt 402]

16. [11-94146-E-11](#) DOMINIC/MARIA DEPALMA
DJP-1 Naresh Channaveerappa

CONTINUED MOTION TO DISMISS
CASE
9-12-13 [[366](#)]

CONT. FROM 10-31-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors', creditors holding the 20 largest unsecured claims], parties requesting special notice, and Office of the United States Trustee on September 12, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Dismiss Case has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the 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 Motion to Dismiss case is continued to 10:30 a.m. on December 19, 2013 pursuant to order of the court. No appearance required.

Creditor Farmers & Merchant Bank of Central California moves the court for an order dismissing the Chapter 11 case.

However, the parties filed a Stipulation to Continue Farmers & Merchant Bank of Central California's Motion for Order Dismissing Chapter 11 Case on September 26, 2013. Dckt. 377. The court approved the continuance of the motion to October 31, 2013, in the order dated September 28, 2013. Dckt. 378.

CONTINUANCE

At the October 10, 2013 hearing, the parties agreed and the court ordered that the hearing be continued to November 21, 2013. Dckt. 383.

CONTINUANCE

The parties filed a Stipulation on November 8, 2013 to continue the hearing to December 19, 2013. Dckt. 402. The court approved the continuance of the motion, in the order dated November 12, 2013. Dckt. 403.

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 Case filed by Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion is continued to 10:30 a.m. on December 19, 2013.

17. [11-94146-E-11](#) DOMINIC/MARIA DEPALMA MOTION FOR COMPENSATION BY THE
WFH-17 Naresh Channaveerappa LAW OFFICE OF WILKE, FLEURY,
HOFFELT, GOULD AND BIRNEY, LLP
FOR MEGAN A. LEWIS, TRUSTEE'S
ATTORNEY(S), FEES: \$104,161.00,
EXPENSES: \$2,369.85
10-31-13 [[388](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on October 31, 2013. By the court's calculation, 21 days' notice was provided. 21 days' notice is required.

Tentative Ruling: The Second Interim Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Second Interim Application for Fees. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

FEES REQUESTED

Wilke, Fleury, Hoffelt, Gould & Birney, LLP, Counsel for Michael D. McGranahan, Chapter 11 Trustee, makes a Second Interim Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period September 1, 2012 through September 30, 2013. The order of the court approving employment of counsel was entered on May 29, 2012.

Wilke Fleury has previously sought allowance of fees and costs. On November 28, 2012, the court approved Wilke Fleury's first interim application for fees of \$59,394.50 and costs of \$1,816.06. Dckt. 268.

Description of Services for Which Fees Are Requested

Asset Analysis and Recovery: Counsel spent 4.0 hours and incurred total fees of \$196.00 in connection with this task. Counsel described the tasks performed as assisting the Trustee with recovering insurance proceeds due to the damage to the Debtor's car and house including researching and advising Trustee on title issues.

Asset Disposition: Counsel spent 73.9 hours incurred total fees of \$20,726.00 in connection with this task. Counsel described the tasks performed as assisting the Trustee analyze which properties to sell to make the business viable. This involved analysis of secured claims, determination of income and taxes that will generated from the sale of various properties, and analysis of title of relevant property. Counsel drafted a Motions for Approval of Firehouse Property and Crop Production Services. The money generated from these sales was used to pay off various creditors.

Business Operations: Counsel spent 5.1 hours and incurred total fees of \$1,448.00 in connection with this task. Counsel described the tasks performed as assisting the Trustee with day-to-day issues with Debtor's business operation.

Case Administration: Counsel spent 16.5 hours and incurred total fees of \$4,196.50 in connection with this task. Counsel described the tasks performed as attending status conferences, preparing status conference statements, and communicating with creditors' counsel and Debtor's counsel about case status.

Cash Collateral (Financing/Cash Collections): Counsel spent 43.7 hours and incurred total fees of \$12,588.50 in connection with this task. Counsel described the tasks performed as working and communicating with relevant parties to develop acceptable budget. This included review of Debtors' bills and creditors' proofs of claim. Counsel also prepared four motions for cash collateral and attended the hearings.

Claims Administration and Objections: Counsel spent 2.4 hours and incurred total fees of \$670.50 in connection with this task. Counsel described the tasks performed as reviewing the proofs of claim filed by Stanislaus Tax Collector's Office and drafted a letter relating to payment of Crop Production Services' claim.

Claims and Plan: Counsel spent 31.4 hours and incurred total fees of \$9,207.50 in connection with this task. Counsel described the tasks performed as review of proof of claim of each of the creditors, in-person meeting with the Trustee and worked on plan reorganization. Counsel negotiated an adequate protection stipulation with Farmers and Merchants Bank in an effort to begin payment of its claim.

Fee/Employment Applications: Counsel spent 70.2 hours and incurred total fees of \$15,109.00 in connection with this task. Counsel described the tasks performed as calculating the Trustee's fees, preparing application for Trustee's fees and attending the hearing. Counsel also prepared its fee application and attending the hearing. Counsel also prepared two applications to employ special counsel, Mr. Johnston to assist the Trustee in communicating with the Debtors and Anthony Drew Rowe to assist the Trustee in evicting two tenants from Debtors' properties.

Other Contested Matters: Counsel spent 2.3 hours and incurred total fees of \$754.00 in connection with this task. Counsel described the tasks performed as negotiating several continuances of such motion.

Plan and Disclosure Statement: Counsel spent 99.1 hours and incurred total fees of \$28,577.50 in connection with this task. Counsel described the tasks performed as analyzing and negotiating various plan options and disclosure statements and developing plan reorganization.

Relief from Stay/Adequate Protection Proceedings: Counsel spent 40.9 hours and incurred total fees of \$10,687.50 in connection with this task. Counsel described the tasks performed as reviewing and responding to Motions for Relief from Automatic Stay. Counsel also negotiated an adequate protection stipulation with Farmers & Merchants' Bank of Central California.

DISCUSSION

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 as legal 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 legal services undertaken 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 [legal fee] tab 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 is obligated to consider:

- (a) Is the burden of the probable cost of legal 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 Counsel's services rendered a successful administration of the estate including ensuring efficient business operation, negotiating a Plan and selling two properties to pay creditors. As of October 23, 2013, the Trustee holds the sum of \$159,923.40 in unencumbered cash. The Trustee also holds the sum of \$62,972.55 in a cash

collateral account and monies may only be used in accordance with the court approved cash collateral budget.

Counsel states that the fees incurred on behalf of the Trustee were reasonable under the circumstances and it discounted its fees by \$24,349.00 as a professional courtesy discount to the Trustee. Counsel states two attorneys were actively involved in the case and Counsel recognized that his resulted in some duplication of efforts that should not be passed to the Trustee.

The court notes that several phone conferences by both counsel appear to be double billed. On April 30, 2013, both Ms. Lewis and Mr. Williamson billed .6 for conference call with client. On June 5, 2013, both Ms. Lewis and Mr. Williamson billed .9 for telephone conference with client. On July 3, 2013, both Ms. Lewis and Mr. Williamson billed .9 for telephone conferences with their client. On August 22, 2013, both Ms. Lewis and Mr. Williamson billed .2 for conference call. On August 29, 2013, both Ms. Lewis and Mr. Williamson billed .4 for conference all with Debtor's Counsel and .5 for conference call with client. On September 5, 2013, both Ms. Lewis and Mr. Williamson billed .8 for a conference call. On September 19, 2013, both Ms. Lewis and Mr. Williamson billed .3 for a conference call with Debtor's Counsel. On September 26, 2013, both Ms. Lewis and Mr. Williamson billed for a conference call with Debtor's Counsel and billed .6 hours. This totals approximately 5.2 hours of duplicate time, which, billed at the junior associate rate totals \$1,482.00 in fees. The court does not approve this duplicate amount of attorneys fees. FN.1.

FN.1. When multiple attorneys from one law firm are meeting with or conducting conference calls with a client, the record should clearly reflect either (1) the necessity of the two attorneys being present or (2) that the billing has been adjusted to take into account two attorneys being present (such as one attorney not billing or both attorneys showing a portion of the time as "no charge").

FEES ALLOWED

The hourly rates for the fees billed in this case are \$325.00-\$330.00/hour for Counsel Megan Lewis for \$45,620.50 in fees and \$275.00-\$285.00/hour for Counsel Steven J. Williamson for \$58,540.50 in fees. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided.

With the reduction of duplicate time, the total second interim professional fees for Counsel are allowed pursuant to 11 U.S.C. § 331, which are subject to final review pursuant to 11 U.S.C. § 330, in the amount of \$102,679.00. The court commonly authorizes the payment of 50% of the fees on an interim basis, which is \$51,339.50, from the available funds of the Estate as permitted by any stipulation or order authorizing the use of cash collateral or from unencumbered funds in a manner consistent with the order of distribution in this Chapter 11 case. The application to employ counsel not disclosing the payment of any prepetition retainer, Counsel is not authorized to apply any other funds to the payment of these interim fees.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of \$2,369.85 for copies, postage, telephonic court appearances, federal express, and travel to/from Modesto to meet with client and for court hearing. This court does not generally allow the recovery of court call expenses on the theory that generally counsel use the Court Call service to make themselves more competitive in a larger geographic area. For those counsel, the Court Call service is akin to having phones in the office, legal resources, a desk and chair. Therefore, the \$183.60 charged for Court Call is disallowed. The total costs in the amount of \$2,186.25 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

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

Attorneys' Fees	\$102,679.00
Costs and Expenses	\$2,186.25

For a total second interim allowance of \$104,865.25 in Attorneys' Fees and Costs in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Wilke, Fleury, Hoffelt, Gould & Birney, LLP is allowed the following fees and expenses as a professional of the Estate:

Wilke, Fleury, Hoffelt, Gould & Birney, LLP, Counsel for the Chapter 11 Trustee
Applicant's Fees Allowed in the amount of \$102,679.00
Applicants Expenses Allowed in the amount of \$2,186.25,

IT IS FURTHER ORDERED that this is an interim award of fees pursuant to 11 U.S.C. § 331, which are subject to final review and allowance pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that this is a interim allowance of fees and the debtor in possession is authorized to pay \$51,339.50 of the allowed fees and \$2,186.25 of the allowed expenses from funds of the Estate as permitted by a cash collateral stipulation or order, or from unencumbered monies of the estate as they are able to be paid in the ordinary course of business and from such funds that are unencumbered or are cash collateral authorized to be used pursuant to a cash collateral stipulation or order. Counsel is not

Tax Planning: Accountant spent 1.30 hours in this category for total fees of \$299.00. Accountant described the tasks performed as preparing tax protection for the sale of rental.

Tax Preparation: Accountant spent 1.50 hours in this category for total fees of \$713.00. Accountant described the tasks performed as preparing 2013 tax returns.

Fee application: Accountant spent .40 hours in this category for total fees of \$92.00. Accountant described the tasks performed as preparing fee application.

DISCUSSION

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).

19. [13-90148-E-7](#) MARK BRUX
ADJ-5 Patrick B. Greenwell

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF JOHNSTON &
JOHNSTON LAW CORP. FOR ANTHONY
D. JOHNSTON, TRUSTEE'S
ATTORNEY(S), FEES: \$4,825.00,
EXPENSES: \$0.00
10-31-13 [[59](#)]

DISCHARGED 7-2-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on October 31, 2013. By the court's calculation, 21 days' notice was provided. 21 days' notice is required.

Tentative Ruling: The Final Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Final Application for Fees. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

FEES REQUESTED

Anthony D. Johnston, Counsel for the Michael D. McGranahan Chapter 7 Trustee, 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 March 14, 2013 through October 31, 2013. The order of the court approving employment of counsel was entered on March 21, 2013.

Description of Services for Which Fees Are Requested

Asset Analysis and Recovery: Counsel spent 6.0 hours in this category for total fees of \$1500.00. Counsel described the tasks performed as reviewing Debtor's schedules and financial affairs to determine insurance

proceeds received by the Debtor post-petition. Counsel filed an objection to Debtor's claim of a "wild card" exemption for the insurance proceeds that were not turned over.

Asset Disposition: Counsel spent 6.3 hours in this category for total fees of \$1575.00. Counsel described the tasks performed as preparing the Motion to Sell and working with the escrow company and brokers to assist with the sale and purchase of the property.

Fee and Employment Motions: Counsel spent 7.0 hours in this category for total fees of \$1750.00. Counsel described the tasks performed as preparing Motion for Employment and Compensation for an accountant for the Trustee. Counsel also prepared this Motion for Compensation.

DISCUSSION

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.

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 as legal 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 legal services undertaken 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 [legal fee] tab 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 is obligated to consider:

- (a) Is the burden of the probable cost of legal 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 Counsel's services rendered a successful administration of the case through securing insurance proceeds from a claim for vandalism of real property commonly known as 6913 West Pierce Street, Phoenix, AZ, and preparation of various motions such as the Motion to Sell, Motion for Compensation and Motion for Employment of accountant. The bankruptcy estate currently has funds of approximately \$44,300.00.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$250.00/hour for counsel for 19.3 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$4,825.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel for the Trustee waived his costs.

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

Attorneys' Fees	\$4,825.00
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For a total final allowance of \$4,825.00 in Attorneys' Fees in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Anthony D. Johnston is allowed the following fees and expenses as a professional of the Estate:

Anthony D. Johnston, Counsel for the Estate
Applicant's Fees Allowed in the amount of \$4,825.00

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

20. [12-93249-E-7](#) ROBERT HORNAUER
CLH-1 Charles L. Hastings

MOTION TO AVOID LIEN OF
CAROLINE SERRATO AND CHERYL
BOWER
10-22-13 [[15](#)]

DISCHARGED 4-15-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on October 22, 2013. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Avoid a Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f) (1) (ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the 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 Motion to Avoid a Judicial Lien is continued to 10:30 a.m. on December 12, 2013, pursuant to this court's order, Dckt. 28. No appearance required.

The parties filed a stipulation to continue the hearing on the Motion to Avoid Judicial Lien to 10:30 a.m. on December 12, 2013. The court entered an order approving the stipulation on November 7, 2013. Dckt. 28.

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion is continued to 10:30 a.m. on December 12, 2013.

21. [12-91763-E-7](#) TERRY/JULIA LEIB
PBG-2 Patrick B. Greenwell

MOTION TO AVOID LIEN OF
CITIBANK (SOUTH DAKOTA), N.A.
10-24-13 [23]

DISCHARGED 10-9-12

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

Incorrect Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on October 23, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to deny the Motion to Avoid a Judicial Lien. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Motion is denied for insufficient service. Pursuant to Federal Rule of Bankruptcy Procedure 7004(h), Creditor Citibank (South Dakota), N.A., a federally insured depository institution, requires service at an address this court recognizes as proper. Debtor listed "399 Park Ave., New York, NY 10022" as the creditors' address for service. However, after searching on the Federal Deposit Insurance Corporation's website, this address does not appear proper. First, the FDIC lists Citibank (South Dakota), N.A. as "inactive as of July 1, 2011). Second, the FDIC lists 701 East 60th Street North, Sioux Falls, South Dakota as Citibank, N.A.'s address. Therefore, the Motion is denied for incorrect service.

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtors 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 Avoid Judicial Lien is denied without prejudice.

22. [12-91763](#)-E-7 TERRY/JULIA LEIB MOTION TO AVOID LIEN OF
PBG-3 Patrick B. Greenwell CITIBANK (SOUTH DAKOTA), N.A.
10-24-13 [29]

DISCHARGED 10-9-12

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

Incorrect Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on October 23, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to deny the Motion to Avoid a Judicial Lien. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Motion is denied for insufficient service. Pursuant to Federal Rule of Bankruptcy Procedure 7004(h), Creditor Citibank (South Dakota), N.A., a federally insured depository institution, requires service at an address this court recognizes as proper. Debtor listed "399 Park Ave., New York, NY 10022" as the creditors' address for service. However, after searching on the Federal Deposit Insurance Corporation's website, this address does not appear proper. First, the FDIC lists Citibank (South Dakota), N.A. as "inactive as of July 1, 2011). Second, the FDIC lists 701 East 60th Street North, Sioux Falls, South Dakota as Citibank, N.A.'s address. Therefore, the Motion is denied for incorrect service.

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtors 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 Avoid Judicial Lien is denied without prejudice.

23. [12-91763-E-7](#) TERRY/JULIA LEIB MOTION TO AVOID LIEN OF NORTH
PBG-4 Patrick B. Greenwell STAR CAPITAL ACQUISITION
10-24-13 [[35](#)]

DISCHARGED 10-9-12

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

Incorrect Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on October 23, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to deny the Motion to Avoid a Judicial Lien. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Motion is denied for incorrect service. Creditor North Star Capital Acquisition was not properly served. A search on the California Secretary of State website indicates that North Star Capital Acquisition address is 170 Northpointe Parkway, Suite 300, Amherst, New York. Debtor served Creditor at an El Segundo, California address. Therefore, the Motion to Avoid Lien is denied.

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtors 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 Avoid Judicial Lien is denied without prejudice.

24. [11-93765-E-7](#) JACK BIDDLE
[11-9077](#) TPH-1
PERKINS V. BIDDLE

CONTINUED MOTION FOR
COMPENSATION FOR THOMAS P.
HOGAN, PLAINTIFFS ATTORNEY(S),
FEES: \$27,548.00, EXPENSES:
\$2,093.12
9-11-13 [[61](#)]

CONT. FROM 9-26-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on September 11, 2013. By the court's calculation, 15 days' notice was provided. 21 days' notice is required.

Tentative Ruling: The Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Application for Fees. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

PRIOR HEARING

The Court set a briefing schedule and further hearing on the Motion for Prevailing Party attorneys' fees and costs. The hearing on the Motion was continued to 10:30 a.m. on November 21, 2013. Plaintiff seeks this attorney fee award based on California Civil Code 1708.6 (a)(1)(2) and (b)(c).

BACKGROUND

At the conclusion of trial held on August 14, 2013, as to Plaintiff Elizabeth Perkins and Defendant/Debtor Jack Biddle Jr, regarding the non-dischargeability of the State Court Judgment in the amount of \$180,611.60 entered in Stanislaus County Superior Court Case No. 647292 on December 2, 2010, the court found in favor of Plaintiff and against Defendant. Judgment, Dckt. 59.

FEES REQUESTED

Thomas Hogan, Law offices of Thomas P. Hogan, Counsel for Elizabeth Perkins, makes a Request for an award of attorney fees after a trial award of \$180,611.60, which was deemed a nondischargeable debt. The period for which the fees are requested is for the period November 2, 2011 through September 11, 2013.

On November 16, 2010, the Superior Court entered a Default Judgment in the amount of \$180,611.60 against Defendant Jack Biddle Jr. for Battery, Assault, Intentional Infliction of Emotional Distress and Negligence based on the Plaintiff's declaration in Support of a Default Judgment. On August 14, 2013, this Court upheld the State Court Judgment and rendered the \$180,611.60 a non-dischargeable debt. This motion seeks to request an award for attorney fees and costs for the Plaintiff incurred during the Service Period in order to receive the determination of non- dischargeability.

Description of Services for Which Fees Are Requested

Counsel provided total amount of \$27,548.00 in legal services for 139.8 hours including adversary complaint and filing of Motion for Compensation and \$2,093.12 for costs.

FIRST OPPOSITION BY TRUSTEE - September 18, 2013

The Trustee filed an opposition stating that the Applicant did not segregate work attributable to non-dischargeability claim and lumped activities in bankruptcy case in chief and probate proceedings. Trustee asserts that there are questionable times, charge and expense or lack of sufficient detail to attribute the matter to non-dischargeability.

The Trustee also points out that certain legal assistant/paralegal time is billed at \$120-\$180 per hour while an attorney time, other than Hogan, is billed at \$120 per hour. Additionally, Applicant has not provided biography as to the education, experience, or training of any legal assistants or paralegals who are assigned to the case, especially Katie Cochran and Jim Wisner who billed at \$170 and \$180 per hour. Lastly, Katie Cochran is not designated as paralegal who meets the requirements under the California Business and Profession Code § 6450.

The Trustee requests that Applicant's application be denied or adjusted.

REPLY BY APPLICANT - September 20, 2013

Applicant filed a reply to the Trustee's opposition.

Applicant asserts that the motion for compensation is for the services period of November 2, 2011 through September 11, 2013 are in regards to the bankruptcy case and in conjunction with the adversary process. Also, the billing statements are complete, with explanation of the service provided and time spent on the activity.

Applicants states that the legal services fees (\$5,306) and fees (\$511.50) for the probate proceedings are not included in the motion for compensation.

Applicant asserts that paralegal per hour rate is based on experience level. Applicant attached a declaration stating Katie Cochran's education, experience level, and qualifications. Applicant also said that majority of the services were provided Hogan (46.7 hours) and Katie Cochran (33.6 hours). Therefore, Applicant requests reduced the legal fees to \$19,722.00 and still requests \$2,093.12 for the costs.

SECOND OPPOSITION BY TRUSTEE - October 16, 2013

The Trustee filed a final response to Applicant's motion for compensation.

The Trustee acknowledges that Applicant reduced the legal fees to \$19,722.00 and still requests \$2,093.12 for the costs. Additionally, Applicant removed fees of \$5,306 attributable to the probate proceedings.

However, the Trustee still questions the hourly compensation for Katie Cochran at \$170.00 per hour while attorneys are being billed at \$120.00 per hour. If the Court decides to allow the \$170 per hour rate for Katie Cochran, the Trustee requests that clerical work such as filing or providing documents to clients be reduced to \$60 to \$90 per hour. Lastly, the Trustee requests that this motion for compensation should be considered post-petition expense rather than proof of claim.

OPPOSITION BY DEBTOR - October 23, 2013

Debtor filed an opposition to the motion for compensation. Debtor argues that the judgment in Superior Court of California, Stanislaus County, Case No. 647292, does not include an award for attorneys' fees. Additionally, Applicant did not provide authority to support request for attorneys' fees as a prevailing party in an adversary action pursuant to 11 U.S.C § 523(a)(6).

REPLY BY APPLICANT - November 21, 2013

Applicant filed a reply to the Debtor's and Trustee's oppositions.

Applicant states that it seeks attorneys fees based on the California Civil Code section 1708(a)(1)(2) and section 1708(b). Additionally, Applicant has provided authority under the Domestic Violence statutes including Family Code sections 6211 and 6203(a)-(d) for attorneys fees and costs.

Applicant does not address the issue of paralegal's billing rate that is raised by Trustee in the October 16, 2013 opposition. However, Applicant does not oppose the Court treating the motion for compensation as a post-petition expense.

DISCUSSION

This court follows what is referred to as the American Rule, meaning that attorney's fees are not generally available for suits in Federal Court. *Alyeska Pipeline Serv. Co. V. Wilderness Soc'y*, 421 U.S. 240 (1975); *Heritage Ford v. Baroff (In re Baroff)*, 105 F.3d 439, 441 (9th Cir. 1997). Generally, "[a]ttorney's fees may be awarded to an unsecured creditor in a bankruptcy proceeding only to the extent that state law governs the substantive issues and authorizes the court to award fees." *Thrifty Oil Co. v. Bank of America, NT&SA*, 322 F.3d 1039, 1040-41 (9th Cir. 2003). In a nondischargeability action, attorney fees can be included if the fees are recoverable under a state statute. *Bertola v. N. Wis. Prod. Co. (In re Bertola)*, 317 B.R. 95, 99-100 (9th Cir. BAP 2004). Therefore, Plaintiff must show some statutory right to attorney's fees to prevail.

Here, Counsel requests attorney fees pursuant to California Civil Code 1708.6 (a)(1), (2), (b) & (c). This section states,

(a) A person is liable for the tort of domestic violence if the plaintiff proves both of the following elements:

(1) The infliction of injury upon the plaintiff resulting from abuse, as defined in subdivision (a) of Section 13700 of the Penal Code.

(2) The abuse was committed by the defendant, a person having a relationship with the plaintiff as defined in subdivision (b) of Section 13700 of the Penal Code.

(b) A person who commits an act of domestic violence upon another is liable to that person for damages, including, but not limited to, general damages, special damages, and punitive damages pursuant to Section 3294.

(c) The court, in an action pursuant to this section, may grant to a prevailing plaintiff equitable relief, an injunction, costs, and any other relief that the court deems proper, including reasonable attorney's fees.

(d) The rights and remedies provided in this section are in addition to any other rights and remedies provided by law.

(e) The time for commencement of an action under this section is governed by Section 340.15 of the Code of Civil Procedure.

Thus, in order for the court to grant attorneys' fees pursuant to this section, the action must arise "pursuant to this section." Counsel argues that as attorney fees are recoverable under state statute in connection with the underlying claim that was involved in the non-dischargeability action, he has

provided sufficient evidence to show attorney fees are recoverable in this case.

The court finds sufficient basis pursuant to California Civil Code 1708.6(c) to award attorney's fees based on the underlying claim involved in the non-dischargeability action.

FEES ALLOWED

The hourly rates for the fees billed in this case are as following.

Title	Name	Per Hour Rate	Hours Billed
Attorney	Thomas Hogan	\$300.00	46.7 hrs
Attorney	Patrick Hogan	\$120.00	1.8 hrs
Attorney	Matt Tabo	\$120.00	9.1 hrs
Paralegal	Jim Wisner	\$180.00	27.7 hrs
Paralegal	Katie Cochran	\$170.00	33.6 hrs
Paralegal	Lisa Craig	\$180.00	4.1 hrs
Paralegal	Janet Arce	\$150.00	5.3 hrs
Paralegal	Tami Rhodes	\$110.00	1.6 hrs
Paralegal	Angelica Buchanan	\$120.00	1.6 hrs
Legal Assistant	Alex Casas	\$120.00	8.2 hrs

The court finds that the hourly rates reasonable for counsel. However, the court agrees with the Trustee that the paralegal and legal assistant work should be reduced and the court finds that \$100.00 per hour is an appropriate rate. Furthermore, Counsel now seeks an attorney fee award of \$19,722.00, for the 46.7 hours spent by Mr. Hogan (totaling \$14,010.00) and 33.6 hours spent by Paralegal Katie Cochran (totaling \$5,712), which would eliminate all other time spent by the para-professionals (including any clerical work). Billing Ms. Cochran's time at \$100.00 per hour would reduce the claim to \$3,360, for a total of \$17,370.00. The court finds that this fee reduction is appropriate considering the tasks billed by Ms. Cochran (phone calls, emails, letters, reviewing documents, and conferences).

The total attorneys' fees in the amount of \$17,370.00 are approved.

Counsel also seeks the allowance and recovery of costs and expenses in the amount of \$2,093.12 for copies and postage. The total costs in the amount of \$2,093.12 are approved.

As Counsel and the Trustee agree, the attorney fees will be treated as a post-petition expense rather than being included as part of Creditor's Proof of Claim.

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 Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Thomas P. Hogan is allowed the following fees and expenses as a professional of the Estate:

Thomas P. Hogan, Counsel for the Plaintiff
Applicant's Fees Allowed in the amount of \$17,370.00
Applicants Expenses Allowed in the amount of \$2,093.12.

The Attorneys' fees awarded are not part of the Plaintiff's claim in the Jack Biddle bankruptcy case, No. 11-93765.

25. [12-91565-E-7](#) EVERETT HUNTER
[12-9023](#)
EIDSON V. HUNTER, JR.

CONTINUED MOTION FOR
COMPENSATION FOR THOMAS P.
HOGAN, PLAINTIFFS ATTORNEY(S),
FEES: \$14,803.00, EXPENSES:
\$850.20
8-30-13 [[105](#)]

CONT. FROM 9-26-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, and Office of the United States Trustee on August 30, 2013. By the court's calculation, 27 days' notice was provided. 21 days' notice is required.

Tentative Ruling: The Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Application for Fees. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

PRIOR HEARING

The Court set a briefing schedule and further hearing on the Motion for Prevailing Party attorneys' fees and costs. The hearing on the Motion was continued to 10:30 a.m. on November 21, 2013. Opposition was to be filed and served on or before October 10, 2013, and Replies, if any, filed and served on or before October 17, 2013.

BACKGROUND

Defendant-Debtor filed a Chapter 7 petition on May 31, 2012. Plaintiff states that he and Defendant-Debtor entered into a joint venture agreement on July 1, 2009 with the exclusive purpose of the Plaintiff to invest \$25,250 with Defendant-Debtor's limited liability company EHP, LLC to promote scheduled entertainment events. Plaintiff states that Defendant-Debtor acted as a fiduciary regarding Plaintiff's monetary investment, but Defendant-Debtor never held the events in which Plaintiff invested, nor did Defendant-Debtor return

the money invested. Plaintiff alleges that Defendant-Debtor engaged in defalcation and breached the contract between the parties.

Plaintiff states the following occurred in the state court action: On January 6, 2012 Plaintiff filed a second amended complaint for breach of contract. Plaintiff states the breach of contract action resulted in an entry of stipulation for judgment on April 16, 2012 in the Superior Court of California, County of Stanislaus. Plaintiff states that the judgment required that Defendant-Debtor pay \$25,250 to Plaintiff.

On July 30, 2012 Defendant-Debtor was served with the summons and complaint and on September 14, 2012 Defendant-Debtor filed an answer. Plaintiff states that he pursued discovery, but that Defendant-Debtor failed to appear at the 2004 exam and two scheduled depositions.

On February 25, 2013 the court granted Plaintiff's motion for sanctions for Defendant-Debtor's failure to comply. The court ordered Defendant-Debtor to pay \$3,223 to Plaintiff.

On March 29, 2013 the court granted Plaintiff's motion for termination sanction and ordered that Defendant-Debtor's answer be stricken and that the application for entry of default be filed within 30 days of the order.

Plaintiff obtained a default judgment against Defendant on August 1, 2013, Dckt. 96.

FEES REQUESTED

Thomas P. Hogan, Counsel for the Plaintiff Edison, makes a Request for the an award of attorney fees after trial award of \$31,756.20, a nondischargeable debt. The period for which the fees are requested is for the period July 5, 2012 through August 30, 2013 in the total amount of \$15,653.20 consisting of fees of \$14,803.00 and expenses of \$850.20.

Description of Services for Which Fees Are Requested

Counsel spent 87.6 hours in this category for total fees of \$14,803.00 and costs of \$850.20.

The Applicant provide types of legal services that were provided such as:

- (1) Preparing, filing, amending and serving the Adversary Complaint
- (2) Prepared and served a subpoena to the Defendant
- (3) Prepared and efiled proof of claim in defendant's bankruptcy case
- (4) Drafted and filed Motion to Compel Debtor including all supporting pleadings and exhibits
- (5) Prepared, filed and served Motion for Entry of Default Judgment with Exhibits
- (6) Prepared, filed and served Amended Complaint with the Exhibits
- (7) Prepared, filed and served Declaration of Plaintiff in Support of Complaint Determine Non-Dischargeability of Debt
- (8) Made appearances at hearings

The Applicant provides invoices for each attorney and staff who spent time on the matter. Dckt. No. 109. However, the Applicant does not provide total time and amount spent on each of these activities and categories across attorneys and staff members. The court should not be required to go through each invoice to calculate how much time all the attorneys and staff spent on Motion to Compel Debtor or Motion for Entry of Default.

OPPOSITION - DEBTOR

Debtor-Defendant, acting in *pro se*, filed an opposition to the Motion for Compensation.

Debtor-Defendant spends a considerable amount of time discussing the dispute between the Debtor-Defendant and Plaintiff that gave rise to the claim and the attorneys' fees. Debtor challenges the contract the Applicant asserts to be true and correct copy. Dckt. No. 109 - Exhibit A. Additionally, Debtor-Defendant challenges Exhibit B by stating that there were no strategically selected pages.

Debtor-Defendant argues that the 2009 contract between the Debtor-Defendant and Plaintiff did not make a reference to attorneys fees by either party. Additionally, Debtor-Defendant states that Applicant request for fees should be dismissed because many of the charges are redundant, unproductive, unnecessary and unreasonable.

REPLY - APPLICANT

Applicant states that the Venture Agreement was not attached as an exhibit to the motion for compensation as asserted by Debtor-Defendant. Instead the Stipulated Agreement that was signed in October 2001 was attached as an Exhibit A to the motion for compensation. Dckt. No. 109. Applicant challenges Debtor-Defendants factual allegations regarding amount of money involved and its use as well as accusations of defalcation.

With respect to the fees, Applicant argues that Debtor-Defendant only made general allegations about excessive and unreasonable fees. There is no specific analysis.

Additionally, Debtor-Defendant signed a stipulation with a attorneys' fees provision which stated that if Debtor-Defendant failed to pay the settlement then Debtor-Defendant will be required to pay attorneys' fees and costs. Dckt. No. 109 - Exhibit A.

DISCUSSION

Though Counsel does not provide the legal basis for attorney fees, he does state this award is based on the contractual relationship with the Defendant, as stated in the Stipulation of Judgment signed by both parties, which contains a broad attorney fee provision. Counsel asserts that a Stipulation of Judgment was signed by all parties in October of 2011 but the defendant again failed to honor the agreement. The Stipulation for Judgment was signed by the Court on April 10, 2012 and filed with the Court in April 16, 2012.

Civil Code Section 1717(a) provides for attorney fees where the contract specifically provides attorney's fees, which are incurred to enforce the contract, to the prevailing party.

Here, a review of the Stipulation of Judgment on which Counsel bases his motion, paragraph 5 states if the agreed to amount is not paid to Mr. Eidson, then Defendant "agrees to pay the attorney fees and costs of Mr. Eidson, which are not less than \$8,500.00." Exhibit A, ¶ 5, Dckt. 109.

As the contract provides for attorney fees, the court finds that the fees are warranted.

FEES ALLOWED

The hourly rates for the fees billed in this case are as following.

Title	Name	Per Hour Rate	Hours Billed
Attorney	Thomas Hogan	\$350.00	12.1 hrs
Attorney	Patrick Hogan	\$120.00	4.0 hrs
Paralegal	Jim Wisner	\$180.00	8.1 hrs
Paralegal	Katie Cochran	\$180.00	47.8 hrs
Paralegal	Lisa Craig	\$180.00	3.4 hrs
Paralegal	Janet Arce	\$150.00	.5 hrs
Paralegal	Matt Tabo	\$120.00	6.4 hrs
Paralegal	Angelica Buchanan	\$120.00	2.0 hrs
Legal Assistant	Alex Casas	\$120.00	3.3 hrs

The court finds that the hourly rates reasonable for counsel. However, the court finds that the paralegal and legal assistant work should be billed at \$100.00 per hour. Therefore, the paralegal and legal assistant fees are reduced to \$7,150.00. The total attorneys' fees in the amount of \$11,865.00 are approved.

Counsel also seeks the allowance and recovery of costs and expenses in the amount of \$850.20 for copies and postage. The total costs in the amount of \$850.20 are approved.

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

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

The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of

the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Thomas P. Hogan is allowed the following fees and expenses as a professional of the Estate:

Thomas P. Hogan, Counsel for the Plaintiff
Applicant's Fees Allowed in the amount of \$11,865.00
Applicants Expenses Allowed in the amount of \$850.20.

26. [12-92779-E-7](#) **LARRY MOSS** **MOTION TO COMPEL ABANDONMENT**
MLP-4 **Martha Lynn Passalacqua** **11-6-13 [63]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, all creditors, and Office of the United States Trustee on November 6, 2013. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Compel Abandonment was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (2). Consequently, the creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Compel Abandonment.

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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000). Here, Debtprs seek an order compelling the Trustee to abandon the business property known as "Larry Moss Enterprises" or "Land Scape and Fences," as it

is impaired by the Debtor's claimed exemption of \$23,415.00. The business consists of the following assets:

1. Business Checking Account at Wells Fargo Bank, ending in 3303
\$1.00
2. Customer List/Business Value \$3,500.00
3. 2005 Chevy Utility Truck \$12,814.00
4. 1979 Ford Flatbed Truck \$1,000.00
5. 1972 Chevy Flatbed Truck \$1,000.00
6. 1971 Chevy Flatbed Truck \$1,000.00
7. 1989 Wells Cargo 14' Trailer \$1,000.00
8. 1987 Wells Cargo 16' Trailer \$1,000.00
9. 1977 Hanne Car Trailer \$200.00
10. 1972 Terry Camper Trailer \$200.00
11. 1964 Ford Bed Utility Trailer \$200.00
12. 1955 Lowboy Trailer \$200.00
13. Air Comp. & Misc. Lawn Care Equip, etc. \$1,300.00

Since the exemption the property claimed by the Debtor exceeds the value of the property, and the negative financial consequences of the Estate retaining the property, the court determines that the property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

A minute order substantially in the following form shall be prepared and issued by the court:

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

The Motion to Abandon Property filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is granted and that the business property identified as:

1. Business names: "Larry Moss Enterprises" or "Land Scape and Fences"

2. Business Checking Account at Wells Fargo Bank, ending in 3303 \$1.00
3. Customer List/Business Value \$3,500.00
4. 2005 Chevy Utility Truck \$12,814.00
5. 1979 Ford Flatbed Truck \$1,000.00
6. 1972 Chevy Flatbed Truck \$1,000.00
7. 1971 Chevy Flatbed Truck \$1,000.00
8. 1989 Wells Cargo 14' Trailer \$1,000.00
9. 1987 Wells Cargo 16' Trailer \$1,000.00
10. 1977 Hanne Car Trailer \$200.00
11. 1972 Terry Camper Trailer \$200.00
12. 1964 Ford Bed Utility Trailer \$200.00
13. 1955 Lowboy Trailer \$200.00
14. Air Comp. & Misc. Lawn Care Equip, etc. \$1,300.00

on Schedule B are abandoned to Larry Moss, the Debtor, by this order, with no further act of the Trustee required.

27. [11-91881-E-7](#) JONATHAN BASYE
[13-9030](#) SW-1
BASYE V. FNMA ET AL

MOTION TO DISMISS ADVERSARY
PROCEEDING
10-11-13 [7]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor on October 11, 2013. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the 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 Motion to Dismiss is granted. No appearance required.

Defendant Federal National Mortgage Association moves the court to dismiss the complaint filed by Plaintiff Jonathan Mark Basye, for failure to state a claim and for lack of jurisdiction.

Plaintiff owns the property commonly known as 3913 Launberg Ave, Modesto, California (hereinafter the "property"). Schedule A, Bankr. E.D. Cal. Case No. 11-91881, Dckt. 22. The house was sold via foreclosure sale to the Defendant Federal National Mortgage Association (hereinafter "FNMA"). FNMA has initiated eviction proceeding. Compl. 5:9-15. On May 25, 2011, Plaintiff filed for Chapter 13 bankruptcy. Voluntary Petition, Bankr. E.D. Cal. Case No. 11-91881 Dckt. 1. On September 29, 2011, Plaintiff voluntarily converted his case to Chapter 7. Order Converting Case, Bankr. E.D. Cal. Case No. 11-91881, Dckt. 71. Plaintiff received his Chapter 7 discharge and the case closed on January 17, 2012. Discharge of Debtor, Bankr. E.D. Cal. Case No. 11-91881 Dckt. 105; Order Closing Case, Bankr. E.D. Cal. Case No. 11-91881 Dckt. 108.

On September 11, 2013, Plaintiff received an order reopening his case in order to file this adversary proceeding. Order Reopening Case, Bankr. E.D. Cal. Case No. 11-91881, Dckt. 123. Plaintiff concurrently filed this adversary proceeding. Plaintiff filed a motion to reinstate the automatic stay to prevent the eviction proceeding against him, which the court denied. The Court found that the Bankruptcy Code made no provision for the reimposition of the automatic stay. Order Denying Motion to Reimpose

Automatic Stay, Bankr. E.D. Cal. Case No. 11-91881 Dckt. 128. The Court also found that it lacked jurisdiction over the adversary proceeding, and therefore denied the request for injunctive relief in this adversary proceeding.

Plaintiff has not filed opposition to the motion.

JURISDICTION

Defendant contends that the Court lacks subject matter jurisdiction in this case.

A bankruptcy court's jurisdiction over the adversary proceeding derives from its jurisdiction over the underlying Chapter 13 case. *In re Casamont Investors, Ltd.*, 196 B.R. 517, 521 (B.A.P. 9th Cir. 1996). In order for a court to have original jurisdiction over an adversary proceeding, the court must find that the proceeding is one "arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). A proceeding "arising under title 11" is one that "invokes a substantive right provided by title 11." *In re Gruntz*, 202 F.3d 1074, 1081 (9th Cir. 2000). A proceeding "arising in a case under title 11" is one that "'by its nature, could arise only in the context of bankruptcy case.'" *Id.* Finally, a proceeding is "related to a case under title 11" if its outcome could conceivably affect the administration of the estate. *In re Diversified Contract Servs., Inc.*, 167 B.R. 591, 595 (Bankr. N.D. Cal. 1994) (citing *In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988)). If granting the relief sought in the complaint would have no effect on the bankruptcy estate, and the case does not arise in or under title 11, a bankruptcy court must dismiss the matter for lack of subject-matter jurisdiction. *In re Torres*, 367 B.R. 478, 481 (Bankr. S.D.N.Y. 2007).

In supporting the allegation that the Court lacks jurisdiction in this adversary proceeding, Defendant cited the Court's previous Order Denying Motion to Reimpose Automatic Stay. See Order Denying Motion to Reimpose Automatic Stay, Bankr. E.D. Cal. Case No. 11-91881 Dckt. 128, 4:26 to 5:2. Defendant further states that nothing has changed since this order's issuance, nor are there any facts relevant to the complaint as a whole that would change this determination.

As the court discussed in its ruling on the Motion to Reimpose the Automatic Stay,

While the Complaint makes reference to the Administrative Procedures Act and Federal Rules of Civil Procedure, from the face of the Complaint the court cannot identify any claim or controversy as required by Article III, Section 2 of the United States Constitution. The mere fact that the Debtor filed a bankruptcy case and received a Chapter 7 discharge does not "federalize" every dispute.

The Plaintiff clearly has a dispute over the existence and validity of a deed of trust and title obtained by someone pursuant to a non-judicial foreclosure sale. But that dispute appears, from the face of the Complaint, to be a state law real property issue.

The bankruptcy discharge did not affect the lien, thus it is not a question of bankruptcy law whether there was a deed of trust, whether the foreclosure was effective or proper, or whether a trustee's deed from a foreclosure sale is valid.

The proper court for such disputes is the California Superior Court (or United States District Court if there is an Article III federal case or controversy). It appears that the Debtor is enmeshed in such state court litigation, but having come out on the losing end at the trial court. He is prosecuting an appeal and states that he is or has sought a stay pending appeal from the state appellate court. That is proper. Congress did not create, and the United States Bankruptcy Courts do not exist, as a "go to" alternative judicial process when a party does not want to litigate in the state court of general jurisdiction or wants a different outcome than that is a case on appeal in the state court system. While very broad in scope, the exercise of federal judicial power pursuant to 28 U.S.C. § 1334 is limited to the matters arising under the Bankruptcy Code, arising in the bankruptcy case, or related to the bankruptcy case.

Order Denying Motion to Reimpose Automatic Stay, Bankr. E.D. Cal. Case No. 11-91881 Dckt. 128, 4:26 to 5:2.

The court agrees with the previous ruling. The Plaintiff has not shown that proper jurisdiction exists for this proceeding. This is sufficient basis to grant the motion to dismiss.

FAILURE TO STATE A CLAIM

Defendant alleges that plaintiff's complaint fails to state a claim since it is not "a short and plain statement showing that the pleader is entitled to relief" and "a demand for the type of relief sought." See Fed. R. Civ. P. 8(a).

First, Plaintiff alleges that the deed of trust was invalid since FNMA "never validated the lien" and failed to attend the 341(a) meeting of creditors. Compl., 1:24 to 2:2. The Court has stated that "[t]here is nothing in the Complaint or the Motion to indicate any legal basis for failure to provide validation (if required) results in a forfeiture of a deed of trust." Order Denying Motion to Reimpose Automatic Stay, Bankr. E.D. Cal. Case No. 11-91881 Dckt. 128, 5:23-25.

Second, Plaintiff alleges a violation of RESPA for failing to provide a copy of the pooling and servicing agreement (hereinafter "PSA") as requested in his purported qualified written request (hereinafter "QWR") to FNMA. Compl., 3:5-9. However, RESPA only requires a loan servicer to respond to a QWR. 12 U.S.C. § 2605(e)(1)(A). Plaintiff has not pled that FNMA ever serviced the loan. Moreover, RESPA does not require a loan servicer to questions about ownership of the loan, but only to information relating to the service of the loan. See *Consumer Solutions REO, LLC v. Hillery*, 658 F.Supp.2d 1002, 1014 (N.D. Cal. 2009). Therefore, any unnamed loan servicer would not be required to produce the PSA.

Third, Plaintiff alleges that the foreclosure sale must be set aside because an assignment of deed of trust was never recorded. Compl., 3:9-12. However, California law does not require the assignment of a deed of trust to be recorded. The court recently discussed this in *Macklin v. Deutsche Bank Nat'l Trust Co. (In re Macklin)*, 495 B.R. 8 (Bankr. E.D. Cal. 2013).

Fourth, Plaintiff alleges that the substitution of trustee naming Recontrust, N.A. as the foreclosure trustee is invalid because it was "robo-signed." Compl., 4:15-19. Plaintiff further alleges that, accordingly, the assignment of deed of trust and trustee's deed upon sale are void as Recontrust, N.A. lacked authority. Compl., 3:18-24. The Defendant contends that this claim fails because under California law, the recordation of a substitution of trustee is "conclusive" evidence of the validity of the substitution. Cal. Civ. Code § 2924(a); *Kariguddaiah v. US Bank Nat'l Ass'n*, 2012 WL 6601766 (Cal. Ct. App. Dec. 18, 2012); *Riggio v. GMAC Mortg., LLC*, 2013 WL 812408 (Cal. Ct. App. Mar. 6, 2013). Plaintiff further contends that the substitution is still valid even if the document the person who signed it paid no attention to its content. The fact that the substitution of trustee is signed makes it valid, since a substitution of trustee is simply a contractual document effecting a change of trustee.

Fifth, Plaintiff alleges that the foreclosure is invalid as the foreclosure did not comply with the Administrative Procedures Act or the Federal Rules of Civil Procedure. Compl., 4:24-25. Defendant questions Plaintiff's reliance on this procedure. This is not a valid basis for a claim as California non-judicial foreclosures are governed solely by California Civil Code, sections 2924 *et seq.* *Moeller v. Lien*, 25 Cal. App. 4th 822, 830 (1994).

Sixth, Plaintiff states that he is entitled to inspect the wet ink note pursuant to 18 U.S.C. § 2071. Compl., 5:3-5. Defendant contends that this statute is inapplicable since it only states that it is a crime to destroy records in the custody of the Federal Government. Plaintiff has not provided any facts that indicate the note is in any such custody.

Therefore, even if the court found that jurisdiction exists, based on a review of the contentions in the Complaint, the court finds that Plaintiff has failed to state a claim.

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 Adversary proceeding filed by the Defendant Federal National Mortgage Association ("FNMA") 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 the claims against Federal National Mortgage Association are dismissed without prejudice and without leave to amend.

28. [13-91588-E-12](#) MARY JO MEIRINHO
PD-1 Scott A. CoBen

MOTION TO APPROVE STIPULATION
RE: TREATMENT OF CLAIM UNDER
PROPOSED CHAPTER 12 PLAN
10-18-13 [39]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, all creditors, parties requesting special notice, and Office of the United States Trustee on October 18, 2013. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Approve Stipulation has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered.

The Motion to Approve Stipulation is granted. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Creditor, Union Bank, N.A. ("Creditor") moves the court pursuant to Federal Rule of Bankruptcy Procedure 4001(d)(1) for an Order Approving the Stipulation Re: Treatment of Claim Under Debtor's Proposed Chapter 12 Plan of Reorganization, entered between Debtor, Mary Jo Miranda Meirinho and Creditor.

As the Stipulation executed between the parties requires adequate protection payments to commence pre confirmation and includes provisions relating to termination of the automatic stay in the event of default, Union Bank hereby moves under Rule 4001(d) for a court order approving the material provisions.

The court will consider the provisions requiring adequate protection payments commencing pre-confirmation, but will not approve specific plan terms outside of the plan confirmation process.

DISCUSSION

Federal Rule of Bankruptcy Procedure 4001(d) specifies how a creditor obtains approval of a stipulation and order for relief from the automatic stay to be, in pertinent part,

(d) Agreement Relating to Relief From the Automatic Stay, Prohibiting or Conditioning the Use, Sale, or Lease of Property, Providing Adequate Protection, Use of Cash Collateral, and Obtaining Credit.

(1) Motion; Service.

(A) Motion. A motion for approval of any of the following shall be accompanied by a copy of the agreement and a proposed form of order:

(i) an agreement to provide adequate protection;

(ii) an agreement to prohibit or condition the use, sale, or lease of property;

(iii) an agreement to modify or terminate the stay provided for in §362;

(iv) an agreement to use cash collateral; or

(v) an agreement between the debtor and an entity that has a lien or interest in property of the estate pursuant to which the entity consents to the creation of a lien senior or equal to the entity's lien or interest in such property....

(B) Contents. The Motion shall consist of... a concise statement of the relief requested...that lists, or summarizes, and sets out the location within the relevant documents of, all material provisions of the agreement...

(C) Service. The motion shall be served on: (1) any committee elected under §705 or appointed under §1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under §1102, on the creditors included on the list filed under Rule 1007(d); and (2) on any other entity the court directs....

(3) Disposition; Hearing. If no objection is filed, the court may enter an order approving or disapproving the agreement without conducting a hearing. If an objection is filed or if the court determines a hearing is appropriate, the court shall hold a hearing on no less than seven days' notice to the objector, the movant, the parties on whom service is required by paragraph (1) of this subdivision and such other entities as the court may direct.

Here, the Motion satisfies the requirements of the Federal Rule of Bankruptcy Procedure 4001(d)(1)-(3). The Motion describes the material provisions of the stipulation in detail in the Motion and provides a copy of the stipulation agreement. Dckt. 38.

The court finds the terms regarding the pre-confirmation adequate protection payments to creditor are proper. Therefore, the motion is granted regarding the pre-confirmation adequate protection payments.

However, the court does not approve pre-confirmation plan terms. The Debtor in Possession has represented to this Creditor and the court the plan terms which will be proposed with respect to this claim. The court expects the Debtor in Possession and counsel to honor those representations, absent a change in circumstances which make such terms improvident or inconsistent with the Bankruptcy Code. The proposed terms will be subject to the review of the court and creditors at the confirmation 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 to Approve Stipulation filed by Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the following terms in the Stipulation Re: Treatment of Claim Under Debtor's Proposed Chapter 12 Plan of Reorganization, entered between Debtor in Possession and Debtor, Mary Jo Miranda Meirinho and Creditor Union Bank, N.A., Dckt. 38 are approved:

Pending confirmation of the Chapter 12 Plan, Debtor in Possession shall tender regular contractual payments to the Chapter 12 Trustee for distribution to Union Bank pursuant to the terms of the pre-petition loan documents in the sum of \$819.10 commencing December 1, 2013 and continuing on the first of each month thereafter until the outstanding balance owed on Union Bank's claim has been paid in full ("Contractual Payment"). This payment amount includes \$559.50 for principal and interest and a \$259.60 escrow impound for real property taxes and real property hazard insurance. This amount is subject to change pursuant to terms of the Subject Loan. Contractual Payments on Union Bank's Secured Claim shall be paid by the Chapter 12 Trustee until completion of the Chapter 12 case, at which time the Debtor shall make Contractual Payments directly to Union Bank until all outstanding amounts under the Secured Claim are paid in full.

In addition to the Contractual Payments, pending confirmation of the Chapter 12 Plan, Debtor in Possession shall tender arrearage payments to the Chapter 12 Trustee for distribution to Union Bank to cure the contractual arrears in the sum of \$12,095.24, amortized over sixty (60) equal monthly installments ("Arrearage Payments"). Arrearage Payments in the amount of \$201.59 per month shall commence December 1, 2013 and shall continue on the first of each month thereafter until the contractual arrears have been cured in full.

29. [13-91189-E-11](#) MICHAEL/JUDY HOUSE
RMY-3 Robert M. Yaspan

MOTION TO EMPLOY EDWARDS, LIEN
AND TOSO, INC. AS APPRAISER(S)
10-24-13 [57]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors holding the 20 largest unsecured claims, parties requesting special notice and Office of the United States Trustee on October 24, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Employ has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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 Motion to Employ is granted. No appearance required.

Debtors-in-Possession seeks to employ counsel Jeffrey Lien of Edwards, Lien & Toso as an appraiser for two ranch properties for the amount of \$9,000.00, with a deposit of \$6,500.00. Debtors-in-Possession own the properties located at 6231 Smith Road, Oakdale, California ("Smith Ranch") and 2107 S. Stearns Road, Oakdale, California ("Triumph Ranch"). Debtors-in-Possession seek to employ an appraiser to proceed to address any issues regarding their value.

Jeffrey Lien, a certified General Appraiser in California and associate of Edwards, Lien & Toso, testifies that he nor his firm do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

DISCUSSION

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

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

Taking into account all of the relevant factors in connection with the employment and compensation of counsel, considering the declaration demonstrating that counsel 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 Jeffrey Lien of Edwards, Lien & Toso as an appraiser for the Chapter 11 estate on the terms and conditions set forth in the Appraisal Service Agreement, Exhibit B , Dckt. 59. The approval of the contingency fee 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.

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

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

The Motion to Employ filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Employ is granted and the Debtor-in-Possession is authorized to Jeffrey Lien of Edwards, Lien & Toso as an appraiser for the Chapter 11 estate on the terms and conditions as set forth in the Appraisal Service Agreement, Exhibit B , Dckt. 59.

IT IS FURTHER ORDERED that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and 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 except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

30. [13-91189-E-11](#) **MICHAEL/JUDY HOUSE** **MOTION TO FILE CLAIM AFTER**
RMY-4 **Robert M. Yaspan** **CLAIMS BAR DATE**
10-24-13 [[61](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors holding the 20 largest unsecured claims, parties requesting special notice and Office of the United States Trustee on October 24, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for An Order Setting Claims Bar Date is denied. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtors-in-Possession move the court for an entry of order (1) fixing January 31, 2014 as the date by which claims must be filed in order to be considered timely; and (2) approving the form of the Notice of January 31, 2014 Bar Date for Claims, attached as Exhibit 1.

Federal Rule of Bankruptcy Procedure 3003(c)(3) states that the court shall fix and for cause shown may extend the time within which proof of claim or interest may be filed.

Per the Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines, filed June 27, 2013, the Proof of Claim deadline set by the court in this case was set October 29, 2013. Dckt. 6.

Debtors-in-Possession are requesting that the Court set the bar date of January 31, 2014 and allow Debtors until November 30, 2013 to serve the

Bar Notice (Exhibit A) on the interested parties and creditors. The Bar Notice sets a bar date of January 31, 2014 for claimants to file a proof of claim. The Bar Notice provides creditor with 60 days from the notice of the bar date to file a proof of claim. Debtors-in-Possession state it is appropriate for the court to set a bar date because Debtors anticipate filing a Plan and Disclosure Statement by February 2014 and need to determine all allowed claims. Debtors-in-Possession argue that they are providing adequate time for claimants to file their claims.

However, Debtors-in-Possession have not provided sufficient "cause" under Federal Rule of Bankruptcy Procedure to extend the bar date. Debtors-in-Possession seek to "set" the bar date rather than "extend" the date. Further, Debtors-in-Possession provide no "cause shown" as required by Federal Rule of Bankruptcy Procedure 3003(c) (3).

Based on the foregoing, the court denies the Motion to Set Bar Date.

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 An Order Setting Claims Bar Date filed by Debtors-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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 7, 2013. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Compel Abandonment was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (2). Consequently, the creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Abandon Property. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000). Here, Creditor Kosich Properties, LLC, moves for an order compelling the Trustee to abandon the personal property located at 2151 W. Main Street, Turlock, California, used by Turlock Dairy Queen in its operations. The personal property includes the following:

1. Restaurant equipment, lobby seating, and signs...\$20,000
2. Orange Julius equipment.....\$ 7,000
3. Surveillance equipment, intercom system,
and kitchen hood.....\$ 500

The property is impaired by three Creditors (Dairy Queen Inc., Direct Capital Corporation, Surveillance equipment, intercom, and bond) with balances of \$44,000.00, \$10,000.00 and \$1,400.00 respectively.

The Trustee filed a statement of non-opposition on November 14, 2013. The Debtors filed a statement of non-opposition on November 14, 2013, Dckt. 21.

Since the debt secured by the property exceeds the value of the property, and the negative financial consequences of the Estate retaining the property, the court determines that the property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

A minute order substantially in the following form shall be prepared and issued by the court:

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

The Motion to Abandon Property filed by the Debtors David and Cathi Erbe having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is granted and that the personal property identified as:

- 1. Restaurant equipment, lobby seating, and signs...\$20,000
- 2. Orange Julius equipment.....\$ 7,000
- 3. Surveillance equipment, intercom system,
and kitchen hood.....\$ 500

on Schedule B are abandoned to David and Cathi Erbe , the Debtors by this order, with no further act of the Trustee required.

32. [12-90696-E-7](#) CLEO PAUGH
SSA-9 Brian S. Haddix

MOTION FOR COMPENSATION FOR
STEVEN S. ALTMAN, TRUSTEE'S
ATTORNEY(S), FEES: \$23,637.50,
EXPENSES: \$132.87
10-15-13 [[116](#)]

DISCHARGED 7-2-12

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors and Office of the United States Trustee on October 15, 2013. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

Final Ruling: The First Interim Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f) (1) (ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the 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 First Interim Application for Fees is granted. No appearance required.

FEES REQUESTED

Steven S. Altman, Counsel for the Irma C. Edmonds, Chapter 7 Trustee, makes a First Interim Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period April 17, 2012 through October 9, 2013. The order of the court approving employment of counsel was entered on May 4, 2012.

Description of Services for Which Fees Are Requested

Case Administration: Counsel spent 13.4 hours in this category for total fees of \$3,350.00. Counsel described the tasks performed as preparing financial statements and operating reports, meeting with the Trustee and responding to general creditor inquiries.

Fee/Employment Application: Counsel spent 8.6 hours in this category for total fees of \$2,150.00. Counsel described the tasks performed preparing applications for employment and compensation for the Trustee's accountant as well as counsel.

Litigation: Counsel spent 1.8 hours in this category for total fees of \$450.00. Counsel described the tasks performed as defending the Trustee in the adversary proceeding regarding the Starineri Family Trust.

Claims Administration: Counsel spent 33.3 hours in this category for total fees of \$8,325.00. Counsel described the tasks performed conducting discovery and negotiations regarding the Strainer Trust and resolving the deed of trust claim.

Asset Analysis and Recovery: Counsel spent .2 hours in this category for total fees of \$50.00. Counsel described the tasks performed working with the Trustee, Debtor and other parties to sell the real property located at 2100 Edsel Lane, Modesto, CA.

Asset Disposition: Counsel spent 20.15 hours in this category for total fees of \$5,037.50. Counsel described the tasks performed working with the escrow company to review the escrow instruction for sale of the real property.

Business Operations: Counsel spent 8.6 hours in this category for total fees of \$2,150.00. Counsel described the tasks performed securing payment history and valuation of Edsel property to rebut the Motion for Relief from Stay and identifying residential farming lease.

Relief from Stay Proceedings: Counsel spent 8.5 hours in this category for total fees of \$2,125.00. Counsel described the tasks performed as correspondence with the creditor regarding the motion and filing an opposition to the motion.

DISCUSSION

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 as legal 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 legal services undertaken 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 [legal fee] tab 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 is obligated to consider:

- (a) Is the burden of the probable cost of legal 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 Counsel's services rendered a successful opposition to the Motion for Relief regarding Debtor's real property, 2331 Edsel Lane. Additionally, counsel filed Motion to Sell a portion of the Debtor's real property, 2100 Edsel Lane, Modesto, California. Lastly, Counsel resolved dispute concerning the residual proceeds owed to the Starineri Family Trust. Counsel states the Trustee is currently holding

\$70,559.58 in residual funds, which should be sufficient to pay all administrative claims and tax expenses in this case.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$250.00/hour for counsel for 94.55 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$23,637.50 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of \$132.87 for copies and postage. The total costs in the amount of \$132.87 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Attorneys' Fees	\$23,637.50
Costs and Expenses	\$ 132.87

For a total first interim allowance of \$23,770.37 in Attorneys' Fees and Costs in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Steven S. Altman is allowed the following fees and expenses as a professional of the Estate:

Steven S. Altman, Counsel for Chapter 7 Trustee
Applicant's Fees Allowed in the amount of \$23,637.50
Applicants Expenses Allowed in the amount of \$132.87,

IT IS FURTHER ORDERED that this is an interim award of fees pursuant to 11 U.S.C. § 331, which are subject to final review and allowance pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

IT IS FURTHER ORDERED that this is a interim allowance of fees and the debtor in possession is authorized

to pay such fees from funds of the Estate as they are able to be paid in the ordinary course of business and from such funds that are unencumbered or are cash collateral authorized to be used pursuant to a cash collateral stipulation or order.

33. [13-91897-E-11](#) KS CHANDI & SONS, INC. MOTION TO EMPLOY C. ANTHONY
CAH-2 C. Anthony Hughes HUGHES AS ATTORNEY(S)
10-24-13 [[15](#)]

Final Ruling: The Court deeming the bankruptcy petition void and null per the Order Re Motion to Dismiss Unauthorized Bankruptcy Filing, dated November 1, 2013, Dckt. 59, **the Motion to Employ is removed from the calendar.** No appearance required at the November 21, 2013 hearing.

34. [13-91897-E-11](#) KS CHANDI & SONS, INC. MOTION TO EXCUSE COMPLIANCE
CAH-3 C. Anthony Hughes WITH 11 U.S.C. SECTION 363 -
CASH COLLATERAL
10-24-13 [[23](#)]

Final Ruling: The Court deeming the bankruptcy petition void and null per the Order Re Motion to Dismiss Unauthorized Bankruptcy Filing, dated November 1, 2013, Dckt. 59, **the Motion to Execute Compliance with 11 U.S.C. Section 363 is removed from the calendar.** No appearance required at the November 21, 2013 hearing.

35. [09-90199-E-7](#) BRADLEY/ROSSANA BYLER
JDP-2 Kristin A. Koo.

MOTION TO AVOID LIEN OF WELLS
FARGO BANK, N.A.
10-15-13 [[42](#)]

DISCHARGED 6-9-09

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on October 15, 2013. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Avoid a Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the 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 Motion to Avoid a Judicial Lien is granted. No appearance required.

A judgment was entered against the Debtor in favor of Wells Fargo Bank, N.A. for the sum of \$10,343.68. The abstract of judgment was recorded with Stanislaus County on August 15, 2008. That lien attached to the Debtor's residential real property commonly known as 901 Sonoma Ave., Modesto, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$240,000.00 as of the date of the petition. The unavoidable consensual liens total \$226,990.47 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of \$13,009.53 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the judgment lien of Wells Fargo Bank, N.A., Stanislaus County Superior Court Case No. 623126, recorded on August 15, 2008 (Document Number 2008008922800), with the Stanislaus County Recorder, against the real property commonly known as 901 Sonoma Ave., Modesto, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

36. [13-90935-E-12](#) **ARTURO/RAMONA ROMERO** **MOTION TO SELL O.S.T.**
KDG-6 **Hagop T. Bedoyan** **11-11-13 [92]**

Local Rule 9014-1(f)(3) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 12 Trustee, all creditors, and Office of the United States Trustee on November 12, 2013. By the court's calculation, 9 days' notice was provided.

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion to Sell Property without prejudice. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Bankruptcy Code permits the Debtor in Possession to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b). Here, the Debtor-in-Possession proposes to sell nonessential equipment not used in farming operations to fund their Chapter 12 plan and to pay property taxes. Debtors-in-Possession state that no buyer has been located but seek authority to sell the equipment for no less than 75% of the stated value. The property is not subject to any liens. The personal property to be sold consists of the following:

DESCRIPTION	ESTIMATED VALUE
11991 ALLIS DEUTZ TRACTOR	\$ 11,000.00
11999 KUBOTA M9000 TRACTOR	\$ 1,800.00
11988FORDTRACTOR	\$ 800.00
1 8N FORD TRACTOR (NO ENGINE)	\$ 1,000.00
1 MF FRONT LOADER 165	\$ 1,000.00
1 MAF ELECTRIC OPTIC PACING LINE	\$ 95,000.00
1 HYDROCOOLER AMMONIUM ON SKIDS	\$ 75,000.00
2 AUTOMATIC BOX FILLERS	\$ 35,000.00
1 AUTOMATIC BIN DUMPER	\$ 9,000.00
1 CHERRY PICKING PACKING LINE-AUTO BIN DUMPER	\$ 75,000.00
150 FULL SIZE PLASTIC BINS @135 EACH	\$ 20,250.00
100 HALF SIZE PLASTIC BINS #120 EACH	\$ 12,000.00
11997 CHEVROLET PICKUP TRUCK	\$ 1,500.00
11987 FORD 1 TON TRUCK	\$ 1,000.00
1 DENAIR TRAILER	\$ 4,500.00
1 DENAIR TRAILER	\$ 2,500.00
11978 CHAMP BUSS	\$ 1,500.00
119741INTERNATIONAL WAYNE BUS	\$ 1,000.00
1 CLARK REEFER/STORAGE	\$ 1,000.00
1 WATER TANK POLYGLASS	\$ 2,000.00
1 DIESEL STORAGE TANK 100 GALLON	\$ 3,000.00
1 ELEVATOR	\$ 1,500.00
2 ELECTRIC FLOOR SCALES	\$ 2,000.00
1 PORTABLE WELDER	\$ 1,500.00
1 FORD MARINE BOAT ENGINE	\$ 1,000.00
2 REEFER TRUCK TRAILERS	\$ 2,000.00
50 WOODEN LADDERS 12FT @10 EACH	\$ 500.00
1 TIMPTE ELECTRIC REEFER	\$ 1,000.00
TOTAL	\$ 364,350.00

However, Debtors-in-Possession have not provided an explanation on how these assets will be sold. Debtors-in-Possession have not requested the hiring of an auctioneer, so it does not appear they intend to sell these assets by auction. Debtors-in-Possession have not provided the limits of the sale, beyond that the sale price be at least 75% of the stated value. Further, the Debtors-in-Possession have not stated to whom the assets are being sold and whether the potential buyers include insiders.

Lastly, the Debtors-in-Possession have not provided any information on how the assets will be marketed and sold.

The court does not have sufficient information to determine if the sale of the subject personal property is in the best interests of the

estate. Based on the evidence before the court, the motion to Sell Property is denied without prejudice.

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

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

The Motion to sell property filed by the Debtor in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Sell Property is denied without prejudice.