UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

December 11, 2014 at 10:30 a.m.

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1. 12-36419-E-11 KFP-LODI, LLC
SAC-13 Scott A. CoBen

MOTION FOR COMPENSATION BY THE LAW OFFICE OF SCOTT A. COBEN AND ASSOCIATES FOR SCOTT A. COBEN, DEBTOR'S ATTORNEY
10-17-14 [431]

Final Ruling: No appearance at the December 11, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on October 17, 2014. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

Scott A. CoBen & Associates, the Attorney ("Applicant") for KFP-Lodi, LLC., the Debtor in Possession ("Client"), makes a Second Interim and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period May 28, 2014 through December 11, 2014. The order of the court approving employment of Applicant was entered on May 29, 2013, Dckt. 212. Applicant requests fees in the amount of $6,375.00.

The court has previously approved First Interim Fees of $33,675.00.

Order, Dckt. 427.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

1991). An attorney must exercise good billing judgment with regard to the services provided as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including general administration, finalizing a loan, injunction, fee application, closing the case. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES REQUESTED

Fees

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

General Case Administration: Applicant spent 1.7 hours in this category. Applicant reviewed two operating reports and attended a status conference.

Loan from SBG1: Applicant spent 4.9 hours in this category. Applicant began preparing the motion to approve the financing with SBG! For the state court action. After reviewing the terms the Applicant found that the loan terms were so onerous that it would not be in Debtor’s best interest to proceed with the financing. After discussions with Debtor’s principal, Applicant ceased work on the financing and began taking steps to secure an injunction.

Injunction: Applicant spent 11.0 hours in this category. Applicant began negotiations with counsel for TerraCotta for a stipulated injunction. Eventually the parties agreed to the terms of an injunction. Applicant filed an adversary proceeding and the proposed stipulation and order for the injunction which the court signed.

Fee Application: Applicant spent 3.9 hours in this category. Applicant prepared and filed the second and final fee application.

Close Case: Applicant spent 4.0 hours in this category. Applicant

prepared and filed a motion to close the case.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Scott CoBen, attorney	25.5	$250.00	$6,375.00
Total Fees For Period of Application			$6,375.00

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

Application	Interim Approved Fees	Interim Fees Paid
First Interim	$33,675.00	$33,675.00
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	$33,675.00	

FEES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. Second Interim Fees in the amount of $6,375.00 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 and prior Interim Fees in the amount of $33,675.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Plan Administrator under the confirmed plan from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 11 under the confirmed Plan.

Applicant is allowed, and the Plan Administrator under the confirmed plan is authorized to pay, the following additional amounts as compensation to this professional in this case:

Fees $6,375.00

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

Pursuant to 11 U.S.C. § 330 the court allows Scott A CoBen & Associates (Scott A. CoBen counsel of record) total final professional fees in the amount of $40,150.00 for services as counsel for the Debtor in Possession and post-confirmation services to the Debtor serving as Plan Administrator.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Scott A. CoBen & Associates ("Applicant"), Attorney for Debtor in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Scott A. CoBen & Associates is allowed the following additional attorneys' fees as a professional of the Estate and services to the post-confirmation Plan Administrator:
>
> Scott A. CoBen & Associates, Professional Employed by Debtor in Possession
>
> Fees in the amount of $ 6,375.00,
>
> Total professional fees in the amount of $40,150.00 for services provided as Applicant in this as counsel for the Debtor in Possession and post-confirmation services to the Debtor serving as Plan Administrator as final fees and costs pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Plan Administrator under the confirmed plan is authorized to pay the fees allowed by this Order from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 11 under the confirmed Plan.

2. 12-36419-E-11 KFP-LODI, LLC
SAC-14 Scott A. CoBen

MOTION FOR FINAL DECREE AND ORDER CLOSING CASE
10-17-14 [436]

Final Ruling: No appearance at the December 11, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and all creditors on October 17, 2014. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

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

The court's decision is to grant the Motion for Final Decree and Order Closing Case.

Federal Rules of Bankruptcy Procedure Rule 3022 provides that, after an estate is fully administered in a Chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case. 11 U.S.C. § 350(a) additionally states that the court is required to close a case after an estate is "fully administered and the court has discharged the trustee." The fact that the estate has been fully administered merely means that all available property has been collected and all required payments made. *In re Menk,* 241 B.R. 896, 911 (9th Cir. B.A.P. 1999).

To determine whether a Chapter 11 case has been "fully administered," the court considers whether:

- the plan confirmation order is final;
- deposits required by the plan have been distributed;
- property to be transferred under the plan has been transferred;
- the debtor (or the debtor's successor under the plan) has taken

control of the business or of the property dealt with by the plan;

• plan payments have commenced; and

• all motions, contested matters and adversary proceedings have been finally resolved.

Federal Rule of Bankruptcy Procedure 3022, Adv. Comm. Note (1991). Additionally, unless the Chapter 11 plan or confirmation order provides otherwise, a Chapter 11 case should not remain open solely because plan payments have not been completed. *See id.*; *In re John G. Berg Assocs., Inc.*, 138 B.R. 782, 786 (Bankr. E.D. Pa. 1992).

Here, the Chapter 11 Plan was confirmed on February 27, 2014. The Plan provided that Debtor is responsible for operating its business and making distributions in accordance with the terms of the plan. Debtors state that all distributions to be made under the plan are current and that all the post-confirmation operating reports have been filed.

As indicated by the Advisory Committee Notes accompanying Fed. R. Bankr. P. 3022, entry of a final decree closing a chapter 11 case should not be delayed solely because the payments required by the plan have not been completed. Rather, the above-listed factors should be considered in determining whether the estate has been fully administered. As stated by Debtors, there are no outstanding deposits that require distribution under the plan and that all disputed claims have been resolved.

Upon confirmation of the Plan, the relevant property became fully vested in Debtors, who are currently managing the estate. Debtors appear to be current on all distribution under the plan and filed post-confirmation operating reports.

Thus, the court finds that Debtors have satisfactorily met the above-listed factors, determining whether the Chapter 11 bankruptcy estate has been fully administered within the meaning of 11 U.S.C. § 350(a). The court will enter a final decree closing Debtors' case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Final Decree and Order Closing Case filed by the Debtors-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and Debtors' Chapter 11 Bankruptcy Case is closed pursuant to 11 U.S.C. § 350(a) and Federal Rule of Bankruptcy Procedure 3022, without limitation or restriction of this court's post-confirmation jurisdiction in this case.

3. 11-46148-E-7 ASHWINDAR KAUR
UST-3 Timothy McCandless

MOTION FOR SANCTIONS AND/OR MOTION TO DISGORGE FEES
10-8-14 [272]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and parties requesting special notice on October 8, 2014. By the court's calculation, 64 days' notice was provided. 28 days' notice is required.

The Motion for Imposition of Sanctions and Disgorgement of Attorney's Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Imposition of Sanctions and Disgorgement of Attorney's Fees is granted.

The United States Trustee ("UST") filed the instant Motion for the Imposition of Sanction and Disgorgement of Attorney's Fees on October 8, 2014. Dckt. 272.

REVIEW OF MOTION

The UST seeks an order (I) imposing sanction on Timothy McCandless, Esq. (Pursuant to the court's inherent authority and Local Bankruptcy Rule 9004-1(c)(1)), and (ii) requiring Mr. McCandless to disgorge the fees he received in contemplation of, or in connection with, this case (pursuant to 11 U.S.C. § 329).

In support of the Motion, the UST states that two of the Debtor's

primary secured creditors filed motions for stay relief. Dckt. 12 and 41. The UST states that Mr. McCandless, the Debtor's attorney of record, filed oppositions to the stay relief motions. In connection with those opposition, the UST alleges that Mr. McCandless also filed three fraudulent declarations. The UST argues that because of these alleged fraudulent declarations, Mr. McCandless should be sanctioned under the court's inherent authority, as well as Local Bankruptcy Rule 9004-1(c)(1).

The UST argues that the fraudulent declarations each contain the electronic signature "/s/ Bhaljeet Singh," which appears to be a misspelling of the name of the Debtor's sister - Bhanjith Singh. Thus, the UST argues that under Local bankruptcy Rule 9004-1(c)(1)(C), Mr. McCandless represented to the court that he had Ms. Sing's "wet" signature in his possession at the time of the filing. See Dckt. 67, 113, and 118. The UST alleges that Bhanjith Singh did not sign the declarations. The UST argues that she has never met or communicated with Mr. McCandless nor did she even learn of the existence of this case until years after Mr. McCandless filed the declarations. See Declaration of Bhanjith Singh, Dckt. 277, Paragraphs 7, 13, 19, 22. According to the UST, the three fraudulent Singh declarations contain numerous inaccuracies. Among other things, the declarations incorrectly state that Ms. Singh is a real estate investor and that she agreed to make a loan to the Debtor. See Bhanjith Singh Declaration, Dckt. 277, paragraphs 8-9, 14-15, 20-21.

To date, Mr. McCandless has ignored the UST's written request, under Local Bankr. R. 9004-1(c)(1)(D), that he provide the "wet" signatures for the three Singh declarations. He has also ignored the UST's request for "wet" signature for related declarations filed in the names of (Anissa Abdullah (dckt. 67, 112, and 117) and Christopher Krosta (Dckt. 67, 114, and 119). The UST argues that the foregoing circumstances suggest that Mr. McCandless fabricated the Singh declarations out of whole cloth in order to once again frustrate the Debtor's secured creditors.

The UST continues to argue that Mr. McCandless should also be ordered to disgorge his $10,000.00 fee pursuant to 11 U.S.C. § 329. The court has already determined that the successive filing by the Debtor and her mother were part of a "scheme to delay, hinder, and defraud creditors." The UST argues that this means that Mr. McCandless' filing of the instant case did not serve a legitimate purpose. Dckt. 151 and 153. The UST argues that Mr. McCandless failed to competently discharge his duty to counsel the Debtor about her duties as a Debtor-in-Possession. Notable, the Debtor in Possession obtained unauthorized post-petition loans. The Debtor in Possession also made significant post-petition transfers. See Dckt. 111, at pg 2, lines 9-10; Dckt 116, pg. 2, lines 9-10; Dckt. 150, pg. 6; Dckt. 176, pg 10.

The UST requests that this court:

1. Impose sanctions of $1,000.00 against Mr. McCandless for the UST's attorney's fees reasonably incurred in bringing the Motion.

2. Prohibit Mr. McCandless from using electronic signatures (i.e. from using the "/s/ name" convention) to indicate signatures other than his own on documents filed with the court for a period of one-year;

3. Order Mr. McCandless to complete 10 hours of ethics CLE (and file a certification with the court upon completion);

4. Impose sanction of $9,000.00 against Mr. McCandless ($1,000.00 for each of the "wet" signatures he failed to produce to the UST);

5. Order Mr. McCandless to disgorge his $10,000.00 fee to the Chapter 7 Trustee, pursuant to 11 U.S.C. § 329; and

6. Grant such relief as the court deems just and proper.

OPPOSITION

Mr. McCandless filed an Opposition to Motion for the Imposition of Sanctions and for Disgorgement of Attorney's Fees on November 26, 2014. Dckt. 280. Mr. McCandless argues that the UST's Motion is factually, procedurally, and substantively flawed. Mr. McCandless argues that he has facsimile copy of the wet signature of the correct declarant who signed a declaration who is Bhaljeet Singh – not Bhanjith Singh.

Mr. McCandless states that his compensation was solely paid by Amar Mathfallu, a friend of the Debtor. Mr. McCandless argues that he provided several bankruptcy related attorney services for the benefit of the Debtor and that the value of the legal services which were performed on behalf of the Debtor substantially exceeded the compensation received. Mr. McCandless argues that the UST was in error by stating that the Declaration which was submitted by Bhaljeet Singh was forged and that the name of the declarant was misspelled. Mr. McCandless argues that the UST has the declarant confused with the sister of the Debtor.

Mr. McCandless states that he is in possession of a facsimile copy of the Declaration signed by Bhaljeet Singh. He argues that the fact he did not produce the signed Declaration more quickly is because the document was prepared nearly three years ago and was amongst thousands of pages of files which are maintained in the extensive archives of the Law Offices of Timothy L. McCandless.

Mr. McCandless also states that he is in possession of a facsimile copy of the Declaration signed by Christopher Kosta. He argues that the fact he did not produce the signed Declaration more quickly is because the document was prepared nearly three years ago and was amongst thousands of pages of files which are maintained in the extensive archives of the Law Offices of Timothy L. McCandless.

Mr. McCandless states that the UST's "naked assertion" that he did not maintain copies of the wet signatures of declarants Bhaljeet Singh and Christopher Kosta is unfounded.

Mr. McCandless continues and argues that the Motion is untimely. Mr. McCandless argues that under 11 U.S.C. § 546(a), in an action or preceding under 11 U.S.C. §§ 544, 545, 547, 548, or 543, the UST had either the earlier of (I) two years after the entry of the Order for relief or (ii) the time the case is closed. In support, Mr. McCandless states that case number 11-46148 was

filed on November 2, 2011. The case was converted to Chapter 7 on February 14, 2012. The Debtor never appeared for any of the Creditor Meeting and Mr. McCandless never saw the Debtor thereafter. Mr. McCandless argues that the UST failed to act with diligence by not seeking copies of the wet signatures until June 25, 2014, almost three years after the case was dismissed. Additionally, Mr. McCandless argues that the UST has not provided any evidence that the wet signatures of the declarants were not in the possession of Mr. McCandless. Mr. McCandless once against argues that because the declarations were filed in his extensive archives, Mr. McCandless should not be held to a standard that he provide the UST with immediate production thereof, particularly in view of the UST's lack of diligence in seeking such documents. Mr. McCandless argues that since he attests to the fact that he was in possession of the wet signatures at the time of filing and has submitted copies, that the originals are contained in his extensive archives, should render the entire issue of the signatures moot.

Mr. McCandless then argues that the court should not exercise its inherent authority because the present scenario does not support the conclusion that a need exists for the court to exercise its implied power, giving that the UST failed to act with diligence.

Lastly, Mr. McCandless argues that he is entitled to the full panoply of constitutional privileges, including trial by a jury, the presumption of innocense, and proof beyond a reasonable doubt. Mr. McCandless supports this premise by improperly citing relatively long excerpts from various cases in which Mr. McCandless purposefully or inadvertently neglects to properly quote. At the end of these improper citations, Mr. McCandless summarily concludes that the court should not elect to utilize its inherent authority and the Motion should be dismissed.

UST'S REPLY

The UST filed a reply on December 4, 2014. Dckt. 282. To begin, the UST states the factual background concerning the letter requesting the "wet" signatures. The UST states that on June 25, 2014, the UST sent a letter to Mr. McCandless requesting "copies of original manual signatures" for declarations filed with the "/s/" signatures of "Bhaljeet Singh." Dckt. 67, 113, and 118). The letter also requested copies of original manual signatures for declarations filed in the names of "Anissa Abdullah" and "Christopher Kosta." The letter was sent by regular U.S. mail, fax, and email, totaling five different addresses. The letter was prompted by concerns articulated by the parties to Adversary Proceeding No. 13-02344. Specifically, Mr. Jason Blumberg, attorney for the UST, was informed that the Defendant Bhanjith Sing believed that unauthorized declarations had been filed in her name. The UST only learned of this issue in the Spring of 2014. After receiving no response to the letter for more than three months, the UST filed the instant Motion.

The UST then addresses Mr. McCandless' opposition. First, the UST argues that Mr. McCandless' belated submission of faxed signatures does not moot the concerns of the Motion. The UST states that more than five months after the UST's original request, Mr. McCandless has only just supplied facsimile copies of the wet signatures. See Declaration of Timothy L. McCandless, Dckt. 281, pg. 2, lines 10-12. The UST argues that several questions about the Singh Declarations remain unanswered. First, who is the person that signed the Singh Declarations? Mr. McCandless states that the

declarant is not the Debtor's sister, Bhanjith Singh. However, the UST states that there are three different spellings of the declarant's name on the facsimile copy. The title and preamble refer to "Bhaljeet Singh"; the "/s/ signature" refers to "Bhaljeet Singh"; and the faxed signature is by "Bhaljeet Singh." see Dckt. 281, pg. 6-7.

Second, why has Mr. McCandless not provide a copy of the declarant's original manual signature as opposed to a copy of a fax? If an "/s/ Name" signature is used, the Local Bankr. R. Requires electronic-filers to retain the "original signed document for three years following the closing of a case. The Local Rules further provides that the failure to produce the originally signed documents may result in the imposition of sanctions. See Local Bankr. R. 9004-1(c)(1)(D).

Third, who faxed the "facsimile copy" of the Singh Declaration to Mr. McCandless? The text at the top of the document indicates that it was sent from "Wine country Investments" Dckt. 281, pg. 6-7. The UST notes in footnote 5 that similar text appears on the Debtor's monthly operating reports. Dckt. 175 at pg. 5-10 and Dckt. 176, pg 1, 5-10. The UST argues that this would suggest that the Debtor (or someone associated with the Debtor) faxed the signed copy of the Singh Declaration.

Fourth, the UST asks why Mr. McCandless has not provided copies of wet signatures (even "facsimile copies") for the declarations of Anissa Abdullah.

The UST continues and argues that the Motion is timely. The UST argues that Mr. McCandless was incorrect in citing 11 U.S.C. § 546(a) two-year statute of limitations since that section only applies to avoidance actions. Citing to *In re Bell*, the UST argues that section 546 does not apply to the present Motion for sanctions and disgorgement. *In re Bell*, 212 B.R. 654, 658 (Bankr. E.D. Cal. 1997) ("Counsel erroneously asserts that the tow-year period to commence actions to avoid unauthorized post-petition transfers bars the United States Trustee from requesting disgorgement. . . . Section 549, however, does not form the basis of this ruling. The fees are ordered disgorged as a sanction. This is not the exercise of an avoiding power."). The UST argues that there is no statute of limitations under 11 U.S.C. § 329 and points to the fact that Local Bankr. R. requires electronic filers to retain an "originally signed document" for at least three years following the closing of a case.

Next, the UST argues that Mr. McCandless has not met his burden to justify his fee. The UST argues that the burden is upon the applicant to demonstrate that the fees are reasonable. *In re Jastrem*, 523 F.3d 438, 443 (9th Cir. 2001). The UST states that Mr. McCandless has not submitted any time records or other documentary evidence to substantiate his claim that the value of his services "substantially exceed[s]" his compensation. The UST further argues that since the court determined that the filing of the case was part of a "scheme to delay, hinder, and defraud creditors," there is a support for disgorgement.

The UST then argues that Mr. McCandless' fees should be disgorged to the Chapter 7 Trustee. Mr. McCandless states in the Opposition that Amar Mathfallu was the source of his fees. However, the UST states that they were informed that Mr. Mathfallu is the Debtor's former spouse and that the court recently determined that Mr. Mathfallu was the recipient of an unauthorized post-petition transfer of more than $166,000.00. See Case No. 13-02342-E, Dckt.

1, Dckt. 34, and Dckt. 43. In light of this, the UST argues that any disgorged attorney's fees should be paid to the Chapter 7 Trustee, subject to the right, if any, of Mr. Mathfallu to seek payment of the funds.

Lastly, the UST argues that the Motion does not seek the imposition of criminal or punitive sanctions. The UST states that the Motion seeks, among others, the following sanctions: (I) an award of attorney's fees; and (ii) a prohibition against Mr. McCandless' use of electronic signatures. These requests appear to fall into the class of permissible sanctions. The UST submits that if any of the requested sanctions is determined to be punitive in nature, then the sanction in question may not be imposed in this forum. The UST states that the concerns that Mr. McCandless articulated about punitive and/or criminal sanctions are not implicated by the Motion.

APPLICABLE LAW

Sanction Authority

Bankruptcy Courts have the jurisdiction to impose sanctions even after a case has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548-49 (9th Cir. 2004). The court also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (In re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); *see also* 11 U.S.C. §105(a).

A Bankruptcy Court is also empowered to regulate the practice of law before it. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.* 501 U.S. 32,43 (1991); *see also Lehtinen*, 564 F.3d at 1058.

The primary purpose of a civil contempt sanction is to compensate losses sustained by another's disobedience to a court order and to compel future compliance with court orders. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1192 (9th Cir. 2003). The contemptor must have an opportunity to reduce or avoid the fine through compliance. *Id*. The court's authority to regulate the practice of law is broader, allowing the court to punish bad faith or willful misconduct. *Lehtinen*, 564 F.3d at 1058. However, the court cannot issue punitive sanctions pursuant to its power to regulate the attorneys appearing before it. *Id.* at 1059. Nevertheless, suspending an attorney from appearing before the court is permissible. *Id.*

The court's jurisdiction over parties concerning their conduct in a bankruptcy case or adversary proceeding is not terminated by the dismissal of the case or adversary proceeding. *Schering Corp. v. Vitarine* Pharmaceuticals, Inc., 889 F.2d 490, 495-496 (3rd Cir. 1989) ("The analogy of Rule 11 sanctions to contempt proceedings is apt. Both are designed to deter misbehavior before the Court. See Fed. R. Civ. P. 11, advisory committee's note ('Since its original promulgation, Rule 11 has provided for the striking of pleadings and imposition of disciplinary sanctions to check abuses in the signing of pleadings...To hold that a district court has no power to order sanctions after a voluntary dismissal is to emasculate Rule 11 in those cases where wily plaintiffs file baseless complaints, unnecessarily sap the precious resources of their adversaries and the courts, only to insulate themselves from sanctions by promptly filing a notice of dismissal.'); *Greenberg v. Sala*, 822 F.2d 882,

885 (9th Cir. 1987) (“At the time the district court denied the defendants' motions for Rule 11 sanctions, the case had been dismissed. The dismissal, however, did not deprive the court of jurisdiction to consider the motions. See *Szabo Food Service, Inc. v. Canteen Corp.*, No. 86-3093, slip op. (7th Cir. Jun. 29, 1987) (voluntary dismissal under Rule 42(a)(1)).”).

11 U.S.C. § 329

This court has the authority, and responsibility, to consider attorneys’ fees obtained or to be paid prior to or during a bankruptcy case. 11 U.S.C. § 329, 330, 331. Fees in excess of the reasonable value of such services may be ordered repaid. The application of 11 U.S.C. § 329 and Federal Rule of Bankruptcy Procedure, may seem harsh, but are necessary to not only protect vulnerable consumers and business owners, but to protect the integrity of the federal judicial process. *See Neben & Starrett v. Chartwell Fin. Corp. (In re Park-Helena Corp.)*, 63 F.3d 877, 881 (9th Cir. Cal. 1995). Debtor's counsel must lay bare all its dealings regarding compensation and must be direct and comprehensive. *See In re Bob's Supermarket's, Inc.*, 146 Bankr. 20, 25 (Bankr. D. Mont. 1992) *aff'd in part and rev'd in part*, 165 Bankr. 339 (Bankr. 9th Cir. 1993). The burden is on the person to be employed to come forward and make full, candid, and complete disclosure. *In re B.E.S. Concrete Products, Inc.*, 93 B.R. 228 (E.D. Cal. 1988). The federal courts are not mere devices to be used to generate fees for attorneys irrespective of any bona fide rights to be adjudicated.

11 U.S.C. § 329 requires that any attorney who provides services for a debtor must provide disclosures to the court and parties in interest. This section states,

> § 329. Debtor's transactions with attorneys
>
> (a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.
>
> (b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to–
>
> (1) the estate, if the property transferred--
>
> (A) would have been property of the

estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

11 U.S.C. § 329.

Local Bankr. R. 9004-1(c)

In relevant part, Local Bankr. R. 9004-1(c) states:

(c) Signatures Generally. All pleadings and non-evidentiary documents shall be signed by the individual attorney for the party presenting them, or by the party involved if that party is appearing in propria persona. Affidavits and certifications shall be signed by the person offering the evidentiary material contained in the document. The name of the person signing the document shall be typed underneath the signature.

(1) Signatures on Documents Submitted Electronically.

(A) Signature of the Registered User. The username and password required to access the electronic filing system shall serve as the registered user's signature on all electronic documents filed with the Court. They shall also serve as a signature, with the same force and effect as a written signature, for purposes of the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules of this Court, including Fed. R. Bankr. P. 9011-1 and LBR 9004-1(c), and for any other purpose for which a signature is required in connection with proceedings before the Court. Unless the electronically filed document has been scanned and shows the registered user's original signature or bears a software-generated electronic signature thereof, an "/s/" and the registered user's name shall be typed in the space where the signature would otherwise appear.

(B) Signatures of Other Persons. Signatures of persons other than the registered user may be indicated by either:

(I) Submitting a scanned copy of the originally signed document;

(ii) Attaching a scanned copy of the signature page(s) to the electronic document; or

(iii) Through the use of "/s/ Name" or a software-generated electronic signature in the signature block where signatures would otherwise appear. Electronically filed documents on which "/s/ Name" or a software-generated electronic signature is used to indicate the signatures of persons other than the registered user shall be subject to the requirements set forth in Subparts (C) and (D) below.

(C) The Use of "/s/ Name" or a Software Generated-Electronic Signature. The use of "/s/ Name" or a software-generated electronic signature on documents constitutes the registered user's representation that an originally signed copy of the document exists and is in the registered user's possession at the time of filing.

(D) Retention Requirements When "/s/ Name" or a Software-Generated Electronic Signature Is Used. When "/s/ Name" or a software-generated electronic signature is used in an electronically filed document to indicate the required signature(s) of persons other than that of the registered user, the registered user shall retain the originally signed document in paper form for no less than three (3) years following the closing of the case. On request of the Court, U.S. Trustee, U.S. Attorney, or other party, the registered user shall produce the originally signed document(s) for review. The failure to do so may result in the imposition of sanctions on the Court's own motion, or upon motion of the case trustee, U.S. Trustee, U.S. Attorney, or other party.

Employment of Professionals by Fiduciaries of the Estate

A trustee or debtor in possession may employ professionals to represent them in bankruptcy cases. 11 U.S.C. §§ 327, 1107. For the authorization to be employed, it must be shown not only that the professional has the skills to provide the services to the estate, but that the professional is "disinterested."

§ 327. Employment of professional persons

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys,

accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. § 327.

Such professionals, including attorneys, employed by the trustee or debtor in possession may request the court approve compensation for services provided to that fiduciary of the bankruptcy estate. 11 U.S.C. §§ 330, 331.

§ 330. Compensation of officers

(a) (1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103--

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11 or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including--

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. § 330. Interim compensation may be allowed professionals during the prosecution of the case. 11 U.S.C. § 331. Such interim fees are subject to final approval at the end of the case.

DISCUSSION

Allowance of Professional Fees, Review Pursuant to 11 U.S.C. § 329

The court first considers the reasonableness of the attorneys' fees, the $10,000.00 which Mr. McCandless asserts that he was entitled to be paid, and retain, for representing the Debtor in filing the bankruptcy case and representing the Debtor in Possession. A review of the Docket reveals that this court has not approve the payment of any professional fees to Mr. McCandless for services provided in representing the Debtor in Possession. Such allowance is required before such professional may receive, or apply from a retainer, any compensation for the services. 11 U.S.C. § 330, 331.

Further review of the Docket discloses that the Debtor in Possession was never authorized to employ Mr. McCandless as attorney for the Debtor in Possession or that Mr. McCandless met the requirements to be employed as such a professional as required by 11 U.S.C. § 327. The failure to obtain the authorization for such employment precludes the professional from receiving any compensation for the services to the Debtor in Possession, who is the fiduciary of the estate. *Atkins v. Wain Samuel & Co. (In re Atkins)*, 69 F.3d 970, 974 (9th Cir. 1995); *Michel v Federated Dep't Stores (In re Federated Dep't Stores)*, (1995, CA6 Ohio) 44 F3d 1310 (6th Cir. 1995); *Lavender v Wood Law Firm*, (1986, CA8 Ark) 785 F2d 247 (8th Cir. 1986); *McCutchen, Doyle, Brown & Enersen v. Official Committee of Unsecured Creditors (In re Weibel, Inc.)*, 176 B.R. 209, 211 (B.A.P. 9th Cir. 1994).

Even if employment was authorized, the court may reduce the amount of fees requested, as succinctly discussed by the court in *In re Escojido*, 2011 Bankr. LEXIS 4288 *4-*5 (Bkcy. S.D. Cal. 2011);

> "The Court may deem fees unreasonable and excessive based on an attorney's failure to perform required services or failure to comply with disclosure requirements. *In re Basham*, 208 B.R. 926, 932-933 (9th Cir. BAP 1997), aff'd 152 F.3d 924 (9th Cir. 1998) (disgorgement appropriate due to lawyer's absenteeism). The Court may cancel counsel's fee agreement, or order the return of any such payment to the extent that it is excessive. *Shapiro Buchman LLP v. Gore Bros. (In re Monument Auto Detail)*, 226 B.R. 219, 226 (B.A.P. 9th Cir. Cal. 1998) (services in excess of value result in court's reducing fee award). Disgorgement of attorney's fees is not a punitive measure and does not constitute "damages." *Berry v. United States Tr. (In re Sustaita)*, 438 B.R. 198, 213 (B.A.P. 9th

> Cir. 2010) (disgorgement a civil remedy with no additional procedural protections). The purpose of disgorgement is to compensate the Debtor for having paid more than the value of services rendered to him by the bankruptcy attorney. *Id.* Stacy bears the burden of proof under 11 U.S.C. § 329(b) to demonstrate the value of his services. *In re Gianulias, 111 B.R. 867, 869* (E.D. Cal. 1989) (disgorgement appropriate for inadequate fee applications)."

As starting point, counsel is required to hold the $10,000.00 retainer in his trust account pending approval of any fees by the court. The $10,000.00 retainer is property of the bankruptcy estate, not the attorney's money. *Barron v. Countryman*, 432 F.3d 590, 595 (5th Cir. 2005)

Upon conversion of the case, the $10,000.00 retainer came under the control of the Chapter 7 Trustee. 11 U.S.C. § 704(a). The U.S. Trustee has requested that the court order the turnover of the $10,000.00 retainer to the Chapter 7 Trustee, the current fiduciary of the bankruptcy estate.

No portion of the retainer having been authorized to be paid to Counsel for services rendered, the full $10,000.00 shall be turned over to the Trustee. The Trustee shall hold the monies and not disburse them until after March 1, 2015, as otherwise permitted by the Bankruptcy Code. On or before January 3, 2015, Counsel for the former Debtor in Possession shall file any application for retroactive or *nunc pro tunc* employment, as properly permitted by applicable law, and application for attorneys' fees, if any. Any attorney liens or interests of Timothy McCandless shall attach to the $10,000.00 retainer while held by the Trustee until said monies are disbursed by the Trustee or determined by the court.

11 U.S.C. § 329 Consideration of Fees

The bankruptcy judge, pursuant to the rights and obligations arising under the Bankruptcy Code consider the fees being claimed by counsel for a debtor for the period of one year before and continuing through the bankruptcy case. 11 U.S.C. § 329. This is a core matter for which the bankruptcy judge makes all findings of fact and conclusions of law, and issues the final order thereon. 28 U.S.C. §§ 1334, 157, and the reference to this bankruptcy court by the United States District Court for the Eastern District of California.

The Declaration provided by Timothy McCandless in opposing the Motion raises several serious legal and ethical issues for counsel. Dckt. 281. He testifies under penalty of perjury that the $10,000.00 was paid by Amar Mathfallu, who Mr. McCandless identifies as a "friend of the debtor." Dckt. 281, ¶ 4. Mr. McCandless provides no testimony as to how he, the witness testifying under penalty of perjury, has personal knowledge of the relationship between the Debtor and Mr. Mathfallu. Nether Mr. Mathfallu nor the Debtor provide any testimony in opposition to the Motion. Mr. Mathfallu has not asserted any interest in the monies which Mr. McCandless has held for the attorneys' fees relating to this bankruptcy case.

Mr. McCandless further states under penalty of perjury that the Debtor did not contribute any compensation for the attorneys' fees. *Id.*, ¶ 5. Mr. McCandless does not provide any testimony as to having personal knowledge of the source of the monies or that the Debtor did not provide all, or a portion,

of the monies to Mr. Mathfallu to conduit the monies to counsel

In his declaration Mr. McCandless does state that the $10,000.00 was paid "on behalf of the Debtor." *Id.*, ¶ 6. The court interprets this testimony that, to the extent that the monies were paid by Mr. Mathfallu, from monies of Mr. Mathfallu, they were paid for the benefit of the Debtor, "no strings attached." On Schedule D or F the Debtor does not list Mr. Mathfallu as a creditor who loaned her $10,000.00 and as someone who has a right to be repaid the $10,000.00. Dckt. 1 at 17-18, 21-25.

In response to Question 9 of the Statement of Financial Affairs the Debtor states under penalty of perjury that Mr. McCandless was paid $10,000.00 by Amar Mathfallu "on behalf of the Debtor..." *Id.*, at 36.
This further indicates that once paid, it was the Debtor's money, not Mr. Mathfallu's to take back at his discretion.

The court also notes that Mr. Mathfallu and the Debtor conducted improper post-petition activities by which $166,270.00 of monies of the estate were improperly transferred by Ashwindar Kaur, in her fiduciary capacity as the Debtor in Possession to Amar Mathfallu. Judgment, Adv. No. 13-2341. Though this $10,000.00 payment "on behalf of" the Debtor, Mr. Mathfallu was enabled with the Debtor in Possession to loot the estate of $166,270.00. Additionally, the Debtor in Possession further improperly transferred an additional $10,000.00 to Indar Jeet Kaur during this bankruptcy case.

From Counsel's response, the court cannot tell what legal services were provided, what the value of such services would be, and what portion, if any, of the $10,000.00 retainer should be paid to Counsel, if he is authorized to be employed as counsel for the then Debtor in Possession.

REQUEST FOR SANCTIONS

The electronic filing of documents requires that the attorneys comply with the basic rules. Just as an attorney would not physically file a paper declaration that was blank or unsigned, the attorney cannot file an electronic declaration for which there is not an actual signature. A serious dispute exists as to what signatures exist and when.

As part of his response, Debtor's counsel states that due to his having "hundreds of bankers boxes" of files, which are maintained in the "extensive archives" for Counsel's law office. Thus, he said that it was difficult for him to produce for the U.S. Trustee the original wet signatures for the declarations which were signed three years earlier. The court finds such conclusory statements not persuasive. Counsel has files. Counsel knows under the Local Bankruptcy Rules that if Counsel elect to file a pleading using the "/s/ [name]" electronic signature is Counsel's "representation that an originally signed copy of the document exists and is in the registered user's possession at the time of filing." L.B.R. 9004-1(c)(1)(C). Further, that for at least three years Counsel must retain the "originally signed document" in paper form and to produce that on request of the U.S. Trustee or other party. L.B.R. 9004-1(c)(1)(D). A facsimile or imaged signature (such as in PDF format) will constitute an original signature for purposes of these Rules. L.B.R. 9014-1(d). If the image of the signature is on the document filed, then the electronic version is the "original" document and the retention requirement does not apply.

The U.S. Trustee's request for sanctions arises under two grounds. The first is Counsel's failure to comply with Local Bankruptcy Rule 9014-1(c)(1)(D) and provide the original signatures. Second, that the declarations files were inaccurate, and that Counsel bears culpability for filing inaccurate declarations. The improper conduct is asserted to include using fictitious declarations. A dispute exits as to the possible identity, and existence of a Bhaljeet Singh.

These issues are fundamentally different from the more mundane counsel wasn't approved, counsel is not entitled to be paid from the retainer issue. This is a good example as to why the Supreme Court did not include Federal Rule of Civil Procedure 18, Joinder of Claims, into the bankruptcy law and motion practice as incorporated by Federal Rule of Bankruptcy Procedure 9014. Based on Mr. McCandless' Response, these issues may well require extensive discovery, the deposition of "Bhaljeet Singh," and production of documents before the parties are prepared to present competent, admissible, personal knowledge, properly authenticated documents for the court to make a determination on the imposition of corrective sanctions, if any. FN.1.

FN.1. The court notes that on the Statement of Financial Affairs both a Bhaljeet Singh and a Baljeet Singh are listed as having silent family ownership interests (1% and 3%, respectively) as "Current Partners, Officers, Directors and Shareholders" of the Debtor, Ashwindar Kaur. Question 3 Statement of Financial Affairs, Dckt. 1 at 39. Notwithstanding it being questionable as to how eighteen people are identified as being "Current Partners, Officers, Directors, and Shareholders" of an individual debtor, there are these two separate names listed, which may indicate to separate people. (The court also notes that Amar Mathfallu, who gave the money on behalf of the Debtor to counsel is also an investor in the real property with the Debtor, clearly having a financial interest in this bankruptcy case and the property of the estate.)

The court denies without prejudice that portion of the motion seeking sanctions to be imposed against Timothy McCandless. The U.S. Trustee, or any other party in interest, may file such separate motion(s) as deemed appropriate, if any, to address such issues. The denial of the Motion is not an indication of the court's review of the merits of the Motion, but to have such issues filed as a separate contested matter and not interfere with the first relief requested with respect to the $10,000.00 retainer.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Imposition of Sanctions and Disgorgement of Attorney's Fees filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Disgorge the retainer is granted and Timothy McCandless shall deliver to Irma C.

Edmonds, the Chapter 7 Trustee, $10,000.00 on or before December 31, 2014.

IT IS FURTHER ORDERED that the Trustee shall hold the monies and not disburse them until after March 1, 2015, as otherwise permitted by the Bankruptcy Code. On or before January 3, 2015, Counsel for the former Debtor in Possession shall file any application for retroactive or *nunc pro tunc* employment, as properly permitted by applicable law, and application for attorneys' fees, if any, to be paid from the $10,000.00 retainer. Any attorney liens or interests of Timothy McCandless shall attach to the $10,000.00 retainer while held by the Trustee until said monies are disbursed by the Trustee or determined by the court.

IT IS FURTHER ORDERED that the request for Sanctions and other relief in the Motion are denied without prejudice.

4. 14-22679-E-7 DENNIS FLORES
14-2193
FLORES V. NATIONSTAR MORTGAGE, LLC ET AL

CONTINUED STATUS CONFERENCE RE: COMPLAINT
7-1-14 [1]

The Status Conference is Continued to 2:30 p.m. on xxxxxxxxxxx, 2015.

The court having reconverted the bankruptcy case filed by Dennis Flores to one under Chapter 13, the Status Conference is continued to allow the Defendant to file a responsive pleading and the real parties in interest to prosecute this Adversary Proceeding.

5. 14-22679-E-7 DENNIS FLORES
Mark Lapham

CONTINUED MOTION TO RECONVERT CASE TO CHAPTER 13
10-3-14 [97]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Chapter 13 Trustee, Capitol One – Guitar Center, Chase Bank VISA, Lowe's / GGCRB, Medic Ambulance Service, Nationstar Mortgage, LLC, and United Recovery Systems, LP on October 3, 2014. By the court's calculation, 34 days' notice was provided. 21 days' notice is required. Fed. R. Bank. P. 2002(a)(4) 21-day notice for Chapter 7, 11, and 12 cases.

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

The Motion to Convert the Chapter 7 Bankruptcy Case to a Case under Chapter 13 is granted.

This Motion has been filed by Dennis Flores ("Debtor") to convert this case from one under Chapter 7 to one under Chapter 13. The Bankruptcy Code authorizes a one-time, near absolute right of conversion from Chapter 7 to Chapter 13. 11 U.S.C. § 706(a); *see also Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007).

MOTION

Debtor asserts that the case should be converted because he initially filed a voluntary petition for relief under Chapter 13 on March 17, 2014.

Debtor converted that case to one under Chapter 7 as he waited for determination of his disability case because he had expended all of the money available for his Chapter 13 Plan while the disability case was pending. Now that the case had been determined, Debtor receives disability benefits that allow him to repay his creditors through a Chapter 13 plan.

Debtor further asserts that he will return to his job as a police officer in the near future and this regular paycheck will also allow him to complete a Chapter 13 reorganization. Though the exact figures of Debtor's pay are as yet unconfirmed, Debtor believes they will be available before a rescheduled Meeting of Creditors in this case. Debtor states that his attorney will file an Amended Chapter 13 Plan within 15 days of the case conversion.

In support, the Debtor filed a declaration which states that upon the receipt of Debtor's disability payments, all of his short term and long term disability benefits were paid. Debtor alleges that he can now afford to repay his creditors. The Debtor states that he advised the Chapter 7 Trustee of the receipt of his disability funds. At that time, the Debtor states that the Trustee froze his bank accounts with the exception of $5,000.00. Debtor states that he needs to repay the family and friends who have helped him during the period of conversion and waiting for his disability payments. Debtor argues that the receipt of the payments, when released, will allow him to be eligible for Chapter 13 protections.

STIPULATION

On November 1, 2014, the Debtor and the Chapter 7 Trustee filed a Stipulation to continue the hearing on the Motion to Reconvert the Case to One Under Chapter 13 to December 11, 2014. In light of the actions taken in this case and the related Adversary Proceeding, the court continued the hearing to 10:30 a.m. on December 11, 2014.

DISCUSSION

Here, the Debtor filed a Chapter 13 case, then converted it to one under Chapter 7 – presumably making the determination that proper relief was available under Chapter 7 rather than providing for payments to creditors through a Chapter 13 plan. Though 11 U.S.C. § 706 does not appear on its face to allow debtors to seek to reconvert a case, most courts find such power to exist for the court. *In re Carter*, 84 B.R. 744 (D.C. Kan. 1988) (such restriction to discretionary conversion by a debtor under § 706(a) bars repeated attempts to convert cases for purposes of delay). The court considers, as it does under other conversions, whether the debtor demonstrates an eligibility and ability to prosecute in good faith a case under the new Chapter of the Bankruptcy Code.

Notice was provided to the Chapter 7 Trustee, Office of the United States Trustee, and other interested parties. FN.1. No opposition has been filed.

FN.1. The court would like to remind Debtor's Counsel that the use of Docket Control Numbers for motions and related documents is encouraged in this court. This ensures that the court does not have to scour the docket to find which Certificate of Service belongs with which motion. Although the court in this

instance was able to identify the applicable service and notice documents relating to this Motion, the court impresses upon Debtor's Counsel the importance of properly using Docket Control Numbers.

The Motion itself is very thin concerning the legal authority for the court to reconvert the case back to a Chapter 13 bankruptcy or why such reconversion is warranted. . Additionally, the Motion only provides limited explanation on why the facts surrounding this case justifies this unusual re-conversion. The Debtor merely argues that the Debtor initially converted the case while waiting for a determination on his disability case and to avoid an "adverse ruling" from the Chapter 13 Trustee. The Debtor then continues to argue that re-conversion is proper because, now that Debtor has received his disability funds, he can use the frozen assets to pay back family and friends, and then pay creditors through a Chapter 13 plan.

However, the Debtor does not explain why a Chapter 13 plan could not provide for the family and friends or why the Debtor did not seek an order from the court. The Debtor has not provided enough factual bases to justify this court from re-converting the case back to a Chapter 13 after the Debtor utilized his one time right of conversion to avoid an "adverse ruling." The court will not allow the Debtor to convert at will to avoid the realities of his case and then later use the ramifications of that conversion as grounds to have the court to re-convert the case. This type of strategy seems to be precisely the type of delay that prevents the court from granting re-conversion.

The Chapter 7 Trustee has not filed an opposition to the Motion. The Motion was filed on October 3, 2014. Dckt. 96. No creditors have filed an opposition to the Motion to reconvert this case to one under Chapter 13.

The court is concerned that the Debtor may use the reconversion of the case to pick and chose to pay his pre-reconversion creditors, preferring family and friends over other creditors. Debtor says "I have to repay the family and friends who helped me during this period." Declaration, Dckt. 99.

The court grants the Motion and reconverts the case, on the condition that the Trustee release all funds he is holding to Counsel for the Debtor, which monies shall be held in said Counsel's client trust account and not disbursed except upon further order of this court. The Debtor can propose a plan to pay all creditors as permitted under the Bankruptcy Code. To the extent that a portion of the monies held in the trust account may properly be claimed as exempt or otherwise used to pay specific creditors outside a Chapter 13 Plan, the Debtor may request such relief by notice motion.

The Motion is granted and the case is reconverted to one under Chapter 13.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Convert filed by Dennis Flores having been

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

IT IS ORDERED that the Motion to Convert is granted, and the case is reconverted to one under Chapter 13 of the Bankruptcy Code (Title 11).

IT IS FURTHER ORDERED that the Chapter 13 Trustee shall disburse all monies he is holding for the bankruptcy estate at the time of conversion to Mark Lapham, counsel for the Debtor. Mr. Lapham shall deposit the monies in his client trust account, where such monies shall be held and not disbursed except upon further order of this court. The Chapter 7 Trustee shall file, in addition to his final report, a Report of Disbursement to Counsel, which shall state the amount of monies disbursed to counsel and have attached a copy of the check, with both front and back, showing the endorsement and deposit into Counsel's client trust account.

6. 14-22679-E-7 DENNIS FLORES — CONTINUED ORDER TO SHOW CAUSE
14-2193 RHS-1 — 9-19-14 [13]
FLORES V. NATIONSTAR MORTGAGE, LLC ET AL

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Dennis Flores ("Debtor"), Debtor's attorney, Trustee, and other parties in interest on September 24, 2014. The court computes that 43 day's notice has been provided.

The Order to Show Cause was issued to have Plaintiff-Debtor's counsel, Mark Lapham, show: (1) why the court should not dismiss this adversary proceeding; or(2) why the Chapter 7 Trustee should not be substituted as the real party in interest.

The court's decision is to discharge the Order to Show Cause.

On September 19, 2014, the court issued an Order to Show Cause. Dckt. 13. The court ordered that Debtor-Plaintiff's attorney, Mark Lapham, to appear and show cause as to: (1) why th Adversary Proceeding should not be dismissed for lack of prosecution; or (2) why the Chapter 7 Trustee should not be substituted as the Plaintiff real party in interest.

The Plaintiff-Debtor and the Chapter 7 Trustee filed a stipulation continuing the hearing on the Plaintiff-Debtor's motion to reconvert his Chapter 7 bankruptcy case to one under Chapter 13. In this Adversary Proceeding the Chapter 7 Trustee (who has not substituted in as the successor plaintiff) and Bank of America, N.A. have filed a stipulation extending the Bank's time to respond to the Complaint. Stipulation, Dckt. 17.

On October 31, 2014, the Plaintiff-Debtor and Bank of America, N.A. filed a stipulation to have the hearing on this Order to Show Cause continued. The Chapter 7 Trustee, who is the successor to the former Chapter 13 debtor, the Plaintiff-Debtor, for any claims of the estate being asserted in the Adversary Proceeding, is not a party to the Stipulation.

The court continued the hearing on the Order to Show Cause is continued to 10:30 a.m. on December 11, 2014. Dckt. 28. In the order continuing the hearing, the court ordered that substantive responses shall be filed on or before December 1, 2014. The court explicitly stated that "[f]ailure to respond will be taken as that person concurrence that this Adversary Proceeding should be dismissed pursuant to the Order to Show Cause."

The Chapter 7 Trustee has appeared in this Adversary Proceeding, but has not yet substituted in as the successor Plaintiff. That must be done.

DISCUSSION

Failure to Prosecute

As to the first issue of why the Adversary Proceeding should not be dismissed for lack of prosecution, the court finds that cause exists to dismiss the Adversary Proceeding.

It is within the inherent power of the court to *sua sponte* dismiss a case for lack of prosecution. *Link v. Wabash R. Co.*, 370 U.S. 626, 630 (1962). For a court to dismiss a case for lack of prosecution, the court must weigh "(1) the public's interest in expeditious resolutions of litigation, (2) the court's need to manage its docket, (3) the risk of prejudice to defendants, (4) the public policy favoring disposition of cases on their merits, and (5) the availability of less dramatic measures." *In re Osinga*, 91 B.R. 893, 895 (B.A.P. 9th Cir. 1988)(citing *Ash v. Cvetkov*, 739 F.2d 493, 496 (9th Cir. 1984)).

The court shall only dismiss for lack of prosecution when there is "unreasonable delay." *Nealey v. Transportation Maritima Mexicana, S.A.*, 662 F.2d 1275, 1280 (9th Cir.1980). "Unreasonable delay creates a presumption of injury to [defendant's] defenses." *Alexander v. Pacific Maritime Association*, 434 F.2d 281, 283 (9th Cir.1970). However, "whether actual prejudice exists may be an important factor in deciding whether a given delay is 'unreasonable.'" *Citizens Utilities Company v. American Telephone & Telegraph Company*, 595 F.2d 1171, 1174 (9th Cir.), cert. denied, 444 U.S. 931, 100 S.Ct. 273, 62 L.Ed.2d 188 (1979).

RECONVERSION TO CHAPTER 13

The court has granted the Motion to Reconvert the bankruptcy case of Dennis Flores, the original named plaintiff, to one under Chapter 13. Having been reconverted, he is the real party in interest to proceed with prosecution.

The parties have stipulated to allow the Defendant until December 23, 2014, to file a responsive pleading.

The court having restored the Debtor, Dennis Flores, to the status of a Chapter 13 Debtor, little would be served to dismiss this Adversary Proceeding and require a new one to be filed.

Therefore, after review of the Adversary Proceeding, the Order to Show Cause, and the lack of any opposition or response from the parties, the court discharges the Order to Show Cause.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Order to Show Cause is discharged, with no sanctions are issued pursuant thereto.

7. 14-29284-E-11 CHARLES MILLS **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Lucas B. Garcia **10-22-14 [55]**

Final Ruling: No appearance at the December 11, 2014 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Charles Mills ("Debtor"), Trustee, and other such other parties in interest as stated on the Certificate of Service on October 22, 2014. The court computes that 58 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case ($429.00 due on October 17, 2014).

The court's decision is to discharge the Order to Show Cause, and the case shall proceed in this court.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Order to Show Cause is discharged, no sanctions ordered, and the case shall proceed in this court.

8. 14-29284-E-11 CHARLES MILLS **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Lucas B. Garcia **11-21-14 [90]**

Final Ruling: No appearance at the December 11, 2014 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Charles Mills ("Debtor"), Trustee, and other parties in interest on November 23, 2014. The court computes that 18 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case ($429.00 due on November 17, 2014).

The court's decision is to continue the hearing to 2:30 a.m. on December 18, 2014, to be heard on the court's calendar in the Modesto Courtroom for Department E, to be conducted in conjunction with other matters in this case specially set for that date and time.

The court's docket reflects that the default in payment which is the subjection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Debtor: $429.00.

9. 14-29284-E-11 CHARLES MILLS **CONTINUED MOTION TO EMPLOY LUKE GARCIA AS ATTORNEY**
LBG-5 Lucas Garcia **10-9-14 [46]**

Final Ruling: No appearance at the December 11, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on parties requesting special notice on October 8, 2014. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The court's decision is to continue the hearing to 2:30 a.m. on December 18, 2014, to be heard on the court's calendar in the Modesto Courtroom for Department E, to be conducted in conjunction with other matters in this case specially set for that date and time.

The Debtor-in-Possession, Charles Mills, seeks to employ counsel Luke Garcia, pursuant to Local Bankruptcy Rule 9014-1(f)(2) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of counsel to assist the Debtor-in-Possession and provide services associated with legal representation of the Debtor-in-Possession .

The Debtor-in-Possession argues that counsel's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate regarding present financial affairs of both the Debtor-in-Possession and Debtor-in-Possession's estate.

Luke Garcia testifies that he is representing the Debtor-in-Possession and the estate. Mr. Garcia testifies he and the firm do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

OCTOBER 23, 2014 HEARING

The court continued the hearing to 10:30 a.m. on December 11, 2014 to allow Debtor's Attorney to file and serve the supplemental declaration and the continued Notice of Hearing on all interested parties.

DEBTOR'S ATTORNEY SUPPLEMENTAL DECLARATION

On October 28, 2014, Lucas Garcia, Debtor's Attorney, filed a supplemental declaration and attached the Attorney-Client Retainer Agreement, which outlined the scope of representation, costs, and other necessary information on the representation. Dckt. 76 & 77.

DISCUSSION

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

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

10. 14-29284-E-11 CHARLES MILLS **MOTION TO DISMISS CASE**
LBG-7 Lucas Garcia **11-17-14 [81]**

Final Ruling: No appearance at the December 11, 2014 hearing is required.

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

Correct Notice NOT Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on November 17, 2014. By the court's calculation, 24 days' notice was provided. 35 days' notice is required. Fed. R. Bank. P. 2002(a)(4) 21-day notice for Chapter 7, 11, and 12 cases and L.B.R. 9014(a)(f)(1) 14-day written opposition filing requirement.

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

The hearing on the Motion to Dismiss is continued the hearing to 2:30 a.m. on December 18, 2014, to be heard on the court's calendar in the Modesto Courtroom for Department E, to be conducted in conjunction with other matters in this case specially set for that date and time.

This Motion to Dismiss the Chapter 11 bankruptcy case of Charles Mills ("Debtor") has been filed by Debtor.

On December 4, 2014, the court issued an order continuing the hearing to 2:30 p.m. on December 18, 2014 in United States Courthouse, 1200 I Street, Second Floor, Modesto, California. Dckt. 101.

11. 14-27090-E-7 JOHN MCCALL **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Pro se **10-28-14 [68]**

Final Ruling: No appearance at the December 11, 2014 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on John McCall ("Debtor"), Trustee, and other such other parties in interest as stated on the Certificate of Service on October 30, 2014. The court computes that 42 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay filing fee for Notice of Voluntary Conversion of $25.00.

The Order to Show Cause is discharged as moot.

The court having dismissed this bankruptcy case by prior order filed on November 17, 2014 (Dckt. 72), the Order to Show Cause is discharged as moot, with no sanctions ordered.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Order to Show Cause is discharged as moot, and no sanctions are ordered.