

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Fredrick E. Clement
Bankruptcy Judge
2500 Tulare Street, Fifth Floor
Department A, Courtroom 11
Fresno, California

TUESDAY

DECEMBER 3, 2013

PRE-HEARING DISPOSITIONS

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

MATTERS RESOLVED BEFORE HEARING

If the court has issued a final ruling on a matter and the parties directly affected by a matter have resolved the matter by stipulation or withdrawal of the motion before the hearing, then the moving party shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter to be dropped from calendar notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860.

ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 52(b), 59(e) or 60, as incorporated by Federal Rules of Bankruptcy Procedure, 7052, 9023 and 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

9:00 a.m.

1. [12-19800](#)-A-7 PAUL/YOLANDA TORRES MOTION TO SELL
TMT-2 11-4-13 [[45](#)]
TRUDI MANFREDO/MV
ERIC ESCAMILLA/Atty. for dbt.
TRUDI MANFREDO/Atty. for mv.

Tentative Ruling

Motion: Sell Property

Notice: LBR 9014-1(f)(2); no written opposition required; limited opposition filed by Bank of America, N.A.

Disposition: Granted

Order: Prepared by moving party consistent with this ruling

Property: 4335 W. Yale Ave., Fresno, CA

Buyer: Debtors

Sale Price: \$97,999.00

The components of the price are as follows:

-\$800.00 cash

-\$21,930.00 exemption credit in favor of the debtors

-\$35,036.00 lien in favor of Bank of America (sale is subject to lien)

-\$40,233.00 lien in favor of Everhome Mortgage Co. (sale is subject to lien)

Sale Type: Private sale subject to overbid opportunity

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Bank of America, N.A. has filed a limited opposition to ensure that the sale is not free and clear of its liens. Because the motion does not request this type of relief, the court will not grant it. Bank of America, however, does not oppose the sale of the estate's interest in the subject property subject to its lien. The order shall state that the sale is subject to all liens on the property.

Section 363(b)(1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. §§ 363(b)(1); *see also In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). The moving party is the Chapter 7 trustee and liquidation of property of the estate is a proper purpose. *See* 11 U.S.C. § 704(a)(1). As a result, the court will grant the motion. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.

2. [12-19109](#)-A-7 DEANNA GRANT
RH-3
SHERYL STRAIN/MV

ROBERT HAWKINS/Atty. for mv.

MOTION TO COMPROMISE
CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH CATHLEEN GRANT
11-1-13 [[40](#)]

No tentative ruling.

3. [13-14911](#)-A-7 IRENE NUNES
UST-1
AUGUST LANDIS/MV
GEORGE LOGAN/Atty. for dbt.
GREGORY POWELL/Atty. for mv.

MOTION TO DISMISS CASE
10-22-13 [[16](#)]

Final Ruling

Motion: Dismiss Chapter 7 Case under § 707(a)

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

The well-pled facts of the motion show that the case has been unreasonably delayed. At the initial meeting of creditors on August 23, 2013, the trustee requested amendments to the schedules to correct errors, but no amendments have been filed to date. The meeting of creditors has been continued multiple times because of the Chapter 7 trustee's inability to obtain the debtor's testimony affirming the petition and schedules and testimony regarding the debtor's financial circumstances. For these reasons and based on the motion and supporting papers, the court finds that the case should be dismissed under § 707(a)(1) for unreasonable delay by the debtor that is prejudicial to creditors.

4. [13-15814](#)-A-7 ALBERTO/LUCIA AQUINO MOTION TO COMPEL ABANDONMENT
TOG-4 10-29-13 [[17](#)]
ALBERTO AQUINO/MV
THOMAS GILLIS/Atty. for dbt.

Final Ruling

Motion: Compel Abandonment of Property of the Estate

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted only as to the business and such business assets described in the motion

Order: Prepared by moving party pursuant to the instructions below

Business Description: Aquino Herbal life

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Property of the estate may be abandoned under § 554 of the Bankruptcy Code if property of the estate is "burdensome to the estate or of inconsequential value and benefit to the estate." See 11 U.S.C. § 554(a)-(b); Fed. R. Bankr. P. 6007(b). Upon request of a party in interest, the court may issue an order that the trustee abandon property of the estate if the statutory standards for abandonment are fulfilled.

The business described above is either burdensome to the estate or of inconsequential value to the estate. An order compelling abandonment of such business is warranted.

The order will compel abandonment of the business and the assets of such business only to the extent described in the motion. The order shall state that any exemptions claimed in the abandoned business or the assets of such business may not be amended without leave of court given upon request made by motion noticed under Local Bankruptcy Rule 9014-1(f)(1).

5. [12-18816](#)-A-7 LORENZO/VALERIE MEJIA MOTION TO AVOID LIEN OF BANK OF
SDM-2 AMERICA, N.A.
LORENZO MEJIA/MV 10-21-13 [[22](#)]
SCOTT MITCHELL/Atty. for dbt.

Tentative Ruling

Motion: Avoid Lien that Impairs Exemption

Disposition: Denied without prejudice

Order: Civil minute order

The court will deny the motion without prejudice on grounds of insufficient service of process on the responding party. A motion to avoid a lien is a contested matter requiring service of the motion in the manner provided by Federal Rule of Bankruptcy Procedure 7004.

Fed. R. Bankr. P. 4003(d), 9014(b); see also *In re Villar*, 317 B.R. 88, 92 n.6 (B.A.P. 9th Cir. 2004). Under Rule 7004, service on FDIC-insured institutions must "be made by certified mail addressed to an officer of the institution" unless one of the exceptions applies. Fed. R. Bankr. P. 7004(h).

INSUFFICIENT SERVICE OF PROCESS

Service of the motion was insufficient. Service of the motion was not made by certified mail or was not addressed to an officer of the responding party. No showing has been made that the exceptions in Rule 7004(h) are applicable. See Fed. R. Bankr. P. 7004(h)(1)-(3).

IMPROPER RELIEF SOUGHT

The debtors seek to avoid an asserted judicial lien held by the responding party, Bank of America, N.A. in the amount of \$155,659.00. Mot. Avoid Judicial Lien at 2, ECF No. 22. In identifying the lien to be avoided, the motion also refers to Schedule D attached as an exhibit. Schedule D, however, describes Bank of America, N.A.'s lien as a "deed of trust," which is a consensual lien not within the scope of the debtor's avoidance rights under § 522(f). For this reason, the motion does not set forth proper grounds for relief and will be denied on this ground. See 11 U.S.C. § 522(f)(1); Fed. R. Bankr. P. 9013.

In addition, the motion incorporates by reference the abstract of judgment that was recorded to create the judicial lien to be avoided. A review of the abstract of judgment shows that Citibank, N.A. is the party holding the judgment rather than the party named as the responding party in the motion. It also shows \$5,947.69 as the amount of judgment debt rather than \$155,659.00 as alleged in the motion. Thus, the motion and exhibits attached to the motion contain inconsistent facts about the judicial lien to be avoided and the party holding such lien. Because of these inconsistencies, the court finds that the motion does not "state with particularity the grounds therefor" and will be denied on this ground as well.

6. [13-13924](#)-A-7 BOGHOS/HELEN KRIKORIAN CONTINUED MOTION TO AVOID LIEN
KDG-1 OF BETTY EGAN
BOGHOS KRIKORIAN/MV 10-15-13 [[43](#)]
HAGOP BEDOYAN/Atty. for dbt.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Avoid Lien that Impairs Exemption

Notice: LBR 9014-1(f)(2) / Continued date of hearing; written opposition filed by Creditor Betty Egan

Disposition:

-(1) Continued in part for evidentiary hearing as to the value of the real property

-(2) Granted in part to the extent the motion requests avoidance of Egan's lien in its entirety on all personal property (except for the debtors' checking account) described in the motion and claimed fully exempt including: (i) the debtors' household goods and (ii) the loan value of the debtors' Jackson life insurance policy

-(3) Granted in part to the extent the motion requests partial avoidance of Egan's lien on the debtors' two vehicles that have been claimed partially exempt: the lien will be avoided as to the exempt amount of each vehicle (\$1,450.00 for each vehicle and \$2,900.00 in the aggregate for both vehicles), and the lien attaches to the aggregate nonexempt equity of \$2,888.00

-(4) Denied in part as to the checking account scheduled with a value of \$500.00, but the denial is without prejudice to the debtors' amending their schedules to claim such property exempt

Order: The court will issue a scheduling order from chambers

AVOIDANCE OF LIEN ON REAL PROPERTY DEPENDS ON VALUATION

At the hearing on the matter, the court will hold a scheduling conference and set an evidentiary hearing under Federal Rule of Bankruptcy Procedure 9014(d). An evidentiary hearing is required because disputed, material factual issues must be resolved before the court can rule on the relief requested. The court identifies the following disputed, material factual issues: (1) the value of the real property located at 9648 N. 10th Street, Fresno, California 93720, (2) the amount of the judgment debt secured by Egan's lien.

Before the hearing, the parties shall attempt to meet and confer to determine: (i) whether the court has fully and fairly described the evidentiary issues requiring resolution; (ii) whether any party wishes to engage in discovery prior to the evidentiary hearing and the time necessary to complete discovery; (iii) the deadlines for any dispositive motions or evidentiary motions; (iv) the dates for the evidentiary hearing and the trial time that will be required; (v) whether the parties wish to use or waive the provisions of Local Bankruptcy Rule 9017-1; and (vi) any other such matters as may be necessary or expedient to the resolution of these issues.

AVOIDANCE OF LIEN ON PERSONAL PROPERTY

Legal Standards for Lien Avoidance

There are four elements to avoidance of a lien that impairs an exemption: (1) there must be an exemption to which the debtor would have been entitled; (2) the property must be listed on the schedules and claimed as exempt; (3) the lien must impair the exemption claimed; and (4) the lien must be a judicial lien or nonpossessory, nonpurchase-money security interest in property described in § 522(f)(1)(B). *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003). Impairment is statutorily defined: a lien impairs an exemption "to the extent that the sum of—(i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A).

Checking Account

The motion states that the debtors have claimed an exemption in their bank account in the amount of \$500.00. Mot. Avoid Judicial Lien 2, ECF No. 43. The debtors' listed a checking account on Schedule B with a value of \$500.00. Schedule C shows that no exemption has been claimed in any bank accounts. Accordingly, Egan's lien has not impaired any claimed exemption in the debtors' bank account.

Life Insurance Policies

The debtors have listed two life insurance policies on Amended Schedule B filed on October 15, 2013 at docket number 49. The policy with insurer Jackson Life Insurance ("Jackson") has a scheduled value of \$20,000.00. The other policy with insurer American General Insurance ("American") has a scheduled value of \$5,000.00.

On Schedule C, the debtors have exempted the entire \$20,000 cash or loan value of the Jackson policy. No exemption is claimed in any amount of the \$5,000 cash or loan value of the American policy. Thus, the Jackson policy is exempt and the American policy is not, but the American policy may be subject to a secured claim in the amount of \$8,200.00 as shown on Schedule D.

Egan concludes based on a vague argument that her lien attaches to \$5,000.00 of the loan policies. The court does not understand Egan's argument. But it seems that Egan asserts that both policies must be aggregated under section 704.100 of the California Code of Civil Procedure, and that \$5,000.00 of the two policies in the aggregate is subject to her lien.

The debtors have properly claimed the Jackson policy exempt in the amount of \$20,000.00. No interpretation of §704.100 would require the debtors to exempt the American policy in the amount of \$5,000.00 or account for the loan value of such policy when considering whether a different policy's loan value has been properly claimed exempt.

Furthermore, the stipulation between the debtors and Egan that resolves her objection to the debtors' exemptions, which the court has not yet approved, appears to indicate that Egan agreed that the life insurance policies are fully exempt. The court interprets this statement to mean that the equity in the policies has been claimed exempt, given that Schedule C shows no exemption claimed in the

American policy. The court believes that the stipulation, signed by Egan, which remains subject to the court's approval, may preclude any argument by Egan that the debtors' exemption in the Jackson policy is improper.

Thus, the debtors may avoid Egan's lien on the Jackson policy in its entirety. The sum of Egan's lien and the exemption amount exceeds the value of the policy by the amount of the debt secured by Egan's lien.

Avoidance of Egan's Lien on Debtors' Vehicles

The debtors have claimed an exemption in two vehicles. The motion seeks only to partially avoid the liens on the vehicles. The exemption amount for each is \$1,450. Each vehicle has been scheduled with a value that exceeds the exemption amount.

Egan argues that Egan's lien cannot be avoided as to the vehicles because the debtors have non-exempt equity in the two vehicles. But Egan's argument is not consistent with the law. Here, Egan's lien is the only lien on the debtors' two vehicles. Based on the statutory formula above, her lien impairs the debtors' exemption to the extent that the sum of her lien plus the debtors' exemption amounts exceeds the value of the debtors' property subject to her lien.

Thus, the court rejects Egan's argument that Egan's lien on the vehicles may not be avoided given the existence of some non-exempt equity. Her lien will be partially avoided as to the vehicles and will only attach to the non-exempt equity in the vehicles.

Example of Avoidance of Egan's Lien on Vehicles for Purposes of Illustration

For example, applying the statutory formula and *assuming* Egan's lien secured a total judgment debt of \$28,723.76, Egan's lien plus all other liens (\$0.00) plus the debtors' exemption in the two automobiles totaling \$2900 equals \$31,623.76. The two automobiles together have a value of \$5,788.00. The total of Egan's lien plus the debtors' exemption exceeds the value of the two automobiles by \$25,835.76 ($\$31,623.76 - \$5,788.00 = \$25,835.76$).

As a result, Egan's lien may be avoided to the extent of \$25,835.75 as to the vehicles—assuming for purposes of argument that her lien secures a debt of \$28,723.76. Regardless of the amount of debt her lien secures, her lien may be avoided *to the extent that* the debt secured by her lien plus the debtors' exemption amount exceeds the value of the two automobiles.

Stated differently, Egan's lien in this example would be avoided as to \$25,835.76 and would remain attached only to the non-exempt equity in the automobiles in the amount of \$2,888.00. This result remains true even if Egan's lien is more than the amount used in this example. Egan's lien will be partially avoided so that it attaches only to the non-exempt equity in debtors' vehicles regardless of the amount of Egan's lien.

Avoidance of Egan's Lien on All Other Personal Property Claimed Fully Exempt

The court will grant the motion in part to the extent that it seeks to avoid Egan's lien on all of the debtors' personal property described in the motion that has been claimed as fully exempt. See 11 U.S.C. § 522(f). Egan's lien plus all other liens (none) plus the exemption amount (the full value of the personal property claimed fully exempt) exceeds the value of the personal property by the full amount of Egan's judgment debt, regardless of whatever that amount may be. Egan's lien will be avoided in its entirety on all of debtors' personal property described in the motion that has been claimed fully exempt.

7. [13-13924](#)-A-7 BOGHOS/HELEN KRIKORIAN CONTINUED OBJECTION TO DEBTOR'S
LDM-1 CLAIM OF EXEMPTIONS
BETTY EGAN/MV 8-9-13 [[20](#)]
HAGOP BEDOYAN/Atty. for dbt.
LARRY MILLER/Atty. for mv.
RESPONSIVE PLEADING

Tentative Ruling

Objection: Claim of Exemptions

Notice: Continued date of the hearing; opposed by Debtors

Disposition: Pending

Order: Pending

INITIAL OBJECTION TO DEBTORS' CLAIM OF EXEMPTIONS

Background

Creditor Betty Egan, a judgment creditor, originally filed her objection to the debtors' claims of exemption on August 9, 2013. The objection was directed at the amounts of the exemptions claimed in life insurance policies and in two automobiles.

On October 2, 2013, the court issued a tentative ruling, sustaining the objection in part and overruling it in part. But then the court continued the hearing to allow an amended Schedule C to be filed and a stipulation resolving the issues to be filed.

The debtors filed an amended Schedule C and a stipulation that appeared to resolve the issue between the parties. However, the court further continued the hearing at the objecting party's request.

Given the various filings and continuances in this matter, a basic timeline of the major events in this matter is helpful:

-Aug. 12, 2013: Initial objection filed

-Sept. 19, 2013: Opposition filed

-Oct. 2, 2013: Hearing continued to allow amended Schedule C and stipulation to be filed.

-Oct. 15, 2013: Amended Schedule C filed

-Oct. 31, 2013: Stipulation filed

-Nov. 12, 2013: Hearing continued to Dec. 3 at the objecting party's request

-Nov. 14, 2013: Another objection to exemptions filed that is tied to the same original objection's docket control number

Stipulation

At the hearing on December 3, 2013, the court intends to inquire as to the status of the matter and determine whether the stipulation resolves the issues raised by the initial objection filed by Egan.

The stipulation seems improper in part for two reasons. First, the trustee is not a party to the stipulation or the trustee does not appear to have approved it. Second, the stipulation references a nonexistent exemption. Paragraph 1 of the stipulation provides that Schedule B lists \$500.00 in a checking account. Paragraph 2 of the stipulation says that this amount is fully exempt. Amended Schedule C, however, does not show that this \$500.00 is exempt. Accordingly, the parties' stipulation is improper to the extent that it provides that property is exempt when it has not been claimed exempt on Schedule C.

Lastly, the court also intends to discuss whether the stipulation's paragraph 3 is appropriate in light of the fact that it seeks the approval of the validity of a lien in the absence of an adversary proceeding. Fed. R. Bankr. P. 7001(2).

ADDITIONAL OBJECTION FILED NOVEMBER 14, 2013

Egan filed an additional objection tied to the same docket control number on November 14, 2013. This objection has been filed as part of the same objection as Egan's initial objection.

Given that the objection raises entirely new issues, and new grounds for relief that were not presented in the initial objection, the court considers this objection to be a separate objection from the original objection filed on August 9, 2013 at docket number 20.

Further, no notice of hearing was filed for this objection pursuant to Local Bankruptcy Rule 9014-1(f). This amended objection should be given a different docket control number and be set for hearing separately from the initial objection. See LBR 9001-1(n) (defining motion to include objections), LBR 9014-1(c) (docket control number requirements).

Accordingly, the court intends to overrule the objection to the amended claim of exemptions. The court will make such a ruling without prejudice to Egan's re-filing the objection in a procedurally proper manner.

8. [13-16329](#)-A-7 JOSE PUENTES
RHT-1

OPPOSITION RE: TRUSTEE'S MOTION
TO DISMISS FOR FAILURE TO
APPEAR AT SEC. 341(A) MEETING
OF CREDITORS
10-17-13 [[10](#)]

NELLIE AGUILAR/Atty. for dbt.
WITHDRAWN

Final Ruling

Trustee's motion to dismiss Having been withdrawn, the matter is
dropped from calendar as moot. The case will remain pending.

9. [13-16944](#)-A-7 DOROTHY SHAW

MOTION FOR WAIVER OF THE
CHAPTER 7 FILING FEE OR OTHER

DOROTHY SHAW/MV
FEE

10-25-13 [[5](#)]

DOROTHY SHAW/Atty. for mv.
RESPONSIVE PLEADING

Tentative Ruling

Application: Waiver of Chapter 7 Filing Fee

Notice: LBR 9014-1(f)(2); no written opposition required

Disposition: Denied

Order: Civil minute order

The Bankruptcy Court may waive the filing fee in a case under Chapter 7 of 11 U.S.C. for an individual if that individual "has income of less than 150% of income official poverty line . . . applicable to a family of the size involved and is unable to pay the fee in installments." 28 U.S.C. § 1930(f)(1).

The debtor claims of household of two. Schedule I, filed October 25, 2013, ECF No. 1. The 150% poverty level is \$1,891.25 per month. The debtor's gross income, as reflected on Schedule I, is \$2,394.58 per month. The debtor's net income, as reflected on Schedule I, is \$1,322.13. The court ordinarily uses the net income for calculating eligibility for a filing fee waiver. But in this case, Schedule I, Line 4d contains the verbiage "Retirement/Garnishment/CPU PUR" \$710.01. The court believes that the retirement is a proper deduction but the garnishment and "CPU PUR" (computer purchase?) are not proper deduction for calculating eligibility; the former will cease upon the filing of the petition and the later is a voluntary deduction. But the debtor has not itemized these deduction and, hence, the court is unable to calculate fee waiver eligibility.

10. [12-19661](#)-A-7 JORGE/MARY LOU SANTOS
WW-30
RILEY WALTER/MV

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF WALTER AND
WILHELM FOR RILEY C. WALTER,
DEBTOR'S ATTORNEY(S), FEE:
\$4422.50, EXPENSES: \$2262.84
11-5-13 [[438](#)]

RILEY WALTER/Atty. for dbt.

Final Ruling

Motion: Final Application for Compensation and Expenses

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Approved

Order: Prepared by applicant

Applicant: Walter & Wilhelm

Additional compensation approved: \$4,422.50

Additional costs approved: \$2,262.84

Aggregate additional fees and costs approved: \$6,685.34

Retainer held: \$2,250.00

Additional amount to be paid as administrative expense: \$4,435.34

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by an attorney for a debtor in possession in a Chapter 11 case and for "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. See *id.* § 330(a)(3).

The court finds that the additional compensation and expenses sought, as well as all previous awards, are reasonable, and the court will approve the application on an final basis. In this case, all compensation and expense requested were incurred prior to the date the debtors converted this case from Chapter 11 to Chapter 7. The moving party is authorized to draw on any retainer held.

11. [12-19661](#)-A-7 JORGE/MARY LOU SANTOS MOTION FOR COMPENSATION FOR
WW-31 MARTIN C. GARCIA ACCOUNTANCY
RILEY WALTER/MV CORPORATION, ACCOUNTANT(S),
FEE: \$1944.00, EXPENSES: \$0.00
11-5-13 [[432](#)]

RILEY WALTER/Atty. for dbt.

Final Ruling

Motion: Final Application for Compensation and Expenses
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Approved
Order: Prepared by applicant

Applicant: Martin C. Garcia Accountancy Corporation
Additional compensation approved: \$1,944.00
Additional costs approved: \$0.00
Aggregate additional fees and costs approved: \$1,944.00
Retainer held: \$0.00
Additional amount to be paid as administrative expense: \$1,944.00

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by an attorney for a debtor in possession in a Chapter 11 case and for "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. See *id.* § 330(a)(3).

The court finds that the additional compensation and expenses sought, as well as all previous awards, are reasonable, and the court will approve the application on an final basis. In this case, all compensation and expense requested were incurred prior to the date the debtors converted this case from Chapter 11 to Chapter 7.

12. [13-15663](#)-A-7 MADONNA CIUFFO MOTION TO AVOID LIEN OF UNIFUND
JDM-1 CCR PARTNERS
MADONNA CIUFFO/MV 10-22-13 [[11](#)]
JAMES MILLER/Atty. for dbt.

Final Ruling

Motion: Avoid Lien that Impairs Exemption
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before

the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 522(f) of the Bankruptcy Code authorizes the court to avoid a lien "on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled." 11 U.S.C. § 522(f)(1). There are four elements to avoidance of a lien that impairs an exemption: (1) there must be an exemption to which the debtor would have been entitled; (2) the property must be listed on the schedules and claimed as exempt; (3) the lien must impair the exemption claimed; and (4) the lien must be a judicial lien or nonpossessory, nonpurchase-money security interest in property described in § 522(f)(1)(B). *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003). Impairment is statutorily defined: a lien impairs an exemption "to the extent that the sum of-(i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A).

The responding party's judicial lien, all other liens, and the exemption amount together exceed the property's value by an amount greater than or equal to the debt secured by the responding party's lien. As a result, the responding party's judicial lien will be avoided entirely.

13. [12-12172](#)-A-7 SANTINO/SOPHIA MORALES MOTION TO COMPROMISE
JES-1 CONTROVERSY/APPROVE SETTLEMENT
JAMES SALVEN/MV AGREEMENT WITH SANTINO AND
SOPHIA MORALES
10-22-13 [[20](#)]

ADRIAN WILLIAMS/Atty. for dbt.
JAMES SALVEN/Atty. for mv.

Final Ruling

Motion: Approve Compromise or Settlement of Controversy

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, incorporated by Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

In determining whether to approve a compromise under Federal Rule of Bankruptcy Procedure 9019, the court determines whether the compromise was negotiated in good faith and whether the party proposing the compromise reasonably believes that the compromise is the best that can be negotiated under the facts. *In re A & C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1982). More than mere good faith negotiation of a

compromise is required. The court must also find that the compromise is fair and equitable. *Id.* "Fair and equitable" involves a consideration of four factors: (i) the probability of success in the litigation; (ii) the difficulties to be encountered in collection; (iii) the complexity of the litigation, and expense, delay and inconvenience necessarily attendant to litigation; and (iv) the paramount interest of creditors and a proper deference to the creditors' expressed wishes, if any. *Id.* The party proposing the compromise bears the burden of persuading the court that the compromise is fair and equitable and should be approved. *Id.*

Based on the motion and supporting papers, the court finds that the compromise is fair and equitable considering the relevant A & C *Properties* factors. The compromise will be approved.

14. [13-15372](#)-A-7 ISAAC GUERRA MARTINEZ ORDER TO SHOW CAUSE WHY ORDER GRANTING DEBTOR'S APPLICATION FOR WAIVER OF THE CHAPTER 7 FILING FEE SHOULD NOT BE VACATED AND THE FILING FEE PAID IN FULL
11-5-13 [[20](#)]

J. IRIGOYEN/Atty. for dbt.

Tentative Ruling

Application: Order to Show Cause Vacating Order for Waiver of Filing Fee

Notice: LBR 9014-1(f)(2); no written opposition required

Disposition: Sustained, fee waiver revoked

Order: Civil minute order

The Bankruptcy Court may waive the filing fee in a case under Chapter 7 of 11 U.S.C. for an individual if that individual "has income of less than 150% of income official poverty line . . . applicable to a family of the size involved and is unable to pay the fee in installments." 28 U.S.C. § 1930(f)(1).

In his request for a fee waiver the debtor showed a household of 7 and income of \$2,220 per month, which is less than 150% of the official poverty line (\$4,451.25 per month for a household of 7 persons). Application for Waiver, August 7, 2012, ECF No. 5. But on October 27, 2013, the debtor filed an Amended Schedule I, which showed a household of 3 and gross income from his business, Martinez Trucking, of \$10,687.08 per month. Schedule I, filed October 27, 2013, ECF No. 18. His business expenses total \$6,611.60, which leaves a net of \$4,075.48 per month. The 150% poverty line for a household of three is \$2,441.25 per month. Based on Amended Schedules I and J, and even using the debtor's pretax net income, it appears that the debtor does not qualify for the fee waiver.

15. [13-15683](#)-A-7 NANCY DUCKHORN
RDB-1
NANCY DUCKHORN/MV
RICK BANKS/Atty. for dbt.

MOTION TO AVOID LIEN OF CAVALRY
SPV I, LLC.
11-5-13 [[13](#)]

Tentative Ruling

Motion: Avoid Lien that Impairs Exemption

Notice: LBR 9014-1(f)(1); written opposition required (none filed)

Disposition: Continued to January 2, 2013, at 9:00 a.m. to allow the moving party to amend Schedule C, and any such amendment must be filed no later than December 18, 2013, by close of business

Order: Civil minute order

LACK OF AN EXEMPTION IN THE PROPERTY

Section 522(f) of the Bankruptcy Code authorizes the court to avoid a lien "on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled." 11 U.S.C. § 522(f)(1). There are four elements to avoidance of a lien that impairs an exemption: (1) there must be an exemption to which the debtor would have been entitled; (2) the property must be listed on the schedules and claimed as exempt; (3) the lien must impair the exemption claimed; and (4) the lien must be a judicial lien or nonpossessory, nonpurchase-money security interest in property described in § 522(f)(1)(B). *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003). Impairment is statutorily defined: a lien impairs an exemption "to the extent that the sum of-(i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A).

Property must be listed on the schedules and claimed as exempt as a requirement for lien avoidance under § 522(f). See *Goswami*, 304 B.R. at 390-91 (deciding the unrelated issue of whether a debtor loses the ability to amend exemptions claimed upon case closure, and relying on the premise that property must be claimed exempt on the schedules for purposes of lien avoidance). "If the debtor does not proffer the verified schedules and list of property claimed as exempt, the court nevertheless has discretion to take judicial notice of them for the purpose of establishing whether the property is listed and claimed as exempt" *In re Mohring*, 142 B.R. 389, 393 (Bankr. E.D. Cal. 1992), *aff'd*, 153 B.R. 601 (B.A.P. 9th Cir. 1993), *aff'd*, 24 F.3d 247 (9th Cir. 1994) (unpublished mem. decision). It follows that a debtor who has not claimed an exemption in property encumbered by a judicial lien or a nonpossessory, nonpurchase-money security interest may not use the protections of that section. See *Goswami*, 304 B.R. at 390-91 (quoting *In re Mohring*, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992)).

Here, the debtor has not claimed even a de minimus exemption in the property subject to the responding party's lien. Accordingly, a prima facie case has not been made for relief under § 522(f).

MODIFIED APPROACH TO LIEN AVOIDANCE ON CO-OWNERSHIP INTEREST

If a debtor who co-owns a fractional interest in property moves to avoid the judicial lien on the property under § 522(f), then the court applies a common sense approach that varies somewhat from a strict mechanical application of the formula under § 522(f)(2)(A). "Under

this approach, one nets out consensual liens against the entire fee in co-owned property before determining the value of a debtor's fractional interest and excludes those liens from the calculation of 'all other liens on the property' under § 522(f)(2)(A)(ii)." *All Points Capital Corp. v. Meyer (In re Meyer)*, 373 B.R. 84, 90 (B.A.P. 9th Cir. 2007).

In this case, the responding party holds a judicial lien on the moving party's real property for which an exemption has been claimed. The moving party co-owns the real property with a non-debtor party and holds a fractional one-half interest in the property based on the description of the property in Schedule A.

The debtor has not netted out the consensual deed of trust to determine the debtor's fractional interest in the property as required by *Meyer*. Thus, the debtor has not applied the correct approach in determining whether statutory impairment exists for purposes of lien avoidance.

Once the debtor has claimed an exemption of some value in the property, the court will net out the debt secured by the consensual deed of trust (\$245,613) against the value of the entire fee interest (\$241,928) before determining the value of the fractional co-ownership interest that the debtor would have in the absence of liens. The debtor's fractional interest for purposes of the statutory impairment formula appears to be less than \$0.00. Thus, regardless of the amount of the exemption claimed by the debtor, the judicial lien will be avoidable under the formula described in *Meyer*.

At the continued hearing date, if an exemption has been claimed in the property on Schedule C, then the court may rule that the responding party's judicial lien may be avoided in its entirety because the judicial lien, all other liens except consensual liens, and the exemption amount together exceed the value of the moving party's fractional interest in the property by an amount greater than the debt secured by the responding party's lien.

16. [13-17484](#)-A-7 STEVEN/CONCEPCION MOTION TO COMPEL ABANDONMENT
JRL-1 MCPHETRIDGE 11-26-13 [[11](#)]
STEVEN MCPHETRIDGE/MV
JERRY LOWE/Atty. for dbt.

Tentative Ruling

Motion: Compel Abandonment of Property of the Estate

Notice: LBR 9014-1(f)(3) and order shortening time; no written opposition required

Disposition: Granted only as to the business and such business assets described in the motion

Order: Prepared by moving party pursuant to the instructions below

Business Description: Sole proprietorship providing daycare services

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Property of the estate may be abandoned under § 554 of the Bankruptcy Code if property of the estate is "burdensome to the estate or of inconsequential value and benefit to the estate." See 11 U.S.C. § 554(a)-(b); Fed. R. Bankr. P. 6007(b). Upon request of a party in interest, the court may issue an order that the trustee abandon property of the estate if the statutory standards for abandonment are fulfilled.

The business described above is either burdensome to the estate or of inconsequential value to the estate. An order compelling abandonment of such business is warranted.

The order will compel abandonment of the business and the assets of such business only to the extent described in the motion. The order shall state that any exemptions claimed in the abandoned business or the assets of such business may not be amended without leave of court given upon request made by motion noticed under Local Bankruptcy Rule 9014-1(f)(1).

17. [13-15592](#)-A-7 DOUGLAS/CYNTHIA MARTIN MOTION TO COMPEL ABANDONMENT
PBB-1 10-29-13 [[25](#)]
DOUGLAS MARTIN/MV
PETER BUNTING/Atty. for dbt.

Tentative Ruling

Motion: Compel Abandonment of Property of the Estate

Notice: LBR 9014-1(f)(2); no written opposition required

Disposition: Continued to December 11, 2013, at 9:00 a.m., with a supplemental declaration consistent with this ruling to be filed no later than December 5, 2013.

Order: Prepared by moving party

Real Property Description: 46319 Veater Ranch Rd., Coarsegold, CA 93614 ("Coarsegold Property")

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

LEGAL STANDARDS

Property of the estate may be abandoned under § 554 of the Bankruptcy Code if property of the estate is "burdensome to the estate or of inconsequential value and benefit to the estate." See 11 U.S.C. § 554(a)-(b). Upon request of a party in interest, the court may issue an order that the trustee abandon property of the estate if the statutory standards for abandonment are fulfilled.

ANALYSIS

Insufficient Grounds for Relief

The declaration of Douglas Albert Martin describes the real property both by identifying its location and legal description. It further lists the value of the property at \$185,000.00 and lists the liens and exemptions.

The problem with the declaration is that it lists Seterus, Inc. as having a lien against the Coarsegold Property described above and that such lien secures a debt in the amount of \$166,722. But Schedule D attached as an exhibit to the motion indicates that Seterus, Inc. does not hold a lien against the Coarsegold Property. Instead, Seterus is scheduled as having a lien against a rental real property located at 102 Trotter St., Coalinga, California ("Coalinga Property").

"Wells Fargo Hm [sic] Mortgag [sic]" is shown on Schedule D as having a deed of trust on the Coarsegold Property described above securing a claim of \$178,416.00. But the declaration does not state this fact, and the court will not infer it in the absence of a further declaration.

Because the declaration asserts facts inconsistent with its exhibits incorporated by reference, the debtors have provided insufficient grounds for relief. To remove any ambiguity about the facts and to provide cogent grounds for the relief sought, the debtors may file a supplemental declaration or amend Schedule D if necessary.

Compliance with Rule 9013

The motion states generally that "[t]he property has no equity, it is fully exempt and it is a burden on the estate." The "property" referred to in the motion is not described in the motion itself. From the face of the motion, one cannot tell whether what type of property is the subject of the motion.

Although the declaration does contain this information, the motion does not set forth with sufficient particularity the grounds for the relief requested in compliance with Rule 9013. In the future, the motion itself should state at least the basic facts, including a general description of the real property, with sufficient particularity for the court to determine the grounds for the relief.

18. [13-15593](#)-A-7 ROBERT/LYNN KELLEY
PBB-1
ROBERT KELLEY/MV
PETER BUNTING/Atty. for dbt.

MOTION TO COMPEL ABANDONMENT
10-29-13 [[12](#)]

Tentative Ruling

Motion: Compel Abandonment of Property of the Estate

Notice: LBR 9014-1(f)(2); no written opposition required

Disposition: Granted

Order: Prepared by moving party

Real Property Description: 28549 Ave. 13 1/4, Madera, California 93638

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

LEGAL STANDARDS

Property of the estate may be abandoned under § 554 of the Bankruptcy Code if property of the estate is "burdensome to the estate or of inconsequential value and benefit to the estate." See 11 U.S.C. § 554(a)-(b). Upon request of a party in interest, the court may issue an order that the trustee abandon property of the estate if the statutory standards for abandonment are fulfilled.

ANALYSIS

Sufficient Grounds Provided for Order Compelling Abandonment

The real property described above is either burdensome to the estate or of inconsequential value to the estate. An order compelling abandonment is warranted. The order shall state that any exemptions claimed in the real property abandoned may not be amended without leave of court given upon request made by motion noticed under Local Bankruptcy Rule 9014-1(f)(1).

Compliance with Rule 9013

The motion states generally that "[t]he property has no equity, it is fully exempt and it is a burden on the estate." The "property" referred to in the motion is not described in the motion itself. From the face of the motion, one cannot tell whether what type of property is the subject of the motion.

Although the declaration does contain this information, the motion does not set forth with sufficient particularity the grounds for the relief requested in compliance with Rule 9013. In the future, the motion itself should state at least the basic facts, including a general description of the real property, with sufficient particularity for the court to determine the grounds for the relief.

19. [13-15998](#)-A-7 FEDERICO GARCIA
TMT-1
TRUDI MANFREDO/MV

MOTION TO DISMISS CASE AND/OR
MOTION TO EXTEND DEADLINE TO
FILE A COMPLAINT OBJECTING TO
DISCHARGE OF THE DEBTOR
11-5-13 [[14](#)]

TRUDI MANFREDO/Atty. for mv.

Tentative Ruling

Motion: Dismiss Case for Failure to Provide Tax Returns and Pay
Advices Timely to the Trustee

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Prepared by moving party

The Chapter 7 trustee moves to dismiss this case because the debtor did not timely provide the trustee their most recently filed tax returns required by § 521(e)(2)(A)(i) and copies of their pay advices for the 60-day period preceding the petition date from any employer of the debtor.

Tax returns are required to be provided to the trustee no later than 7 days before the meeting of creditors. See 11 U.S.C. § 521(e)(2)(A)(i). The court shall dismiss a case if the debtor fails to comply with § 521(e)(2)(A)(i) "unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor." See *id.* § 521(e)(2)(B).

Based on the facts asserted in the motion and supporting papers, the debtor has not complied with § 521(e)(2)(A)(i) and no showing has been made that such noncompliance was because of circumstances beyond the debtor's control. On this ground, the court must dismiss the case.

Furthermore, at the first creditors' meeting on October 15, 2013, the required documents (tax returns and pay stubs) were not provided to the trustee. The trustee explained to the debtor the importance of providing the required documents to the trustee. The creditors' meeting was then continued because the debtor did not provide the required tax returns to the trustee. At the second, continued meeting of creditors on October 28, 2013, the required documents still were not provided. The debtor has not shown that such delay is a result of circumstances beyond his control. Thus, the debtor's continued failure to comply with his duties to provide documents to the trustee constitutes unreasonable delay by the debtor that is prejudicial to creditors warranting dismissal under § 707(a)(1).

20. [13-15180](#)-A-7 JOHN HAMILTON
SAS-1

OPPOSITION RE: TRUSTEE'S MOTION
TO DISMISS FOR FAILURE TO
APPEAR AT SEC. 341(A) MEETING
OF CREDITORS
10-21-13 [[12](#)]

DAVID LANGE/Atty. for dbt.

Tentative Ruling

Motion: Dismiss Case and Extend Deadlines

Notice: LBR 9014-1(f)(1); written opposition required or case dismissed without hearing

Disposition: Granted in part, conditionally denied in part

Order: Prepared by chapter 7 trustee

The Chapter 7 trustee has filed a Motion to Dismiss for Failure to Appear at the § 341(a) Meeting of Creditors and Motion to Extend Deadlines for Filing Objections to Discharge. The debtor opposes the motion. The court will deny the motion to dismiss subject to the condition that the debtor attend the continued meeting of creditors.

Certain deadlines will be extended so that they run from the continued date of the § 341(a) meeting of creditors rather than the first date set for the meeting of creditors. The continued date of the meeting of creditors will be determined by the court at the hearing after conferring with the trustee and the attorney for the debtors. The deadline for objecting to discharge under § 727 is extended to 60 days after this continued date. See Fed. R. Bankr. P. 4004(a). The deadline for bringing a motion to dismiss under § 707(b) or (c) for abuse, other than presumed abuse, is extended to 60 days after such date. See Fed. R. Bankr. P. 1017(e).

The motion will be granted in part and conditionally denied in part. The motion will be granted to the extent it requests extension of certain deadlines so that they run from the continued date of the meeting of creditors. The motion will be conditionally denied in part to the extent it requests dismissal of the case. The court will deny the motion to dismiss subject to the condition that the debtor appear at the continued meeting of creditors, but if the debtor does not appear at the continued meeting of creditors, the case will be dismissed on the trustee's ex parte declaration.

21. [13-17441](#)-A-7 JOANNE STOKES
GH-2
JOANNE STOKES/MV
GARY HUSS/Atty. for dbt.

MOTION TO COMPEL ABANDONMENT
11-26-13 [[15](#)]

Tentative Ruling

Motion: Compel Abandonment of Property of the Estate

Notice: LBR 9014-1(f)(3) and order shortening time; no written opposition required

Disposition: Granted only as to the business and such business assets described in the motion

Order: Prepared by moving party pursuant to the instructions below

Business Description: Sole proprietorship that provides daycare services

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Property of the estate may be abandoned under § 554 of the Bankruptcy Code if property of the estate is "burdensome to the estate or of inconsequential value and benefit to the estate." See 11 U.S.C. § 554(a)-(b); Fed. R. Bankr. P. 6007(b). Upon request of a party in interest, the court may issue an order that the trustee abandon property of the estate if the statutory standards for abandonment are fulfilled.

The business described above is either burdensome to the estate or of inconsequential value to the estate. An order compelling abandonment of such business is warranted.

The order will compel abandonment of the business and the assets of such business only to the extent described in the motion. The order shall state that any exemptions claimed in the abandoned business or the assets of such business may not be amended without leave of court given upon request made by motion noticed under Local Bankruptcy Rule 9014-1(f)(1).

22. [13-16718](#)-A-7 PATRICIO/IRMA DEL RIO
HDN-2
PATRICIO DEL RIO/MV
HENRY NUNEZ/Atty. for dbt.
ORDER 11/26/13

MOTION TO COMPEL ABANDONMENT
11-25-13 [[13](#)]

Tentative Ruling

Motion: Compel Abandonment of Property of the Estate

Notice: LBR 9014-1(f)(3) and order shortening time; no written opposition required

Disposition: Granted only as to the business and such business assets described in the motion

Order: Prepared by moving party pursuant to the instructions below

Business Description: Long haul truck driving business

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Property of the estate may be abandoned under § 554 of the Bankruptcy Code if property of the estate is "burdensome to the estate or of inconsequential value and benefit to the estate." See 11 U.S.C. § 554(a)-(b); Fed. R. Bankr. P. 6007(b). Upon request of a party in interest, the court may issue an order that the trustee abandon property of the estate if the statutory standards for abandonment are fulfilled.

The business described above is either burdensome to the estate or of inconsequential value to the estate. An order compelling abandonment of such business is warranted.

The order will compel abandonment of the business and the assets of such business only to the extent described in the motion. The order shall state that any exemptions claimed in the abandoned business or the assets of such business may not be amended without leave of court given upon request made by motion noticed under Local Bankruptcy Rule 9014-1(f)(1).

23. [13-17255](#)-A-7 PAULETTE AVEDIKIAN
JRL-1
PAULETTE AVEDIKIAN/MV
JERRY LOWE/Atty. for dbt.

MOTION TO COMPEL ABANDONMENT
11-26-13 [16]

Tentative Ruling

Motion: Compel Abandonment of Property of the Estate

Notice: LBR 9014-1(f)(3) and order shortening time; no written opposition required

Disposition: Granted only as to the business and such business assets described in the motion

Order: Prepared by moving party pursuant to the instructions below

Business Description: Sole proprietorship consisting of residential caregiving to seniors and disabled individuals

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Property of the estate may be abandoned under § 554 of the Bankruptcy Code if property of the estate is "burdensome to the estate or of inconsequential value and benefit to the estate." See 11 U.S.C. § 554(a)-(b); Fed. R. Bankr. P. 6007(b). Upon request of a party in interest, the court may issue an order that the trustee abandon property of the estate if the statutory standards for abandonment are fulfilled.

The business described above is either burdensome to the estate or of inconsequential value to the estate. An order compelling abandonment of such business is warranted.

The order will compel abandonment of the business and the assets of such business only to the extent described in the motion. The order shall state that any exemptions claimed in the abandoned business or the assets of such business may not be amended without leave of court given upon request made by motion noticed under Local Bankruptcy Rule 9014-1(f)(1).

24. [13-17486](#)-A-7 SEKAR/MANJARI
PLF-1 BALAKRISHNAN
SEKAR BALAKRISHNAN/MV
PETER FEAR/Atty. for dbt.

MOTION TO COMPEL ABANDONMENT
11-26-13 [8]

Tentative Ruling

Motion: Compel Abandonment of Property of the Estate

Notice: LBR 9014-1(f)(3) and order shortening time; no written opposition required

Disposition: Granted only as to the business and such business assets described in the motion

Order: Prepared by moving party pursuant to the instructions below

Business Description: Sole proprietorship described as a sugar cane juice retailer

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Property of the estate may be abandoned under § 554 of the Bankruptcy Code if property of the estate is "burdensome to the estate or of inconsequential value and benefit to the estate." See 11 U.S.C. § 554(a)-(b); Fed. R. Bankr. P. 6007(b). Upon request of a party in interest, the court may issue an order that the trustee abandon property of the estate if the statutory standards for abandonment are fulfilled.

The business described above is either burdensome to the estate or of inconsequential value to the estate. An order compelling abandonment of such business is warranted.

The order will compel abandonment of the business and the assets of such business only to the extent described in the motion. The order shall state that any exemptions claimed in the abandoned business or the assets of such business may not be amended without leave of court given upon request made by motion noticed under Local Bankruptcy Rule 9014-1(f)(1).

10:00 a.m.

1. [13-15910](#)-A-7 SCOTT BAKER MOTION FOR RELIEF FROM
PD-1 AUTOMATIC STAY
GREEN TREE SERVICING LLC/MV 10-16-13 [[14](#)]
MARK ZIMMERMAN/Atty. for dbt.
JONATHAN CAHILL/Atty. for mv.

Final Ruling

Motion: Stay Relief

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Prepared by moving party

Subject: 2646 West Dorothea Avenue, Visalia, California

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 362(d)(2) authorizes stay relief if the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2). Chapter 7 is a mechanism for liquidation, not reorganization, and, therefore, property of the estate is never necessary for reorganization. *In re Casgul of Nevada, Inc.*, 22 B.R. 65, 66 (B.A.P. 9th Cir. 1982). In this case, the aggregate amount due all liens exceeds the value of the collateral and the debtor has no equity in the property. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

2. [13-15519](#)-A-7 MARIO ORTIZ MOTION FOR RELIEF FROM
RMD-1 AUTOMATIC STAY
EVERBANK/MV 10-25-13 [[13](#)]
JOEL WINTER/Atty. for dbt.
RYAN DAVIES/Atty. for mv.

Final Ruling

Motion: Stay Relief

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Prepared by moving party

Subject: 2609 North Hulbert Avenue, Fresno, California

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court

considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 362(d)(2) authorizes stay relief if the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2). Chapter 7 is a mechanism for liquidation, not reorganization, and, therefore, property of the estate is never necessary for reorganization. *In re Casgul of Nevada, Inc.*, 22 B.R. 65, 66 (B.A.P. 9th Cir. 1982). In this case, the aggregate amount due all liens exceeds the value of the collateral and the debtor has no equity in the property. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

3. [13-15365](#)-A-7 GENICE PRICE MOTION FOR RELIEF FROM
MLE-1 AUTOMATIC STAY
JUDITH HUTCHISON/MV 10-28-13 [[34](#)]
MONRAE ENGLISH/Atty. for mv.

Final Ruling

Motion: Stay Relief

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Prepared by moving party

Subject: *Hutchison v. Price*, No. CVU 249331 (Tulare County Superior Court 2012)

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 362(d)(1) authorizes stay relief cause. Cause may include pursuing claims pending in a non-bankruptcy forum. *In re Wardrobe*, 559 F.3d 932, 937 (9th Cir. 2009). The stay is modified to allow the moving party to prosecute through judgment, including post-judgment motions, costs bills and appeals, the foregoing action. Save and except the recovery of insurance proceeds from applicable policies, the creditor shall take no act to enforce any such judgment without leave of this court. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

4. [13-16693](#)-A-7 JORGE SILVA AND ANGELICA MOTION FOR RELIEF FROM
JCB-1 MARAVILLA AUTOMATIC STAY
DEUTSCHE BANK NATIONAL TRUST 10-25-13 [[16](#)]
COMPANY/MV
JONATHAN BOND/Atty. for mv.

Final Ruling

Motion: Stay Relief

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Prepared by moving party

Subject: 1053 Recreation Avenue, Sanger, California

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 362(d)(1) authorizes stay relief for cause shown. Cause includes the debtor's pre-petition loss of real property by way of foreclosure. In this case, the debtor's interest in the property was extinguished prior to the petition date by a foreclosure sale. The motion will be granted. The moving party may take such actions as are authorized by applicable non-bankruptcy law, including prosecution of an unlawful detainer action (except for monetary damages), to obtain possession of the subject property. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

10:30 a.m.

1. [13-16100](#)-A-7 ALBERT/NAOMI SANDOVAL PRO SE REAFFIRMATION AGREEMENT
WITH NATIONWIDE WEST LLC
10-28-13 [[17](#)]

No tentative ruling.

11:00 a.m.

1. [11-12264](#)-A-7 GENEAL CHIMA
WW-1
GENEAL CHIMA/MV

PRETRIAL CONFERENCE RE: MOTION
FOR SANCTIONS FOR VIOLATION OF
THE AUTOMATIC STAY AND/OR
MOTION FOR SANCTIONS FOR
VIOLATION OF THE DISCHARGE
INJUNCTION
7-11-13 [[122](#)]

JEFF REICH/Atty. for dbt.
MICHAEL WILHELM/Atty. for mv.
RESPONSIVE PLEADING

No tentative ruling.

2. [11-12264](#)-A-7 GENEAL CHIMA
WW-2
GENEAL CHIMA/MV
11-18-13 [[159](#)]
JEFF REICH/Atty. for dbt.
OST 11/18

MOTION TO COMPEL AND/OR MOTION
FOR SANCTIONS

No tentative ruling.

1:30 p.m.

1. [10-12709](#)-A-11 ENNIS COMMERCIAL MOTION FOR ADMINISTRATIVE
FRB-10 PROPERTIES, LLC EXPENSES
CITIZENS BUSINESS BANK/MV 10-8-13 [[1053](#)]
PETER FEAR/Atty. for dbt.
MICHAEL GOMEZ/Atty. for mv.

Tentative Ruling

Motion: Motion for Allowance of Administrative Expenses under § 503(b)(3)(D), (b)(4)

Notice: LBR 9014-1(f)(1); written opposition filed

Disposition: Granted in part

Order: Prepared by moving party

The creditor and plan proponent Citizens Business Bank has moved for allowance and payment of an administrative expense claim pursuant to § 503(b)(3)(D) and (b)(4). The creditors Daryl Nicholson and Keith Watkins have filed a joint opposition.

For the reasons set forth below, the court will grant the motion in part. An administrative expense claim will be allowed in the amount of \$303,343.85; the rest will be disallowed.

DISCUSSION

Under § 503(b)(3)(D), a creditor who makes a "substantial contribution" in a chapter 11 case may recover its "actual, necessary expenses" as an administrative expense. Similarly, § 503(b)(4) allows as an administrative expense the "reasonable compensation for professional services rendered by an attorney . . . of an entity whose expense is allowable under [§ 503(b)(3)(D)], based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney."

A creditor seeking administrative priority for its legal fees bears the burden of proof to show that the creditor made a substantial contribution to the estate. *Andrew v. Coopersmith (In re Downtown Inv. Club III)*, 89 B.R. 59, 64 (B.A.P. 9th Cir. 1988). The Ninth Circuit has provided that the "principal test of substantial contribution is 'the extent of benefit to the estate.'" *Cellular 101, Inc. v. Channel Commc'ns Inc. (In re Cellular 101, Inc.)*, 377 F.3d 1092, 1096 (9th Cir. 2004) (quoting *Christian Life Ctr. Litig. Defense Comm. v. Silva (In re Christian Life Ctr.)*, 821 F.2d 1370, 1373 (9th Cir. 1987)). The benefit conferred on the estate by the creditor must be direct, rather than "incidental" or "minimal," and must outweigh the benefit to the creditor itself. See *id.* at 1098. Further, the creditor's efforts must have fostered and enhanced, rather than retard or interrupt, the progress of the reorganization. See *id.* at 1096-97. Rather than taking a "net benefit" approach, the bankruptcy court should review each of the creditor's activities independently to determine whether that specified activity benefited the estate. *O'Halloran v. Lyon (In re Mortgs. Ltd.)*, No. AZ-09-1412-KiJuMk, 2010 WL 6259981, at *8 (B.A.P. 9th Cir. Aug. 4, 2010).

Here, Citizens seeks administrative priority for the following activities:

- (1) successfully proposing and confirming a plan of liquidation ("Plan Related Services" category) (\$201,316.05 in fees);
- (2) identifying, analyzing, and preserving estate assets ("Asset Analysis and Preservation" category) (\$24,711.75);
- (3) identifying claims and filing claim objections ("Claim Analysis and Related" category) (\$12,083.85);
- (4) filing and presenting this motion (~\$20,000 to \$40,000);
- (5) obtaining specialized tax advice after the IRS filed a "statement" response to the Plan (\$52,019.50); and
- (6) costs related to the above activities (\$13,212.70).

After reviewing Citizens and Nicholson/Watkins's papers, the court finds that each category of activities constituted a substantial contribution to the estate, other than the filing and presentation of the current motion. Thus, all requested fees and costs will be allowed as an administrative expense, except for the fees from the fourth category, which requested an estimated \$20,000 to 40,000.

The court will now consider each of Nicholson/Watkins's objections to the motion.

"Plan Related Services"

Nicholson/Watkins first argue that the fees relating to "structuring or drafting the plan" are duplicative because Citizens "road the coattails" of Wells Fargo, by modifying the plan proposed by Wells Fargo in the Ben Ennis case. However, that is the equivalent is saying that an attorney does not deserve fees for proposing a plan when the plan was originally a template that the attorney then modified. The Ben Ennis plan and ECP plan are different plans. There are similarities between the two, but it is difficult to characterize Citizens' efforts as simply copying Wells Fargo. One could not take the Wells Fargo's plan in the Ben Ennis case and use it in the ECP case. Thus, the fees relating to structuring and drafting the plan cannot be characterized as duplicative.

Next, Nicholson/Watkins object to the fees relating to the "client communications" that Frandzel had with its client Citizens, arguing that these fees were expended for the primary benefit of the client, rather than for the estate. However, even though these communications may represent attorney-client privilege or attorney work product, these communications were related to proposing a plan. Citizens is not requesting allowance of the fees relating to all client communications in the case, just for the client communications relating to plan. Thus, they should not be considered fees incurred for the primary benefit of the creditor, rather than for the estate.

"Asset Analysis and Preservation"

Nicholson/Watkins argue that the fees relating to Citizens' successful opposition to a sale motion are inappropriate because no other creditor objected to the sale (only the chapter 7 trustees objected), which shows that Citizens was only acting in its own self-interest. However, Nicholson/Watkins have not demonstrated how preventing the sale worked only in the interest of Citizens, rather than of the estate. By preventing the sale of estate property that was not intended to obtain the highest bidder (the sale required the purchaser to buy 11 properties, and the stalking horse bidder was Ben Ennis who would give \$5 million in cash and would assume \$5 million of ECP's debt), that helped retain the property's value for the entire estate.

"Claims Analysis and Related"

Nicholson/Watkins argue that all of the fees in this category are duplicative and within the duties of the DIP. However, it appears that for these tasks, Citizens did something that the DIP chose not to do. For instance, Citizens, not the DIP, was the party who filed two claim objections and the omnibus claim objection (which objected to six claims). These services should not be characterized as being duplicative.

Filing This Motion

Nicholson/Watkins argue that the fees relating to filing the present motion are unreasonable (between \$20,000 to \$40,000 for what amounts to a fee application). However, these fees must be disallowed for a different reason. Citizens, by requesting allowances for fees it incurred in presenting this motion, is not performing a task that can be considered a benefit for the entire estate. Although the other (substantive) tasks performed by Citizens and its attorneys represent a substantial contribution to the estate, the preparation of this "fee application" truly only benefits Citizens.

Obtaining Tax Advice

Lastly, Nicholson/Watkins object to the attorney's fees relating to Frandzel obtaining tax advice from another firm, who has specialized bankruptcy tax expertise on multiple grounds, after the IRS filed a response to the plan (that refuted the tax treatment proposed by the plan).

First, Nicholson/Watkins argue that these fees were unnecessary because the IRS's filing was considered to be a "statement," rather than an "objection" to the plan. However, no party knew how the court was going to treat the IRS's filing, so Citizens needed to make sure that its plan complied with applicable tax law. Thus, at the time of the IRS's filing, the fees incurred by Citizens was not unnecessary. Further, Citizens had stated that if the legal research would have showed that the IRS's position was ultimately correct, Citizens would have likely withdrawn its plan and then allowed the case to be converted to chapter 7.

Nicholson/Watkins also argue that these fees were "expended in an effort to protect [Citizens] from potential tax liability." However, this argument does not make sense. If the IRS's position was correct, it would seem that the Plan Administrator would be the one who would suffer the adverse tax consequences, not Citizens. Thus, Nicholson/Watkins cannot characterize this as Citizens incurring fees for its own self-interest.

The only ground that might be objectionable (but not raised by Nicholson/Watkins) is that the fees requested of \$52,019.50 are unreasonable. Yet, the tax issues in the ECP case were consistently in play through the entire plan process. The court did want more specificity about the tax treatment of the plan during the disclosure statement phase of the case, and the cost of Citizens obtaining assurances that its proposed tax treatment in the plan was appropriate may greatly outweigh the risk of going forward with confirmation without knowing the actual tax treatment.

CONCLUSION

For the reasons set forth above, the court will grant the motion in part. An administrative expense claim will be allowed in the amount of \$303,343.85; the rest will be disallowed.

2. [10-12709](#)-A-11 ENNIS COMMERCIAL CONTINUED OMNIBUS OBJECTION TO
FRB-7 PROPERTIES, LLC CLAIMS
CITIZENS BUSINESS BANK/MV 4-12-13 [[888](#)]
PETER FEAR/Atty. for dbt.
MICHAEL GOMEZ/Atty. for mv.

Final Ruling

Pursuant to the order approving the parties' stipulation, this matter is continued to February 12, 2014.

3. [10-12709](#)-A-11 ENNIS COMMERCIAL CONTINUED OBJECTION TO CLAIM OF
FRB-8 PROPERTIES, LLC EHA-MODESTO II, LLC, CLAIM
CITIZENS BUSINESS BANK/MV NUMBER 18
4-12-13 [[887](#)]
PETER FEAR/Atty. for dbt.
MICHAEL GOMEZ/Atty. for mv.

Final Ruling

Pursuant to the order approving the parties' stipulation, this matter is continued to February 12, 2014.

4. [10-12709](#)-A-11 ENNIS COMMERCIAL CONTINUED OBJECTION TO CLAIM OF
FRB-9 PROPERTIES, LLC HA COMMERCIAL, LLC, CLAIM
CITIZENS BUSINESS BANK/MV NUMBER 20
4-12-13 [[895](#)]

PETER FEAR/Atty. for dbt.
MICHAEL GOMEZ/Atty. for mv.

Final Ruling

Pursuant to the order approving the parties' stipulation, this matter is continued to February 12, 2014.

5. [10-12709](#)-A-11 ENNIS COMMERCIAL
MMW-54 PROPERTIES, LLC
JUSTIN HARRIS/MV

MOTION TO EMPLOY TERENCE LONG
AS MANAGER OF THE ESTATE
10-8-13 [[1046](#)]

PETER FEAR/Atty. for dbt.

Tentative Ruling

Motion: Nunc Pro Tunc Application to Employ Terence Long as Manager of Estate

Notice: LBR 9014-1(f)(1); written opposition filed

Disposition: Denied

Order: Civil minute order

Terence Long ("Long") has filed an application to employ himself as manager of the ECP estate nunc pro tunc. The Plan Administrator David Stapleton ("Stapleton") and the U.S. Trustee ("UST") have filed oppositions, raising a number of arguments. For the reasons set forth below, the court will deny the application.

DISCUSSION

Standing

Section 327 provides that "*the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons . . . to represent or assist the trustee in carrying out the trustee's duties under this title.*" § 327(a) (emphasis added). In chapter 11 cases, the debtor in possession has most of the same rights and duties as a trustee, including the right to employ professionals on behalf of the estate. See § 1107(a). The responding parties argue that the professional himself cannot seek employment, only the trustee or debtor in possession has standing to do so.

However, the BAP has partially rejected that argument, stating that "the professional should be able to apply for court approved employment where it has been hired by the trustee or debtor in possession, and was assured that court approval would be sought." *In re Mehdi-pour*, 202 B.R. 474, 479-80 (B.A.P. 9th Cir. 1996) *aff'd*, 139 F.3d 1303 (9th Cir. 1998). "When the trustee or debtor in possession fails to seek court approval and the professional has performed services which benefit the estate based on the assurance that court approval would be sought, the professional should have standing to seek nunc pro tunc approval of employment." *Id.*

Yet, in this case, although a professional may have standing to file an employment application, Long has not shown that he had been previously hired as a manager by ECP and that he was assured that court approval would be sought. Thus, it appears that Long does not have standing to seek employment nunc pro tunc.

Nunc Pro Tunc Approval - Exceptional Circumstances

Even if Long himself was able to move for employment, he has not established the exceptional circumstances for allowing employment nunc pro tunc.

The bankruptcy court has the equitable power to retroactively approve the employment of a professional where "exceptional circumstances" exist. *Atkins v. Wain, Samuel & Co. (In re Atkins)*, 69 F.3d 970,

973-74 (9th Cir. 1995) (citing *Law Offices of Ivan W. Halperin v. Occidental Fin. Grp., Inc. (In re Occidental Fin. Grp., Inc.)*, 40 F.3d 1059, 1062 (9th Cir. 1994); *Okamoto v. THC Fin. Corp. (In re THC Fin. Corp.)*, 837 F.2d 389, 392 (9th Cir. 1988)). To establish the presence of exceptional circumstances, the professional seeking retroactive approval must satisfy two requirements: (1) the professional must satisfactorily explain his or her failure to receive prior judicial approval; and (2) the professional must demonstrate that his or her services benefited the estate in a significant manner. *Id.* at 974. Further, the professional must satisfy the statutory requirements for employment found under § 327. *Id.* at 976.

Here, the court finds that Long has not satisfied the first requirement of the "exceptional circumstances" test; Long cannot satisfactorily explain his failure to receive prior judicial approval. It is obvious that Long's reason for the late employment application is due to the court's interpretation of § 326 and intention to reduce his fees as the chapter 11 trustee in the Ben Ennis case. Long's declaration even admits, "I am filing this application on a nunc pro tunc basis as I learned just recently that I was not going to be compensated for services I rendered in connection with the ECP case as part of my compensation as chapter 11 trustee of the Ennis case." It would be improper to say that a professional has provided a satisfactory explanation when the explanation for the nunc pro tunc employment (and subsequent fee request) is to get around the statutory cap under § 326 and recover fees that were (or will be) disallowed. Thus, Long has not shown the presence of exceptional circumstances.

CONCLUSION

For the reasons set forth above, the court will deny the motion.

6.	10-12709 -A-11	ENNIS COMMERCIAL	MOTION FOR COMPENSATION FOR
	MMW-55	PROPERTIES, LLC	TERENCE J. LONG, OTHER
	JUSTIN HARRIS/MV		PROFESSIONAL(S), FEE:
			\$66472.00, EXPENSES:\$0.00
			10-8-13 [1049]

PETER FEAR/Atty. for dbt.
JUSTIN HARRIS/Atty. for mv.
NOTICE FILED RESCHEDULING TO
12/11/13

Final Ruling

The matter is continued to January 11, 2013, at 1:30 p.m.

7. [12-17310](#)-A-11 JOHN/GRACE VISSER
MTL-2
DOUGLAS TUCKER/MV

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF MOSS, TUCKER,
SHIU, HEBESHA & WARD PC FOR
DOUGLAS TUCKER, SPECIAL
COUNSEL(S), FEE: \$13287.50,
EXPENSES: \$716.32
10-29-13 [[893](#)]

RONALD CLIFFORD/Atty. for dbt.

Final Ruling

Motion: Application for Compensation and Expenses

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Approved

Order: Prepared by applicant

Applicant: Moss Tucker

Compensation approved: \$13,287.50

Costs approved: \$716.32

Aggregate fees and costs approved: \$14,003.82

Retainer held: \$156,767.00

Amount to be paid as administrative expense: \$0.00

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by an attorney for a debtor in possession in a Chapter 11 case and for "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. See *id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on an interim basis. Such amounts shall be perfected, and may be adjusted, by a final application for compensation and expenses, which shall be filed prior to case closure. The moving party is authorized to draw on any retainer held.

8. [10-62315](#)-A-11 BEN ENNIS
MDM-4
WELLS FARGO BANK, N.A./MV
RILEY WALTER/Atty. for dbt.
MATTHEW WALKER/Atty. for mv.

MOTION FOR ADMINISTRATIVE
EXPENSES
10-10-13 [[1278](#)]

Final Ruling

Motion: Motion for Allowance of Administrative Expenses under § 503(b)(3)(D), (b)(4)

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

The creditor and plan proponent Wells Fargo Bank has moved for allowance and payment of an administrative expense claim in the amount of \$350,000 pursuant to § 503(b)(3)(D) and (b)(4). For the reasons set forth below, the court will grant the motion.

DISCUSSION

Under § 503(b)(3)(D), a creditor who makes a "substantial contribution" in a chapter 11 case may recover its "actual, necessary expenses" as an administrative expense. Similarly, § 503(b)(4) allows as an administrative expense the "reasonable compensation for professional services rendered by an attorney . . . of an entity whose expense is allowable under [§ 503(b)(3)(D)], based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney."

A creditor seeking administrative priority for its legal fees bears the burden of proof to show that the creditor made a substantial contribution to the estate. *Andrew v. Coopersmith (In re Downtown Inv. Club III)*, 89 B.R. 59, 64 (B.A.P. 9th Cir. 1988). The Ninth Circuit has provided that the "principal test of substantial contribution is 'the extent of benefit to the estate.'" *Cellular 101, Inc. v. Channel Commc'ns Inc. (In re Cellular 101, Inc.)*, 377 F.3d 1092, 1096 (9th Cir. 2004) (quoting *Christian Life Ctr. Litig. Defense Comm. v. Silva (In re Christian Life Ctr.)*, 821 F.2d 1370, 1373 (9th Cir. 1987)). The benefit conferred on the estate by the creditor must be direct, rather than "incidental" or "minimal," and must outweigh the benefit to the creditor itself. See *id.* at 1098. Further, the creditor's efforts must have fostered and enhanced, rather than retard or interrupt, the progress of the reorganization. See *id.* at 1096-97. Rather than taking a "net benefit" approach, the bankruptcy court should review each of the creditor's activities independently to determine whether that specified activity benefited the estate. *O'Halloran v. Lyon (In re Mortgs. Ltd.)*, No. AZ-09-1412-KiJuMk, 2010 WL 6259981, at *8 (B.A.P. 9th Cir. Aug. 4, 2010).

Here, Wells Fargo seeks administrative priority for its legal fees

incurred in the following activities:

- (1) successfully moving for the appointment of the chapter 11 trustee (\$201,136.98 in fees);
- (2) successfully opposing Ben Ennis's motion to convert the case (\$24,855.70);
- (3) successfully opposing the Trustee's proposed settlement with Daryl Nicholson (\$17,429.23);
- (4) opposing the Trustee's motion to abandon property to Ben Ennis, resulting in the Trustee's withdrawal of the motion (\$12,662.91); and
- (5) successfully proposing and confirming a plan of liquidation (\$283,115.96 in fees).

Altogether, the fees for these five activities totaled around \$540,000. However, since Wells Fargo's Disclosure Statement estimated its administrative expense claim to be \$350,000, Wells Fargo has voluntarily limited its requested administrative expense claim to \$350,000. Further, according to Wells Fargo, the Plan Administrator has confirmed that he has sufficient cash on hand to pay the requested \$350,000 in fees.

After reviewing Wells Fargo's papers, the court finds that each of the five activities constituted a substantial contribution to the estate. First, by moving for the appointment of the chapter 11 trustee, Wells Fargo protected the estate's assets, namely by preventing Ennis's unauthorized sales of estate property and by allowing the new trustee to unwind Ennis's post-nuptial agreement. Next, successfully opposing Ben Ennis's motion to convert the case to chapter 7 allowed Wells Fargo to confirm its plan, something that most of the creditors preferred as indicated by their acceptance votes. By opposing the Trustee's proposed settlement with Nicholson, Wells Fargo helped prevent the estate from a settlement that would have given Nicholson a greater claim than what he had asserted he was owed. Then, by opposing the Trustee's proposed abandonment of property to Ennis and causing the Trustee to withdraw its motion, Wells Fargo prevented the estate from incurring tax liability given that the abandonment was actually a sale. Lastly, by successfully proposing and confirming a plan of liquidation, Wells Fargo avoided the likely conversion of the case, which would have likely resulted in smaller distributions to creditors.

CONCLUSION

For the reasons set forth above, the court will grant the motion.

9. [10-62315](#)-A-11 BEN ENNIS MOTION TO EMPLOY TERENCE LONG
MMW-56 AS MANAGER FOR THE ESTATE
JUSTIN HARRIS/MV 10-9-13 [[1271](#)]
RILEY WALTER/Atty. for dbt.

Tentative Ruling

Motion: Motion to Employ Terence Long as Manager of Estate

Notice: LBR 9014-1(f)(1); written opposition filed

Disposition: Denied

Order: Civil minute order

Terence Long ("Long") has filed a motion to employ himself as manager of the Ben Ennis estate nunc pro tunc. The Plan Administrator David Stapleton ("Stapleton") and the U.S. Trustee ("UST") have filed oppositions, raising a number of arguments. For the reasons set forth below, the court will deny the motion.

DISCUSSION

Section 327(d)

Section 327(a) provides that "the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons . . . to represent or assist the trustee in carrying out the trustee's duties under this title." If the trustee wishes to employ him- or herself as a professional, § 326(d) applies. This statute states that the "court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate." But "[b]y its express language, section 327(d) permits the trustee to serve only as 'attorney or accountant.' It does not authorize the trustee to serve in any other professional capacity." *U.S. Tr. v. Bloom (In re Palm Coast, Matanza Shores Ltd. P'ship)*, 101 F.3d 253, 258 (2d Cir. 1996); accord *In re Mandell*, 203 B.R. 345, 347-48 (Bankr. S.D. Fla. 1996) ("If Congress intended to authorize the trustee to act in any professional capacity other than attorney or accountant, Congress knew how to express such intention.").

Here, Long, who was the chapter 11 trustee before confirmation, is seeking to employ himself in a non-attorney and non-accountant role, specifically as the "manager" for the estate. None of the duties set forth in the motion appear to represent the typical duties of an attorney or an accountant. Thus, employment of Long as the manager is improper.

Nunc Pro Tunc Approval - Exceptional Circumstances

Even if Long was able to be employed as a manager, he has not established the exceptional circumstances for allowing employment nunc pro tunc.

The bankruptcy court has the equitable power to retroactively approve the employment of a professional where "exceptional circumstances" exist. *Atkins v. Wain, Samuel & Co. (In re Atkins)*, 69 F.3d 970, 973-74 (9th Cir. 1995) (citing *Law Offices of Ivan W. Halperin v. Occidental Fin. Grp., Inc. (In re Occidental Fin. Grp., Inc.)*, 40 F.3d 1059, 1062 (9th Cir. 1994); *Okamoto v. THC Fin. Corp. (In re THC Fin. Corp.)*, 837 F.2d 389, 392 (9th Cir. 1988)). To establish the presence of exceptional circumstances, the professional seeking retroactive approval must satisfy two requirements: (1) the professional must satisfactorily explain his or her failure to receive prior judicial approval; and (2) the professional must demonstrate that his or her services benefited the estate in a significant manner. *Id.* at 974. Further, the professional must satisfy the statutory requirements for employment found under § 327. *Id.* at 976.

Here, the court finds that Long has not satisfied the first requirement of the "exceptional circumstances" test; Long cannot satisfactorily explain his failure to receive prior judicial approval. It is obvious that Long's reason for the late employment application is due to the court's interpretation of § 326 and intention to reduce his fees as the chapter 11 trustee in the Ben Ennis case. Long's

declaration even admits, "I am filing this application on a nunc pro tunc basis as I learned just recently that I was not going to be compensated for services I rendered in connection with the ECP case as part of my compensation as chapter 11 trustee of the Ennis case." It would be improper to say that a professional has provided a satisfactory explanation when the explanation for the nunc pro tunc employment (and subsequent fee request) is to get around the statutory cap under § 326 and recover fees that were (or will be) disallowed. Thus, Long has not shown the presence of exceptional circumstances.

CONCLUSION

For the reasons set forth above, the court will deny the motion.

10. [10-62315](#)-A-11 BEN ENNIS MOTION FOR COMPENSATION FOR
MMW-57 TERENCE LONG, OTHER
JUSTIN HARRIS/MV PROFESSIONAL(S), FEE:
\$245,295.00, EXPENSES: \$0.00
10-9-13 [[1274](#)]
- RILEY WALTER/Atty. for dbt.
NOTICE FILED RESCHEDULING TO
12/11/13

Final Ruling

The hearing has been re-noticed for December 11, 2013, at 1:30 p.m.
The hearing will be dropped from calendar.

11. [13-16879](#)-A-11 RODRIGO ROMERO CHAPTER 11 STATUS CONFERENCE
10-29-13 [[11](#)]
- ANTHONY EGBASE/Atty. for dbt.

No tentative ruling.

12. [13-14894](#)-A-11 JORENE MIZE CONTINUED CHAPTER 11 STATUS
CONFERENCE
7-24-13 [[21](#)]
- ROSEANN FRAZEE/Atty. for dbt.

Final Ruling

The matter is continued to December 17, 2013, at 1:45 p.m.

13. [13-14894](#)-A-11 JORENE MIZE MOTION TO USE CASH COLLATERAL
RAF-6 11-5-13 [[117](#)]
JORENE MIZE/MV
ROSEANN FRAZEE/Atty. for dbt.

Final Ruling

The matter is continued to December 17, 2013, at 1:45 p.m.

14. [13-16596](#)-A-11 ANTHONY/MONIQUE DA COSTA CHAPTER 11 STATUS CONFERENCE
CHRISTIAN JINKERSON/Atty. for dbt. 10-17-13 [[34](#)]

No tentative ruling.

15. [12-17336](#)-A-11 VISSER FARMS CONTINUED MOTION TO USE CASH
KDG-2 COLLATERAL
VISSER FARMS/MV 8-27-12 [[7](#)]
SCOTT BLAKELEY/Atty. for dbt.

Tentative Ruling

Motion: Use Cash Collateral

Notice: LBR 9014-1(f)(2); no written opposition required

Disposition: To be determined

Order: Prepared by moving party

Creditor: Wells Fargo Bank

Expiration: December 31, 2013

Adeq. Protection: To Be Determined

The trustee or debtor in possession may not use cash collateral unless each entity that has an interest in the collateral consents or the court, after notice and a hearing, authorizes the use on specified terms and finds that the impacted creditor is adequately protected. 11 U.S.C. §§ 363(c)(2),(e), 361; Fed. R. Bankr. P. 4001(b).

At the hearing, the court will inquire: (1) whether the motion has been resolved by stipulation and, if so, the terms of the stipulation, including those specified in Federal Rule of Bankruptcy Procedure 4001(b)(1)(B); or (2) if the matter is not resolved by stipulation, whether the matter is (a) ripe for resolution, (b) not ripe for resolution but may be resolved without resort to Federal Rule of Bankruptcy Procedure 9014(d), or (c) not ripe for resolution but requires an evidentiary hearing under Federal Rule of Bankruptcy Procedure 9014(d).

Orders approving the use of cash collateral, whether by stipulation or

after hearing, shall: (1) specify the duration of the order approving the use of cash collateral; (2) comply with Federal Rule of Bankruptcy Procedure 4001(b)(1)(B)(i)-(iv); (3) comply with LBR 4001-1(c)(3)-(4); (4) attach as an exhibit a specific and itemized budget; (5) expressly reserve the right of any party to proceed under 11 U.S.C. §§ 506(c), 552(b)(1); and (6) be approved as to form by each appearing impacted creditor and any other party in interest so requesting approval.

16. [12-17310](#)-A-11 JOHN/GRACE VISSER
KDG-2
JOHN VISSER/MV
RONALD CLIFFORD/Atty. for dbt.

CONTINUED MOTION TO USE CASH
COLLATERAL
8-27-12 [[9](#)]

Tentative Ruling

Motion: Use Cash Collateral

Notice: LBR 9014-1(f)(2); no written opposition required

Disposition: To be determined

Order: Prepared by moving party

Creditor: Wells Fargo Bank

Expiration: December 31, 2013

Adeq. Protection: To Be Determined

The trustee or debtor in possession may not use cash collateral unless each entity that has an interest in the collateral consents or the court, after notice and a hearing, authorizes the use on specified terms and finds that the impacted creditor is adequately protected. 11 U.S.C. §§ 363(c)(2),(e), 361; Fed. R. Bankr. P. 4001(b).

At the hearing, the court will inquire: (1) whether the motion has been resolved by stipulation and, if so, the terms of the stipulation, including those specified in Federal Rule of Bankruptcy Procedure 4001(b)(1)(B); or (2) if the matter is not resolved by stipulation, whether the matter is (a) ripe for resolution, (b) not ripe for resolution but may be resolved without resort to Federal Rule of Bankruptcy Procedure 9014(d), or (c) not ripe for resolution but requires an evidentiary hearing under Federal Rule of Bankruptcy Procedure 9014(d).

Orders approving the use of cash collateral, whether by stipulation or after hearing, shall: (1) specify the duration of the order approving the use of cash collateral; (2) comply with Federal Rule of Bankruptcy Procedure 4001(b)(1)(B)(i)-(iv); (3) comply with LBR 4001-1(c)(3)-(4); (4) attach as an exhibit a specific and itemized budget; (5) expressly reserve the right of any party to proceed under 11 U.S.C. §§ 506(c), 552(b)(1); and (6) be approved as to form by each appearing impacted creditor and any other party in interest so requesting approval.

2:00 p.m.

1. [10-62315](#)-A-11 BEN ENNIS
MMW-52
JUSTIN HARRIS/MV

CONTINUED MOTION FOR
COMPENSATION FOR TERENCE J.
LONG, CHAPTER 11 TRUSTEE(S),
FEE: \$72373.35, EXPENSES:
\$164.85
7-25-13 [[1222](#)]

RILEY WALTER/Atty. for dbt.
JUSTIN HARRIS/Atty. for mv.
RESPONSIVE PLEADING

Final Ruling

At the suggestion of the parties, the matter is continued to December 11, 2013, at 2:00 p.m.