

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Modesto, California

December 19, 2013 at 10:30 a.m.

1. [13-91701](#)-E-11 MARVAIS WADEN AND SHAIMA MOTION TO EMPLOY DAVID FOYIL AS
DEF-2 KAKAR ATTORNEY
David Foyil 10-17-13 [[34](#)]

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 Office of the United States Trustee on October 17, 2013. By the court's calculation, 63 days' notice was provided. 28 days' notice is required.

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

The Motion to Employ is granted. No appearance required.

Debtors, Marvais Waden and Shaima Kaker, seek to employ counsel David Foyil, as their Chapter 11 bankruptcy counsel. Debtors state they selected counsel for his experience and require his professional services as Debtors-in-Possession, including:

- A. Giving Debtors legal advice with respect to their powers and duties as Debtors in Possession in the continued operation of their business, conduct of the financial affairs, and management of their property, including, without limitation, to advise and to consult with the Debtors concerning questions arising in the administration of the estate and their rights and remedies with regard to the estate's assets and the claims of secured and unsecured creditors, and other parties in interest;

December 19, 2013 at 10:30 a.m.

- B. Preparing on behalf of, but with the assistance of, the Debtors all necessary applications, answers, orders, reports and other legal papers, including the contemplated plan of reorganization and disclosure statement; and
- C. Performing all other legal services for Debtors as Debtors in Possession as may be necessary herein.

David Foyil testifies that he has agreed to the above stated services at the rate of \$350.00 per hour, subject to a minimum pre-petition fee of \$7,500.00. Mr. Foyil testifies he or his firm do not represent or hold any interest adverse to the Debtors-in-Possession or to the estate and that they have no connection with the Debtors-in-Possession, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

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

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

Taking into account all of the relevant factors in connection with the employment and compensation of counsel, considering the declaration demonstrating that counsel does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ David Foyil as counsel for Debtors-in-Possession on the terms and conditions set forth in the motion. The approval of fees is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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

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

The Motion to Employ filed by the 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 to Employ is granted and the Debtors-in-Possession are authorized to employ David Foyil as counsel.

IT IS FURTHER ORDERED that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

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

2. [13-90606-E-7](#) **ROGER/CAROLYN ERNST**
KMT-1 **David M. Meegan**

MOTION TO COMPEL ABANDONMENT
12-5-13 [39]

DISCHARGED 7-9-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 5, 2013. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

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

Creditor Bank of Agriculture and Commerce, seeks to compel the Chapter 7 Trustee, Irma Edmonds, to abandon property of the bankruptcy estate to the Debtors, Roger and Carolyn Ernst. The property of the estate is described in Schedule B as a possible cross-claim against Bank of Agriculture & Commerce in Case No. 679538 for damages arising out of foreclosure of assets of Roger Ernst & Associates, Inc. and other guarantee of debt ("Cross-Claim").

Creditor argues that the Cross-Claim is of inconsequential value and benefit to the bankruptcy estate, as Debtors have valued the asset at \$0.00. Creditor states that it and the debtors (and other parties to the action) are negotiating a settlement agreement which will provide for no payment to the Debtors.

DEBTOR'S STATEMENT OF SUPPORT

Debtors filed a statement of support for the motion to compel filed by Creditor. Debtors state the relief requested, if granted, will help permit the Debtors to promptly setting the state court action and bring to a close litigation that in part led to the need to seek chapter 7 relief.

DISCUSSION

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

The Debtors list this asset on Schedule B, filed on April 1, 2013 (Dckt. 1) as,

"Possible cross-claim against Bank of Agriculture & Commerce in Case No. 679538 (see Statement of Financial Affairs, No.4) for damages arising out of foreclosure of assets of Roger Ernst & Associates, Inc., and other guarantee of debt)"

Clearly the Trustee and Creditors have had knowledge of this possible asset and could address at this time any basis for their being value for the estate.

Since the property has not value to the estate, and the negative financial consequences of the Estate retaining the property, the court determines that the property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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

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

possible cross-claim against Bank of Agriculture & Commerce in Case No. 679538 for damages arising out of foreclosure of assets of Roger Ernst & Associates, Inc. and other guarantee of debt

on Schedule B is abandoned to the Debtors, Roger Dale Ernst and Carolyn Kay Ernst, by this order, with no further act of the Trustee required.

IT IS ORDERED that the Motion to Convert is granted and the case is converted to a proceeding under Chapter 13 of Title 11, United States Code.

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

CONT. FROM 11-26-13

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

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

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

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

PRIOR HEARING

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

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

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

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

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

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

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

Value of the Assets

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

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

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

Further, the Trustee contends that the overbidding will provide an additional opportunity for the estate to test the market for the values of the Assets. The Proposed sale will enable the Trustee to recover substantial value to the state for the benefit of the creditors, pending the continued

administration of the Excluded Property, without having to further administer the assets. Therefore, the proposed sale reduce further administration of the above assets, thereby avoiding what may be significant additional fees and expenses.

Discussion of Section 363(f)

Triunfo One Acquisition, LLC ("Triunfo") asserts that it, as the successor to Bank of the West, has filed several secured claims (asserting both an "attachment lien" and a "judgment lien" from the same state court action for which a final judgment has been issued) against the Debtors' residence. The Trustee asserts that the Debtors' residence will remain subject to Hillcrest Deed of Trust and the Abstract of Judgment (See Purchase Agreement, § 5). Therefore it is asserted by the Trustee that the Motion does not affect the liens asserted by BOW.

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

As a matter of California enforcement of judgment law, the "attachment lien" created by recording the writ of attachment is subsumed by the judgment lien. There is only one judgment and only one lien which secures the judgment. The benefit to the creditor for the writ of attachment is that, if properly recorded, the judgment lien perfection date will date back to the recording of the writ of attachment.

What the court cannot determine, and the parties address in their opposition and reply, is what interest, if any, in the real property is being sold. The Trustee states that the Debtors are to acquire "any equity" in the real property above the liens. It is not clearly identified whether there is an equitable interest in the property being sold, against which Triunfo may be asserting a lien on the proceeds, or merely a contractual right to be paid the proceeds from the sale of the property, if sold by the Trustee or through a bankruptcy plan, which may exist after the payment of all secured claims.

CONTINUANCE

The court continued the hearing to allow opposition to be served on or before December 6, 2013. No opposition was filed or served by that date.

However, the Trustee filed a Notice of Partial Withdrawal of the Motion for Approval of Sale of Estate Assets, only as to the sale of the estate's equity, if any, (the "Home Equity") in the real property commonly known as 6978 Hillcrest Drive, Modesto, California. Dckt. 682. These assets are to be sold for: (1) \$52,415.00 for the "Personal Assets" and (2) \$5,000.00 for the "Vehicles."

Based on withdrawal of the sale of "home equity," no opposition being filed to the remainder of the motion, and the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate. The Motion to Permit Debtor to Sell Property is granted, subject to the court considering any additional offers from other potential purchasers at the time set for the hearing for the sale of the property.

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

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

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

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

1. "Personal Assets": all items of tangible personal property located at 6978 Hillcrest Drive, Modesto, CA, consisting of the household goods and furnishings, books, pictures and other art objects, etc., wearing apparel, furs and jewelry, and other items generally described or identified in Items Nos. 4, 5, 6 and 7 of Debtors' Amended Schedule B filed on June 10, 2013;

2. "Vehicles" identified as: (1) 2011 Mercedes Benz E350, (2) 2007 Mercedes-Benz SL550, (3) 2011 Mercedes Benz GL450, (4) 2007 Cadillac Escalade, and (5) 2012 Mercedes Benz S550, which are listed in response to Item 25 of Debtors' Amended Schedule B, Dckt. 595.

IT IS FURTHER ORDERED that the sale is approved on the following terms:

- A. Sales Price: \$97,415.00
- B. Terms of Sale: The terms and conditions set forth in the Purchase Agreement; filed as Exhibit A in support of the Motion, Dckt. 644; free and clear of the Bank of the West and Triunfo Acquisition One separate asserted liens identified above (11 U.S.C. § 363(f)(4)), but subject to any or all other liens and encumbrances. The liens, if any, of Bank of the west and Triunfo Acquisition One attach to the proceeds of the sale.
- C. The assets, or components thereof, are sold by the Trustee on an "as is," and "with all faults," basis, with no representation or warranties, express or implied, with respect to the sale assets, with the Debtors responsible for all taxes due or owing in connection with the sale assets or which become due and owing in connection with the sale thereof.

- D. The Trustee is authorized to execute and deliver any and all documents that may be appropriate and/or necessary to consummate the sale.
- E. The Trustee shall retain and segregate (in a separate account or by accounting therefore in the Trustee's account for this case) the sale proceeds for distribution as provided by the court in a subsequent order.

5. [11-94410-E-11](#) **SAWTANTRA/ARUNA CHOPRA** **MOTION FOR ORDER APPROVING**
HSM-14 **Robert S. Marticello** **STIPULATION AND/OR MOTION TO**
EXTEND TIME
11-8-13 [[651](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 11 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 8, 2013. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The Motion for Order Approving Stipulation and/or Motion to Extend Time is granted. No appearance required.

Gary Farrar, the Chapter 11 Trustee, seeks an order approving stipulation and extending time to file objections to the Debtor's claim of exemptions. The deadline to file objections to the Debtor's amended claims of exemptions is presently set for November 1, 2013. The Debtors and Trustee have entered into a stipulation to extend the deadline for the Trustee to object to the Debtors' amended claims of exemptions until January 10, 2014. The Trustee states that he has requested documentation from the Debtors concerning profit sharing plan and pre-petition investments which may bear on the Debtors' claim of exemptions.

Pursuant to Federal Rule of Bankruptcy Procedure 4003(b), the court may, for cause, extend time to file an objection to the Debtors' claims of exemption.

Based on the evidence presented to the court, a review of the stipulation between the parties agreed to extend the deadline to object to claims of exemption, the motion is granted.

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

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

The Motion for Order Approving Stipulation and/or Motion to Extend Time filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Stipulation to Extend Time to File Objections to the Debtors' Claims of Exemptions filed as Exhibit A, Dckt. 654, is approved and the deadline within which the Trustee may object to the Debtor's claims of exemptions shall be extended until January 10, 2014.

6. [11-94410](#)-E-11 **SAWTANTRA/ARUNA CHOPRA** **MOTION FOR COMPENSATION FOR PMZ**
HSM-15 **Robert S. Marticello** **REAL ESTATE, REALTOR(S), FEES:**
\$1,127.50, EXPENSES: \$0.00
11-8-13 [[655](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 11 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 8, 2013. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The First Interim Application for Fees is granted. No appearance required.

FEES REQUESTED

Gary Farrar, Chapter 11 Trustee, makes an Interim Request for the Allowance of Fees and Expenses in this case for Real Estate Consultant PMZ Real Estate in the amount of \$1,127.50. The period for which the fees are requested is for the period October 28, 2012 through September 12, 2013. The order of the court approving employment of counsel was entered on November 19, 2012.

Description of Services for Which Fees Are Requested

In connection with PMZ's services during the Application Period, the Trustee has efficiently evaluated the estate's diverse real estate assets, as well as multiple notes payable secured by real property. The estate's assets to which the Debtors and creditors have devoted the most attention, and which have been the source of greatest dispute with creditors, are the real property parcels making up the Dale Road Project, a large proposed multi-phase senior care development in Modesto. Throughout the Application Period, PMZ has investigated the value of the Dale Road Project, marketability issues, and comparable sales. This information has been critical to the Trustee's understanding of this case, development of strategies for asset administration, and communications with the Debtors, creditors, and the Court. In addition to the Dale Road Project, PMZ has evaluated the value of a number of the estate's other real estate assets,

including the Debtors' residence, and analyzed title complications bearing on the Trustee's ability to administer certain real estate and related assets. Again, these efforts were critical to the Trustee's ability to make informed decisions about management of the estate and its assets early on and throughout the case.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

FEES ALLOWED

The hourly rates for the fees billed in this case are \$110.00/hour for Bob Brazeal for 10.25 hours. The court finds that the hourly rates reasonable and that Mr. Brazeal effectively used appropriate

skills and rates for the services provided. The total fees in the amount of \$1,127.50 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

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

PMZ Real Estate Fees	\$1,127.50
----------------------	------------

For a total interim allowance of \$1,127.50 in Fees in this case.

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

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

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

IT IS ORDERED that PMZ Real Estate is allowed the following fees and expenses as a professional of the Estate:

PMZ Real Estate, Consultant for the Estate
Applicant's Fees Allowed in the amount of \$ 1,127.50.

IT IS FURTHER ORDERED that this is an interim allowance of fees and the debtor in possession is authorized to pay such fees from funds of the Estate as they are able to be paid in the ordinary course of business and from such funds that are unencumbered or are cash collateral authorized to be used pursuant to a cash collateral stipulation or order.

7. [11-94410](#)-E-11 SAWTANTRA/ARUNA CHOPRA
HSM-16 Robert S. Marticello

MOTION FOR COMPENSATION FOR
RYAN, CHRISTIE, QUINN & HORN,
ACCOUNTANT(S), FEE: \$38,985.00,
EXPENSES: \$0.00.
11-22-13 [[669](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 11 Trustee, parties requesting special notice, and Office of the United States Trustee on November 22, 2013. By the court's calculation, 27 days' notice was provided. 21 days' notice is required.

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

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

FEES REQUESTED

Garry Farrar, Chapter 7 Trustee, makes an Interim Request for the Allowance of Fees and Expenses in this case for Ryan, Christie, Quinn & Horn ("Accountant") in the amount of \$38,985.00. The period for which the fees are requested is for the period April 16, 2013, through November 6, 2013. The order of the court approving employment of counsel was entered on October 24, 2012.

Accountant's first interim application for compensation in the amount of \$31,925.00, covering the period of October 18, 2012 through April 15, 2013, the court allowed \$31,925.00 in requested fees but authorized the Trustee to pay eighty-five percent or \$27,136.25 (leaving \$4,788.75 to be paid at a future date).

Description of Services for Which Fees Are Requested

Administration: Accountant spent 12.1 hours in this category for total fees of \$3,025.00. Accountant discussed with the Trustee regarding ongoing inconsistencies with financial information prepared by the Debtors and provided through their accountant. Further discussions were held regarding required reconciliations and analysis to ascertain the propriety of the information provided by the Debtors.

Monthly Operating Reports: Accountant spent 108.1 hours in this category for total fees of \$20,935.00. Accountant prepared Monthly Operating Reports. In addition to the time required to prepare the Monthly Operating Reports, considerable time was spent attempting to correlate the Debtors' historical records with personal and separate entity financial statements provided by the Debtors, requiring multiple discussions with the Debtors' CPA, as well as the Trustee.

IRS Audit: Accountant spent 1.5 hours in this category for total fees of \$375.00. Accountant addressed an IRS Audit of the Debtors' 2009 and 2010 personal income tax returns.

Tax Return Preparation: Accountant spent 48.3 hours in this category for total fees of \$10,755.00. Accountant prepared the 2011 and 2012 federal and state estate tax returns for both Debtors' estates, corresponding with each tax authority's respective insolvency group, and analysis and reconciliation of cost basis information related to certain assets.

Correspondence: Accountant spent 16.0 hours in this category for total fees of \$3,895.00. Accountant engaged in correspondence related to letters written, emails sent, and telephone conferences held with the Trustee and his counsel regarding various issues generally involving the ongoing attempts to reconcile specific financial information provided by the Debtors.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity,

importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

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

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

Id. at 959.

A review of the application shows that Accountant's services supported the Trustee's evaluation and administration of estate assets, compliance with tax and reporting obligations and resolution of complex tax

and accounting matters. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case range from \$175.00/hour to \$250.00/hour. The court finds that the hourly rates reasonable and that Accountant effectively used appropriate skill and rates for the services provided. The total accountants' fees in the amount of \$38,985.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

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

Attorneys' Fees \$38,985.00

For a total interim allowance of \$38,985.00 in Accountants' Fees in this case. FN.1.

FN.1. Due to the complexity of this case and the significant accounting work, the court approves and authorizes payment of all of the fees on an interim basis, rather than 70%. The court leaves it to the discretion of the Chapter 11 Trustee whether amounts in excess of 70% should prudently paid at this time or wait until confirmation of a plan. The court's 70% "rule" exists to avoid the situation where a Chapter 11 case is converted to a Chapter 7 case and the Chapter 7 Trustee must force professionals in the Chapter 11 case to disgorge interim fees.

Additionally, it drives home the point to less than experienced Chapter 11 counsel (clearly not a situation relating to the counsel in this case) that interim fees are just that - interim. No matter how much work such counsel or professionals do, if the case is converted and the estate rendered insolvent, the Chapter 7 administrative expenses have a higher priority and it's the Chapter 11 professionals who suffer. Some attorney's forget this fact of bankruptcy life, and think that merely because they do the work and get paid, the professionals get to keep it.

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

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

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

IT IS ORDERED that Ryan, Christie, Quinn & Horn is allowed the following fees and expenses as a professional of the Estate:

Ryan, Christie, Quinn & Horn, Accountant for the Estate
Applicant's Fees Allowed in the amount of \$ 38,985.00

IT IS FURTHER ORDERED that this is an interim allowance of fees and the debtor in possession is authorized to pay such fees from funds of the Estate as they are able to be paid in the ordinary course of business and from such funds that are unencumbered or are cash collateral authorized to be used pursuant to a cash collateral stipulation or order.

8. [11-94410](#)-E-11 **SAWTANTRA/ARUNA CHOPRA** **MOTION FOR RELIEF FROM**
MG-3 **Robert S. Marticello** **AUTOMATIC STAY AND/OR MOTION**
FOR ADEQUATE PROTECTION
12-4-13 [684]

LUCILLE ARTERBURN VS.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 11 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on December 3, 2013. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

Final Ruling: The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The court has determined that oral argument will not be of assistance in resolving this matter. No oral argument will be presented and the court shall issue its ruling from the pleadings filed by the parties.

The Motion for Relief from Automatic Stay is continued to 3:30 p.m. on January 16, 2014, pursuant to the parties Stipulation to Continue Matters, Dckt. 716. No appearance at the December 19, 2013 hearing is required.

Lucille E. Arterburn, Trustee of Trust A established under the Jessie O. and Lucille E. Arterburn Trust dated March 7, 1984; Sylvan J. Farrell, Trustee of the Trust A established under the Sylvan J. Farrell & Marie E. Farrell Family Trust dated September 6, 1984; David J. Arterburn and Edith A. Arterburn (Watters), Trustees of Arterburn & Watters, LLP Profit Sharing Plan & Trust; John A & C Jeanie Miller, Trustee of the Miller Family Trust dated November 1, 2000; Thomas A. Miller and Judith A. Miller, husband and wife; Pensco Trust Company Custodian FBO James Wilson IRA Pensco Account #W1240; Pensco Trust Company Custodian FBO Frederick J. Dotzler IRA Pensco Account #70002038; Michael LaPlante and Elizabeth LaPlante, Trustees of the LaPlante Family Trust; Larry Cleveland, Trustee of the Larry Cleveland 401(k) Profit Sharing Plan; Gregory and Amanda Smith Family Trust dated 19 March 2007; Ted Smith and Joyce Smith, Trustees of the Ted and

Joyce Smith Trust; John A. Miller Retirement Account; Vida B. Harris, Trustee of the Vida B. Harris Revocable Living Trust dated April 1, 1992; George H. Lehman, Trustee of the George H. Lehman Family Trust (collectively, "Movants") seek relief from the automatic stay with respect to the real property commonly known as 4754 Dale Road, Modesto, California, providing adequate protection to Movants by requiring payment of real property taxes, and waiving the 14-day stay.

On or about December 3, 2009, Mid Valley Services Inc. ("Mid Valley") funded a \$550,000 loan to Aruna Chopra secured by a deed of trust on the Dale Road Property. Based on representations of Mrs. Chopra, the deed of trust securing the \$550,000 loan was to be in first priority on Lot C. A year later on or about December 17, 2010, Mid Valley funded two additional loans to Mrs. Chopra secured by deeds of trust on the Dale Road Property Lot B. The first of the two loans was in the amount of \$1,250,000 and the second was in the amount of \$700,000. Based on representations of Mrs. Chopra, the deed of trust securing the \$1,250,000 loan was to be in first priority and the deed of trust securing the \$700,000 loan was to be in second priority on Lot B.

Currently, there is a priority lien dispute based on Mrs. Chopra's alleged fraud.

Movant state the delinquent real property taxes on the Dale Road Property have been paid; however, Movant states the first installment of real property taxes for 2013-2014 is due on December 10, 2013 and the second installment will be due on April 10, 2014. The real property taxes are a lien senior to the consensual liens of the Bledsoe Fischer Plaintiffs and the Mid Valley Assignees. Movant argues that as adequate protection, the Court should require the current real property taxes to be paid.

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 Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is continued to 3:30 p.m. on January 16, 2014.

9. [11-94410](#)-E-11 SAWTANTRA/ARUNA CHOPRA
SSA-4 Robert S. Marticello

CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY AND/OR
MOTION FOR ADEQUATE PROTECTION
9-26-13 [[597](#)]

JOANN IRENE BLEDSOE, CARL R.
FISCHER, JR., SANDY FISCHER
VS.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 11 Trustee, creditors holding the 20 largest unsecured claims, all creditors, parties requesting special notice, and Office of the United States Trustee on September 26, 2013. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion for Relief from Automatic Stay is continued to 3:30 p.m. on January 16, 2014, pursuant to the parties Stipulation to Continue Matters, Dckt. 716. No appearance at the December 19, 2013 hearing is required.

Movants Joanne Irene Bledsoe; Carl R. Fischer, Jr. and Sandy Fischer, as trustees of the Carl R. Fischer, Jr. and Sandy Fischer Revocable Trust UDT dated September 25, 2000; Amy C. Sherman, formerly known as Amy C. Fischer, as Trustee of the Amy C. Fischer Revocable Trust UDT dated November 14, 2005; and Robert Daniel Fischer (collectively "Bledsoe-Fischer Creditors" or "Movants") seek relief from the automatic stay with respect to the real property commonly known as 4754 Dale Road, Modesto, California. The moving party has provided the Declaration of Joann Irene Bledsoe to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

Movants contend that the property has no equity, as the market value is \$2,490,000.00 and are owed \$8,395,557.47 in principal and interest. In addition, the Mid-Valley Creditors assert a lien on the real property in the amount of \$2,691,949.04. Additionally, Movant states there is accrued property taxes on the property owed in the amount of \$99,256.16. Movants also argue that the property is not necessary for an effective reorganization.

In the alternative, Movant argues that causes exists for terminating the stay where the debtors have not made post-petition payments. Movants state Debtors have failed to make any payments on the note, either pre- or post-petition.

TRUSTEE'S OPPOSITION

Chapter 11 Trustee opposes the Motion for Relief because the subject parcels are necessary to an effective reorganization in prospect, which the Trustee believes to have a reasonable likelihood of confirmation within a reasonable time period. Trustee states the plan of reorganization is built around the Dale Road Project, of which the subject parcels are a part. Trustee is also informed that the Debtors have obtained a fully executed purchase and sale agreement, pursuant to which the Dale Road Property will be sold for approximately \$17,000,000.00.

Trustee also states that the Debtors recently arranged for payment of \$99,256.16 in property taxes assessed against the subject parcels, which demonstrates their seriousness in attempting to confirm a plan or reorganization around this property.

The Trustee contends that the subject parcels are necessary to an effective plan of reorganization and believes the Debtors should be given a reasonable amount of time to attempt to confirm their plan or reorganization and that the motion should be denied or continued with the confirmation hearing.

DEBTOR'S OPPOSITION

Debtors oppose the motion on the basis that the Dale Road properties are necessary to an effective reorganization. The Debtors have negotiated an agreement for the sale of the properties for \$17,000,000.00, which will be consummated through confirmation of a chapter 11 plan. Debtors state the granting of this motion will destroy the proposed sale and eviscerate the value for the other creditors of this estate. The Debtor states the amended plan will pay creditors 100% of their allowed claims from the proceeds of the sale.

Debtors state the Bledsoe-Fischer Creditors have failed to show they are entitled to adequate protection because they are undersecured creditors and have not shown that their collateral is depreciating post-petition.

Debtors also state that the \$99,256.16 in accrued real property taxes related to the property have been paid. Debtors state that Movant has not provided any evidence that their collateral is declining in value post-petition.

Debtors request that the motion be denied so they can proceed with their proposed 100% plan.

MOVANT'S REPLY

Movant concedes that the Dale Road property is necessary to an effective reorganization. Movant states that it remains to be seen whether the prospective buyer will actually perform and pay the estate \$17 million. Movant states the Agreement for Purchase and Sale of Real Property is contingent upon several conditions, including confirmation of a Chapter 11 plan, list pendens removal, recordation of a parcel map, and Trustee approval.

Movant also concedes that Debtors have filed a multitude of documents, including a Amended Disclosure Statement and First Amended Plan, but the actual efficacy of the documents filed is still a critical issue.

Lastly, the Movant states that it is unwilling to remove the Lis Pendens, which impedes the Debtor's reorganization.

Movant requests that its motions be granted, but that if the court deny its motions, then continue them rather to be hearing with plan confirmation.

DISCUSSION

The Motion for Relief from Automatic Stay is continued to 3:30 p.m. on January 16, 2014, pursuant to the parties Stipulation to Continue Matters, Dckt. 716.

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 Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is continued to 3:30 p.m. on January 16, 2014.

10. [11-94410-E-11](#) **SAWTANTRA/ARUNA CHOPRA** **CONTINUED MOTION TO COMPEL**
SSA-5 **Robert S. Marticello** **ABANDONMENT**
9-26-13 [606]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 11 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 26, 2013. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Abandon Real Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and Local Bankruptcy Rule 9014-1(f) (1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f) (1) (ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The Motion to Compel Abandonment is continued to 3:30 p.m. on January 16, 2014, pursuant to the parties Stipulation to Continue Matters, Dckt. 716.
No appearance at the December 19, 2013 hearing is required.

Movants Joanne Irene Bledsoe; Carl R. Fischer, Jr. and Sandy Fischer, as trustees of the Carl R. Fischer, Jr. and Sandy Fischer Revocable Trust UDT dated September 25, 2000; Amy C. Sherman, formerly known as Amy C. Fischer, as Trustee of the Amy C. Fischer Revocable Trust UDT dated November 14, 2005; and Robert Daniel Fischer (collectively "Bledsoe-Fischer Creditors" or "Movants") move to abandon the property parcel 078-015-029 and 078-015-030. Movant main contention is that the property is of no value to the estate and because the Debtors have not paid the property taxes.

TRUSTEE'S OPPOSITION

The Chapter 11 Trustee opposes the motion because the parcels are not of inconsequential value or benefit to the estate and are not burdensome. Trustee states the plan of reorganization is built around the Dale Road Project, of which the subject parcels are a part. Trustee is also informed that the Debtors have obtained a fully executed purchase and sale agreement, pursuant to which the Dale Road Property will be sold for approximately \$17,000,000.00.

Trustee states the parcels are of consequential value to the estate in that they are necessary to an effective plan or reorganization with a reasonable likelihood of being confirmed. Trustee states Debtors should be given a reasonable amount of time to attempt to confirm their plan or reorganization and that the motion should be denied or continued with the confirmation hearing.

DEBTOR'S OPPOSITION

Debtors oppose the motion arguing that the Motion should be denied because the Dale Road Properties are not of inconsequential value or benefit of the estate. The Debtors have negotiated an agreement for the sale of the properties for \$17,000,000.00, which will be consummated through confirmation of a chapter 11 plan. Debtors state the granting of this motion will destroy the proposed sale and eviscerate the value for the other creditors of this estate. The Debtor states the amended plan will pay creditors 100% of their allowed claims from the proceeds of the sale.

Debtors also state that the \$99,256.16 in accrued real property taxes related to the property have been paid.

MOVANT'S REPLY

Movant concedes that the Dale Road property is necessary to an effective reorganization. Movant states that it remains to be seen whether the prospective buyer will actually perform and pay the estate \$17 million. Movant states the Agreement for Purchase and Sale of Real Property is contingent upon several conditions, including confirmation of a Chapter 11 plan, list pendens removal, recordation of a parcel map, and Trustee approval.

Movant also concedes that Debtors have filed a multitude of documents, including a Amended Disclosure Statement and First Amended Plan, but the actual efficacy of the documents filed is still a critical issue.

Lastly, the Movant states that it is unwilling to remove the Lis Pendens, which impedes the Debtor's reorganization.

Movant requests that its motions be granted, but that if the court deny its motions, then continue them rather to be hearing with plan confirmation.

DISCUSSION

The Motion to Compel Abandonment is continued to 3:30 p.m. on January 16, 2014, pursuant to the parties Stipulation to Continue Matters, Dckt. 716.

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

IT IS ORDERED that the hearing on the Motion to Compel Abandonment is continued to 3:30 p.m. on January 16, 2014.

11. [11-94410-E-11](#) SAWTANTRA/ARUNA CHOPRA
WGS-3 Robert S. Marticello

CONTINUED MOTION TO VALUE
COLLATERAL OF THE
BLEDSOE-FISCHER CREDITORS
10-3-13 [[613](#)]

CONT. FROM 10-31-13

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

Correct Notice Provided. Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 11 Trustee, respondent creditor, and Office of the United States Trustee on October 3, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral is continued to 3:30 p.m. on January 16, 2014, pursuant to the parties Stipulation to Continue Matters, Dckt. 716. No appearance at the December 19, 2013 hearing is required.

PRIOR HEARING

The parties reached an agreement to continue the hearing on the Motion to Value Collateral to December 19, 2013, in return for the immediate payment from a non-estate source of \$99,256.16 in unpaid property taxes to the Stanislaus County Tax Collector which relates to APN 029 and APN 030 on the Dale Road Project located at 4754 Dale Road, Modesto, California. The moving party submitted a Stipulation based on the agreement, and the court granted the Stipulation. Dckt. 632.

DEBTOR'S MOTION

Debtors seek to fix the amount of the Bledsoe-Fischer Creditors secured claim at no more than the value of the real property collateral. The motion is accompanied by the Debtor's declaration. Debtors seek to value the property at \$2,490,000.00, as depicted in the appraisal of David R. Giom of Cogdil & Giomi, Inc., the Bledsoe-Fischer Creditor's appraiser.

CREDITOR'S RESPONSE

Creditor responds, not opposing the ability for Debtor's to value their secured claim, but to the all encompassing language used in the motion.

DISCUSSION

The Motion to Value Collateral is continued to 3:30 p.m. on January 16, 2014, pursuant to the parties Stipulation to Continue Matters, Dckt. 716.

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

IT IS ORDERED that the hearing on the Motion to Value Collateral is continued to 3:30 p.m. on January 16, 2014.

12. [11-94410-E-11](#) **SAWTANTRA/ARUNA CHOPRA** **CONTINUED STATUS CONFERENCE RE:**
Robert S. Marticello **VOLUNTARY PETITION**
12-30-11 [1]

Debtors' Atty: Robert S. Marticello

Notes:

Continued from 11/21/13 by stipulation of the parties. To be heard in conjunction with other matters on the calendar.

[WGS-4] Debtors' First Amended Plan of Reorganization, Dated December 5, 2013, filed 12/5/13 [Dckt 703]

[WGS-4] Debtors' First Amended Disclosure Statement Re: First Amended Plan of Reorganization, Dated December 5, 2013, filed 12/5/13 [Dckt 705], set for hearing 1/16/14 at 3:30 p.m.

13. [11-93411](#)-E-11 SANJIV/SHEENA CHOPRA
RMY-20 Robert M. Yaspan

CONTINUED EVIDENTIARY HEARING
RE: OBJECTION TO CLAIM OF KARAN
SETHI, CLAIM NUMBER 11-2
10-9-12 [[310](#)]

**THIS MATTER WILL BE HEARD TODAY AT 3:30 P.M. WITH THE
CONFIRMATION HEARING**

CONT. FROM 9-26-13

Notes:

Continued by stipulation of the parties dated 8/6/13 [Dckt 726]

Scheduling Order [filed 4/23/13 Dckt 628] -
Close of discovery 7/15/13
Pre-Evidentiary hearing statements by 8/5/13

Federal court jurisdiction for this Objection to Claim arises pursuant to 28 U.S.C. §§ 1334 and 157, and that this is a core proceeding for which the bankruptcy judge issues all orders.

Tentative Ruling: Pursuant to the Stipulation Re: (1) Withdrawal of Debtors' Objection to Amended Proof of Claim No. 11-2 filed by Karan Sethi; (2) Withdrawal of Karan Sethi's Objection to the Confirmation of the Debtor's Plan; (3) Sethi's Change of Vote in Class 3 of Plan of Reorganization to an Acceptance from a Rejection; (4) Withdrawal of Debtor's Opposition to Sethi's Motion for a Temporary Allowance of his Claim for Voting Purposes; and (5) Assignment of Claim to Sonia Sawhney, Dckt. 870, the hearing on this matter is withdrawn and **removed from the calendar**. This "Withdrawal" is deemed by the court to be a stipulation for the dismissal without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii) and Federal Rules of Bankruptcy Procedure 9014, 7041, of the Objection.

14. [11-93411](#)-E-11 SANJIV/SHEENA CHOPRA
RMY-41 Robert M. Yaspan

MOTION FOR LEAVE TO ALLOW
CREDITOR TO FILE THEIR PLAN
BALLOT AFTER THE VOTING
DEADLINE AND TO ALLOW DEBTOR TO
TABULATE THE LATE BALLOTS
11-8-13 [[862](#)]

**THIS MATTER WILL BE HEARD TODAY AT 3:30 P.M. WITH THE
CONFIRMATION HEARING**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, creditors' committee or creditors holding the 20 largest unsecured claims, all creditors, parties requesting special notice, and Office of the United States Trustee on November 8, 2013. By the court's calculation, 41 days' notice was provided. 14 days' notice is required.

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

The court's tentative decision is to grant the Motion for Leave to Allow Creditor to File Ballot After Voting Deadline. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtor-in-Possession filed a "Joint Motion for Leave for Creditor to File its Plan Ballots After the Voting Deadline and to Allow Debtors to Tabulate the Amended Ballots." While the Motion states it's a "joint" motion with Creditors Satnam Sanghera and Ramandeep Sanhera, only Robert M. Yaspan and Joseph G. McCarty, Attorneys for Debtors-in-Possession, have signed the Motion. Dckt. 862. FN.1.

FN.1. It appears that Robert Yaspan is now representing both the Debtors in Possession and these creditors. Such joint representation raises significant conflict issues and may result in counsel being determined not to be disinterested as that term is used in 11 U.S.C. § 327. The creditors may represent themselves in pro se, but appear to have engaged the services of Robert Yaspan to prepare, file, and advocate motions for them.

Given several other representation, appearance of conflict, and comply with the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules, it is disconcerting for the court to see the present Motion as prepared by counsel. It appears, based on the conduct of counsel, that the standard of practice to which counsel is familiar with is one in which such Rules and appearance of conflict/conflict issues are ignored.

The court notes that Satnam Sanghera filed a declaration which states that he did not know he had to send a ballot and was not aware of the voting deadline and believed that the signatures on their Compromise were sufficient to accept the plan. Dckt. 866. However, the Declaration does not state that this motion was filed "jointly" and Mr. Sanghera's signature does not appear on any of the other supporting pleadings.

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

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

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

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

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

A declaration prepared by counsel for the Debtors in Possession has been signed by Mr. Sanghera. Mr. Sanghera states that he was unaware that he had to send a ballot in addition to signing the compromise. The court, taking into consideration Mr. Sanghera's testimony, grants leave to file a ballot. The ballot which has been filed as Exhibit 4, Dckt. 867 is sufficient.

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

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

The Motion for Leave to Allow Creditor to File Ballot After Voting Deadline filed by Debtor-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and Satnam and Ramadeep Sanghera are authorized to execute and deliver to counsel for the Debtors in Possession a ballot voting on the proposed Chapter 11 Plan.

15. [11-93411](#)-E-11 SANJIV/SHEENA CHOPRA
RHG-3 Robert M. Yaspan

CONTINUED MOTION FOR TEMPORARY
ALLOWANCE OF CLAIM
10-15-13 [[787](#)]

**THIS MATTER WILL BE HEARD TODAY AT 3:30 P.M. WITH THE
CONFIRMATION HEARING**

CONT. FROM 10-31-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors' Attorney, and Office of the United States Trustee on October 15, 2013. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

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

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

PRIOR HEARING

Creditor Karen Sethi ("Creditor") moves for a temporary allowance of his claim. The Debtors-in-Possession objected to Creditor's claim and trial has not been held. Creditor argues that it has a colorable claim, as it has a personal guarantee from the Debtor. The Motion states with particularity (Fed. R. Bankr. P. 9013) the following grounds upon which the requested relief is based.

- A. "Karen Sethi moves for temporary allowance of his claim."
- B. Federal Rule of Bankruptcy Procedure 3018(a) allows for the temporary allowance of a claim or interest for purposes of accepting or rejecting a plan.

- C. Karen Sethi's proof of claim includes a document signed by the Debtor which is a personal guaranty. This creates a colorable claim for Karen Sethi.
- D. Therefore, the claim of Karen Sethi should be temporarily allowed (the Debtors having filed an objection to the claim) for purposes of voting to accept or reject a plan.

Motion, Dckt. 787. The evidence in support of the Motion is the Karen Sethi proof of claim filed on April 24, 2012, Proof of Claim No. 11-2. The unsecured claim is asserted in the amount of \$254,908.92, the basis for which is stated to be "contractual fraud." Several documents are attached to the Proof of Claim No. 11-2. The first is an order for entry of judgment in the amount of \$254,908.92 in *Sethi v. Chopra, et al.*, Los Angeles County Superior Court action, case no. LC91002. The order provides for the entry of a default judgment in favor of Karen Sethi and against Sanjiv Chopra.

Proof of Claim 11-2 does not have attached to it a document "labeled" personal guaranty as represented in the Motion. However, Karen Sethi directs the court to review the Declaration of Karen Sethi in opposition to the Objection to Proof of Claim 11-2 filed by the Debtors. Exhibit A, Dckt. 789. Attached to the Declaration is a copy of a document titled "Sanjiv Chopra Personal Guarantee."

DEBTORS-IN-POSSESSION'S OPPOSITION

Debtors-in-Possession assert the motion is untimely, as it was filed after the closing of the ballots and approximately two weeks prior to the confirmation hearing on the plan. The Debtors-in-Possession also state that the Motion lacks any evidence to support it.

Debtors-in-Possession state there is no surprise regarding the objection to claim, as it was filed over a year prior to this motion and that this is merely a tactic for Creditor to stall the confirmation process.

Further, the Debtors in Possession argue that Karen Sethi has not provided evidence in support of the asserted claim. The only evidence presented is the Declaration of Karen Sethi and the disputed documents.

DISCUSSION

A creditor may vote if its claim is deemed allowed or if its claim has been allowed by the court. 11 U.S.C. § 1126(a). A claim is deemed allowed unless an objection is filed to it. 11 U.S.C. § 502. Thus, any creditor with a claim to which an objection has been filed may not vote on a plan. See *In re M. Long Arabians*, 103 B.R. 211, 215 (B.A.P. 9th Cir. 1989).

Federal Rule of Bankruptcy Procedure 3018(a) allows temporary allowance of a claim in such amount as the court deems proper after notice and hearing on any pending objections. 9 COLLIER ON BANKRUPTCY ¶ 3018.01[5] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.) If the claim objection has been pending for a long enough time to have permitted its resolution, the court may decline to allow the claim or any part of it for voting purposes if the delay in hearing the objection is attributable to the claimant. The

court, however, regardless of the circumstances, has the discretion to allow or disallow all or part of the claim for voting purposes. *Id.* A motion seeking temporary allowance for voting purposes may be filed at any time before votes are tallied. *Id.*

Here, the voting deadline for tallying votes was October 9, 2013. This motion was filed October 15, 2013. Movant has had over one year since the objection to their claim was filed to seek temporary allowance of their claim for voting purposes. Conversely, the Debtors in Possession have had one year to prosecute the objection to this claim. The evidentiary hearing on the Objection is scheduled for November 22, 2013.

The Debtors in Possession opposition is built substantially on their reading of the decision *Jacksonville Airport, Inc. v. Michkeldel Inc.*, 434 F.3d 729 (4th Cir. 2006). In *Jacksonville Airport, Inc.*, the creditor did not file any opposition to the objection to claim (none being required under the local rules of that bankruptcy court). Only at the time of the confirmation hearing did the creditor orally petition the court that the creditor's claim be temporarily allowed for voting purposes. The bankruptcy court deemed the oral request untimely. The Court of Appeals affirmed the bankruptcy judge rejecting the creditor's request because it was not made until after the time to vote had expired.

Under the facts of the present case, this court finds that the request is timely. The motion was filed on October 15, 2013, two weeks prior to the scheduled confirmation hearing. This was filed with the backdrop of the evidentiary hearing on the Objection to claim set to be conducted on November 22, 2013, less than one month after the confirmation hearing date. October 9, 2013 was set as the last day for filing ballots for the Chapter 11 plan now before the court. Order, Dckt. 734.

In reviewing the Docket, the court has identified the following tabulation of ballots which the Debtors in Possession have included in the Declaration of Robert Yaspan (counsel who received the ballots). Rather than a straight forward tabulation of ballots chart, it is a detailed narrative of the ballots. From this, the court has created the following table.

Class	Voting	
Class 1 Internal Revenue Service	No Ballot	
Class 2 General Unsecured Claims in the Amount of \$2,000 or less	2 Ballots Submitted For Confirmation: Not Stated Against Confirmation: Not Stated	Not Impaired

<p>Class 3 General Unsecured Claims (excluding Class 2, 4 and 5 Claims, but including a \$2,730,000 claim of Edenathan, LLC)</p> <p>Only one ballot for Edenathan has been provided by the Debtors in Possession, and it fails to state a voting amount or class in which the this creditor purports to be voting. The court does not count the Edenathan Claim in Class 3.</p>	<p>4 Ballots Submitted</p> <p>3 Votes for Confirmation...\$288,349</p> <p>1 Vote Against Confirmation...\$13,959</p>	<p>Impaired</p> <p>The Debtors in Possession attempt to count the “votes” of creditor who failed to cast ballots but with whom the Debtors in Possession have cut side deals. The Bankruptcy Code does not provide for non-voting creditors to “vote” by cutting side deals with the Debtor in Possession. If the court were to allow the non-voting creditors to vote for the plan, then it should allow the non-voting creditor to vote against the plan.</p>
<p>Class 4 Claim of Edenathan, LLC</p>	<p>1 Ballot Submitted</p> <p>1 Vote for Confirmation....Unstated Claim amount or Class within which creditor was voting.</p>	
<p>Class 5 Nagra, LLC</p>	<p>1 Ballot Submitted</p> <p>1 Vote Against Confirmation</p>	<p>This claim is the subject of an objection by the Debtors in Possession and for which a motion for temporary allowance for voting purposes was filed after the deadline for submitting ballots to counsel for the Debtors in Possession.</p>
<p>Class 6 The Debtors</p>		

It appears that a serious question exists as to the votes for and against confirmation, and that the Karen Sethi claim may be a key vote for the class of general unsecured claims. From reviewing the extensive narrative of the ballots submitted, the copies of the ballots, and the failure of the Debtors in Possession to set forth a simple table of ballots, it could well appear that such was done to create confusion with the court as to who actually voted, the amount of claim they asserted, the class in which they would properly vote, and the correct tabulation of the ballots actually cast.

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

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

In light of this case having been pending now for two years, the confirmation hearing set for October 31, 2013, an evidentiary hearing on the actual objection to the Karen Sethi claim, and the active prosecution of claim by Karen Sethi, the court will determine the Karen Sethi claim at the evidentiary hearing prior to conducting a confirmation hearing on the Second Amended Plan filed by the Debtors in Possession. If no appeal is taken from the ruling after the evidentiary hearing, then the court will have finally determined this claim. If an appeal is taken, the court will make its ruling the temporary allowance, if any, of this claim for voting purposes.

Further, in light of the questionable tabulation of ballots, the active participation of this creditor may be necessary for the court to have a truthful and accurate presentation of evidence for any confirmation hearing and to consider whether the Debtors in Possession have and are proceeding in good faith.

STIPULATION FILED BY SETHI AND THE DEBTORS IN POSSESSION

On November 20, 2013, the Debtors in Possession Filed a Document titled,

**"STIPULATION RE: (1) WITHDRAWAL OF
DEBTORS' OBJECTION TO AMENDED PROOF OF CLAIM NO. 11-2
FILED BY KARAN SETHI;
(2) WITHDRAWAL OF KARAN SETHI'S OBJECTION
TO THE CONFIRMATION OF THE DEBTOR'S PLAN;
(3) SETHI'S CHANGE OF VOTE IN CLASS 3 OF PLAN OF
REORGANIZATION TO AN ACCEPTANCE FROM A REJECTION; AND
(4) WITHDRAWAL OF DEBTOR'S OPPOSITION TO SETHI'S MOTION FOR A
TEMPORARY ALLOWANCE OF HIS CLAIM FOR VOTING PURPOSES; AND
(5) ASSIGNMENT OF CLAIM TO SONIA SAWHNEY"**

Dckt. 870. No Stipulations have been approved by the court. The court has accepted this document as (1) dismissing without prejudice the Objection to Claim No. 11-2 and (2) dismissing without prejudice the Objection to Confirmation of the Chapter 11 Plan filed by Karen Sethi, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii) and Federal Rules of Bankruptcy Procedure 9014, 7041. A hearing to approve the Stipulation is set for hearing on the 3:30 p.m. calendar in conjunction with the hearing on confirmation of the Debtors' in Possession proposed Chapter 11 Plan.

Based on the Parties having dismissed the Objection to the Karen Sethi claim, there is no basis for the court to temporarily allow such claim

for voting purposes. The unobjected to Proof of Claim stands on its own right. FN.1.

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

IT IS ORDERED that the Motion is denied.

16. [12-92915-E-7](#) CLIFFORD/JANICE OPLAND
HSM-5 Patrick B. Greenwell

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF HEFNER, STARK &
MAROIS, LLP FOR AARON A. AVERY,
TRUSTEE'S ATTORNEY(S), FEES:
\$5,205.00, EXPENSES: \$71.25
11-14-13 [[50](#)]

DISCHARGED 2-19-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on November 14, 2013. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Final Application for Fees is granted. No appearance required.

FEES REQUESTED

Hefner, Stark & Marois, LLP, ("Counsel") counsel for the Chapter 7 Trustee, makes a Final Request for the Allowance of Fees and Expenses in this case for \$5,276.25. The period for which the fees are requested is for the period January 3, 2013 through December 19, 2013. The order of the court approving employment of counsel was entered on January 15, 2013.

Description of Services for Which Fees Are Requested

Sale of Commercial Building: Counsel spent 10.1 hours in this category. Counsel drafted and obtained approval of motion to sell commercial property in Sonora, California, including compensation to real estate broker; analyzed limited, related issues and drafted application to employ Trustee's real estate broker in connection with the sale.

General Administration: Counsel spent .4 hours in this category. Counsel advised the Trustee in connection with general case matters, as appropriate.

Employment and Compensation: Counsel spent 8.4 hours in this category. Counsel aided in case initiation, employment application for counsel and accountants and drafted and prosecuted the compensation applications.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v.*

Puget Sound Plywood, Inc. (In re Puget Sound Plywood), 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the legal services undertaken as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

(a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?

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

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

Id. at 959.

A review of the application shows that Counsel's services rendered a successful sale of property, generating approximately \$52,184.84, less a small exemption claimed by Debtors, in net sales proceeds for the estate and its creditors. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$295.00/hour and \$300.00/hour. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$5,205.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of \$71.25 for photocopies. The total costs in the amount of \$71.25 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Attorneys' Fees	\$5,205.00
Costs and Expenses	\$ 71.25

For a total final allowance of \$5,276.25 in Attorneys' Fees and Costs in this case.

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

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

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

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

Hefner, Stark & Marois, LLP, Counsel for the Estate
Applicant's Fees Allowed in the amount of \$ 5,205.00
Applicants Expenses Allowed in the amount of \$ 71.25.

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

17. [12-92915-E-7](#) CLIFFORD/JANICE OPLAND MOTION FOR COMPENSATION FOR
HSM-6 Patrick B. Greenwell RYAN, CHRISTIE, QUINN & HORN,
ACCOUNTANT(S), FEES: \$1,415.00,
EXPENSES: \$0.00
11-14-13 [[56](#)]

DISCHARGED 2-19-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on November 14, 2013. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Final Application for Fees is granted. No appearance required.

FEES REQUESTED

Gary Farrar, Chapter 7 Trustee makes a Final Request for the Allowance of Fees and Expenses in this case for Ryan, Christie, Quinn & Horn ("Accountant") for \$1,415.00. The period for which the fees are requested is for the period January 12, 2013 through November 1, 2013. The order of the court approving employment of counsel was entered on January 15, 2013.

Description of Services for Which Fees Are Requested

Administration: Accountant spent 1.2 hours in this category for total fees of \$300.00. Accountant conducted telephone conference with the Trustee regarding an overview of the case, a review of the creditor list to ensure an absence of any potential conflicts of interest, review of its employment application and preparing the instant compensation application.

Tax Preparation: Accountant spent 3.2 hours in this category for total fees of \$590.00. Accountant reviewed the Debtors' 2011 personal federal and state tax returns and prepared the 2012 and 2013 federal and state bankruptcy estate tax returns for each estate.

December 19, 2013 at 10:30 a.m.

Correspondence: Accountant spent 2.1 hours in this category for total fees of \$525.00. Accountant prepared letters to the respective tax authorities' insolvency groups, and letters of instruction to the Trustee.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

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

(9th Cir. 1991). An attorney must exercise good billing judgment with regard to the legal services undertaken as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

(a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?

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

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

Id. at 959.

A review of the application shows that Accountant's services rendered a successful completion of the personal and estate tax returns. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$175.00/hour and \$250.00/hour. The court finds that the hourly rates reasonable and that counsel effectively used appropriate skill and rates for the services provided. The total accountants' fees in the amount of \$1,415.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Accountants' Fees	\$1,415.00
-------------------	------------

For a total final allowance of \$1,415.00 in Accountants' Fees in this case.

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

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

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

auctioneer and legal expenses, and a Section 506(c) surcharge, (ii) a portion of the proceeds of Central Valley Community Bank Account Nos. 8353 and 8671 in the amount of \$142,348.68, (iii) the proceeds of accounts receivable from DiMare Company in the amount of \$986.68, and (iv) proceeds of WAB account no. 7074 in the amount of \$91,576.85, less a prior withdrawal of \$3,823.

Debtor owns equipment, bank accounts and certain accounts receivable arising from its commercial construction business. On September 17, 2013, this Court entered an order approving the retention, by Trustee, of Huisman Auctions to conduct an auction of Debtor's tangible equipment and vehicle assets, Trustee obtained an order of the Court approving the auction and the auction was conducted on October 26, 2013.

During the Chapter 7 case Trustee obtained the turnover of two bank accounts from Central Valley Community Bank, and received the proceeds of accounts receivable from DiMare Company. WAB asserts that these funds constituted the proceeds of its collateral, and that it has a perfected security interest in these funds. In addition, Trustee obtained the turnover of a bank account held at W AB, Account No. XXXX:-7470, in the amount of \$91,576.85. WAB consented to Trustee's use of \$3,823.00 of these funds to pay for insurance on the collateral subject to the auction, leaving a balance of \$87,753.85. WAB also contends that these funds constitute its collateral.

Trustee has investigated the validity and perfection of W AB's liens on equipment and identifiable proceeds of Debtor's accounts receivable. Except as to proceeds of tax refunds and certificated vehicles in which WAB was not noted as lienholder, Trustee is not aware of viable grounds to oppose WAB's liens. Trustee now seeks to turn over the cash proceeds that constitute WAB's collateral, less amounts due to the estate pursuant to the Section 506(c) surcharge agreement between Trustee and WAB.

Trustee contends that the Commercial Security Agreement grants a security interest in, among other things, equipment and proceeds of such collateral. California Commercial Code § 9203. WAB has perfected its security interest in the equipment, identifiable cash proceeds, accounts receivable and bank account collateral by filing a financing statement.

The Trustee has provided sufficient evidence to show that WAB's claim is secured by a lien on equipment, general intangibles, accounts receivable, and proceeds of equipment and accounts receivable pursuant to a Commercial Security Agreement dated January 5, 2003, perfected by the filing of a financing statements and/or continuation statements with the Secretary of State on August 21, 2003, February 29, 2008 and November 8, 2011.

WAB filed a Statement of Non-Opposition to the Motion. Dckt. 348. WAB filed a counter-motion directed to two pre-petition tax refunds in the amounts of \$58,206 and \$407.19, which the Trustee wishes to withhold from distribution, but which WAB asserts a properly perfected security interest.

Based on the evidence before the court, the Motion is granted and the court authorizes the Trustee to distribute to WAB the sum of \$119,064.42 from the proceeds of the auction of Debtor's equipment, and to distribute

the balance of the funds to the Chapter 7 estate; to distribute to WAB the sum of \$142,348.68 from Trustee's Account No. 8082, and to retain the balance of the funds in such accounting pending further order of the court and without prejudice to right of WAB to assert its claims to such liens on such funds; to distribute to WAB the sum of \$986.68 from Trustee's account No. 8108; and to distribute to WAB the sum of \$87,753.85 from Trustee's account No. 8074.

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 Motion for Authority to Distribute Proceeds of Collateral to WestAmerica Bank ("WAB") filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the court authorizes the Trustee to distribute to WAB the sum of \$119,064.42 from the proceeds of the auction of Debtor's equipment, and to distribute the balance of the funds to the Chapter 7 estate; to distribute to WAB the sum of \$142,348.68 from Trustee's Account No. 8082, and to retain the balance of the funds in such accounting pending further order of the court and without prejudice to right of WAB to assert its claims to such liens on such funds; to distribute to WAB the sum of \$986.68 from Trustee's account No. 8108; and to distribute to WAB the sum of \$87,753.85 from Trustee's account No. 8074.

19. [13-91315-E-7](#) APPLEGATE JOHNSTON, INC.
WFH-9 George C. Hollister

COUNTER MOTION TO TRUSTEE'S
MOTION FOR AUTHORITY TO
DISTRIBUTE PROCEEDS OF
COLLATERAL TO WESTAMERICA BANK
12-6-13 [[351](#)]

Local Rule 9014-1(i) Countermotion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on December 5, 2013. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The court's tentative decision is to deny without prejudice the Countermotion to Trustee's Motion for Authority to Distribute Proceeds of Collateral to WestAmerica Bank . 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:

Westamerica Bank ("WAB") counter moves to the Trustee's Motion for Authority to Distribute Proceeds of Collateral. WAB is seeking an order compelling the Trustee to turnover a state tax refund received July 5, 2013 in the amount of \$58,206 and miscellaneous tax refunds received June 2, 2013 in the amount of \$407.19.

The Trustee stated in his motion that the tax refunds do not constitute collateral of WAB and intends to withhold those amounts. WAB contends that the tax refunds at issue are WAB's collateral and it holds a duly perfected security interest in and lien against those funds. WAB cites its Commercial Security Agreement, which includes "All inventory, Chattel Paper, Accounts, Replacement and General Intangibles." WAB contends that general intangibles includes tax refunds.

In Trustee's Motion for Authority to Distribute Proceeds to WAB, it noted that he had viable grounds to oppose WAB's claims to the tax refunds. Memorandum of Points and Authorities, 3: 16-19, Dckt. 339. However, the Trustee does not provide those grounds.

The Court is also unaware of what year the tax refunds are from. The right to a tax refund "vests" at the end of the tax year, since by that point all events necessary to establish Debtor's tax liability have occurred and the debtor's tax liability is fixed, albeit unliquidated. *Brandt v. Fleet Capital Corp. (In re TMCI Elec.)*, 279 B.R. 552, 555 (Bankr. N.D. Cal. 2000). For a secured creditor's security interest to attach to a debtor's collateral, the debtor must have acquired rights in the collateral as of its petition date. *Id.* at 559.

The court does not have sufficient evidence to determine whether WAB has a perfected security interest in the tax refunds.

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 Countermotion to Trustee's Motion for Authority to Distribute Proceeds of Collateral to WestAmerica Bank ("WAB") filed by WAB having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

The Trustee seeks allowance and authority to pay Applicant the fees and costs for the following matters:

- A. Commission: Gross proceeds from the sale totaled \$273,253.50. Applicant is entitled to a commission of 15% or \$40,988.03.
- B. Buyer's Premium: Husiman charged a buyer's premium of up to 10% on individual items sold for \$20,000.00 or less. No items sold for more than \$20,000.00 and Applicant does not seek any buyer's premium.
- C. Ordinary Expenses: Applicant seeks approval of expenses in the aggregate amount of \$7,599.95 for labor expended in preparing equipment for sale and for transportation of equipment. FN.1.

FN.1. While stated as "Ordinary Expenses" relating to the auction, the court's review of the Motions and supporting and pleadings indicates that these are extraordinary transportation and repair expenses to get the equipment sold up to auction quality to maximize the recovery for the Trustee and creditors. As such, these additional expenses are appropriate, as opposed to "ordinary auction expenses" such as washing off a piece of equipment, staging, and conducting the auction.

- D. Internet Buyer's Expense: Applicant seeks approval of an additional fee charged to and paid by internet buyers. Applicant represents that Proxibid has submitted an invoice for \$1,716.20 for services, which represents 4% of the amount bid by internet bidders.

FEES ALLOWED

The court finds that the rates reasonable and that applicant effectively used appropriate services. The total auctioneer fees in the amount of \$40,988.03 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$7,599.95 for labor to transport and prepare the equipment for sale. Applicant also seeks the 4% internet buyer's fee (totaling \$1,716.20) as an out of pocket expense to a third party vendor Proxibid. The total costs in the amount of \$9,316.15 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Applicant' Fees	\$40,988.03
Costs and Expenses	\$ 9,316.15

For a total final allowance of \$50,304.18 in Fees and Costs in this case.

22. [13-91916-E-7](#) **GEORGE/DORIS COBURN**
UST-1 **Pro Se**

**MOTION FOR DENIAL OF DISCHARGE
OF BOTH DEBTORS**
11-20-13 [[16](#)]

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 (*pro se*), Chapter 7 Trustee, and Office of the United States Trustee on November 20, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to deny the Motion for Denial of Discharge of Both Debtors. 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 U.S. Trustee ("UST") requests that the court enter an order denying the discharge of Debtors George W. Coburn and Doris M. Coburn pursuant to 11 U.S.C. § 727(a)(8). UST contends that Debtors filed a voluntary petition for relief under Chapter 7 in this court, Case No. 11-90295-E-7, on January 26, 2011, in which both of the Debtors received a discharge on July 13, 2011. The prior case was commenced within eight years before the date of the filing of the petition in the current case, October 25, 2013.

Section 727(a)(8) provides that a Chapter 7 debtor cannot receive a discharge if the debtors has previously obtained a discharge in a case commenced within eight years of the current case.

It appears Debtors obtained a discharge in their prior case filed January 26, 2011, which falls within eight years from the filing of the current case on October 15, 2013. Therefore, the Debtors are not eligible for a discharge in their current case.

Debtors have not filed opposition to this motion, set on 28 days' notice pursuant to Local Bankruptcy Rule 9014-1(f)(1).

However, the Debtors seek to dismiss their bankruptcy case, as does the Chapter 7 Trustee. Dismissal of the case renders the present Motion moot, as the Debtors will not receive a discharge in this case. The U.S.

Trustee's Motion does not seek a denial of discharge based upon the "bad acts" of Debtors.

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 Denial of Discharge of Both Debtors filed by U.S. Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

23. [12-91118-E-7](#) DANIEL/MARIA RIVERA MOTION TO AVOID LIEN OF KELKRIS
PLG-2 Frank X. Ruggier ASSOCIATES, INC. AND OF
DISCOVER BANK
11-19-13 [[26](#)]

DISCHARGED 7-23-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, respondent creditors, and Office of the United States Trustee on November 19, 2013. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

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

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

SERVICE

Debtor failed to serve the Chapter 7 Trustee, Eric Nims. Debtor served Timothy Yoo in Los Angeles as the Chapter 7 Trustee. Insufficient service is grounds to deny the motion.

MULTIPLE MOTIONS

The Motion seeks to Avoid the Judgment Lien of Creditor KelKris Associates, Inc., dba Credit Bureau Associates and Avoid the Judgment Lien of Discover Bank. While Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure allow for a plaintiff to join multiple claims against a defendant and Rule 20 that allows multiple defendants to be named in one complaint in an adversary proceeding, those rules are not applicable to contested matter in the bankruptcy case. Federal Rule of Bankruptcy Procedure 9014, which does not incorporate Rules 9018 or 9020 for contested matters. The Movant have improperly attempted to join two motions to Avoid Liens for two separate creditors.

As with the present Motion, the reason for not incorporating Rule 7018 into contested matters is in part based on the short notice period for motions and the substantive matters addressed by the bankruptcy court in motions. These include sales of property, disallowing claims, avoiding interests in real and personal property, confirming plans, and compromising rights of the estate - proceedings which in state court could consume years. In the bankruptcy court, such matters may well be determined on 28 days notice. Allowing parties to combine claims and create potentially confusing pleadings would not only be a prejudice to the parties, but put an unreasonable burden on the court in the compressed time frame of bankruptcy case law and motion practice. The Motion is denied for this independent ground.

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

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

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

24. [12-92221-E-7](#) ROBERT BUCHLER
SLF-6 Pro Se

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF SUNTAG LAW FIRM
FOR DANA A. SUNTAG, TRUSTEE'S
ATTORNEY(S), FEE: \$6,500.00,
EXPENSES: \$0.00.
11-21-13 [[63](#)]

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

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

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

The Final Application for Fees is granted. No appearance required.

FEES REQUESTED

The Suntag Law Firm, Counsel for the Chapter 7 Trustee Gary R. Farrar, makes a Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period September 3, 2012 through September 26, 2013. The order of the court approving employment of counsel was entered on November 1, 2012.

Description of Services for Which Fees Are Requested

General Case Administration: Counsel spent 11.10 hours in general case administration; this time included reviewing Debtor's schedules to determine whether it was appropriate to object to exemptions or file a complaint objecting to Debtor's discharge, preparing Counsel's employment application, preparing and filing a notice of bankruptcy with the state court in which Debtor's divorce was pending, and preparing the instant application for compensation.

Advice to trustee Regarding Debtor's Pending Cases and Executory Contracts: Counsel spent 9.30 in connection with these tasks. Debtor is practicing attorney who had active cases when he filed this bankruptcy case.

December 19, 2013 at 10:30 a.m.

Counsel researched what aspects of the law practice were property of the estate, and issues regarding the possible assumption of the executory contracts between Debtor and his clients. Counsel provided its findings and recommendations to Trustee, and prepared a stipulation to extend Trustee's deadline to assume or reject to the executory contracts while he considered the issue.

Based on Counsel's research, Trustee decided not to pursue Debtor's active cases.

Employment of Realtor and Sale of Real Property: Counsel spent 21.30 hours in connection with these tasks. On his Schedule A, Debtor disclosed real property located at 233 High Street, Modesto, California. He disclosed that he owned the property jointly with his former spouse (who resides in it), and valued the property at \$135,000 and scheduled liens against it of \$49,541.34. He did not claim an exemption in it.

Counsel helped Trustee investigate the value of the property by reviewing the provisions of the judgment in Debtor's divorce proceeding, and how funds would be allocated between Debtor and his former spouse should the property be sold. Counsel also reviewed the liens and delinquent property taxes in the preliminary title report on the property.

As a result of the investigation, Trustee concluded that the property had equity for the estate, and accordingly Counsel prepared an application to employ a realtor to market and sell the property. The realtor received two offers to purchase the property as a result of his efforts, and Trustee accepted an offer of \$129,950 with a 23 percent down payment. Counsel prepared the motion to sell the property and the court authorized the sale.

Sale of Debtor's Accounts Receivables: Counsel spent 25 hours in connection with these tasks. On his Amended Schedule B, Debtor disclosed 13 accounts receivable which represented past due amounts his clients owed him from legal services. Debtor valued the receivables at \$54,505. Debtor did not claim an exemption in the receivables, and did not schedule any liens or encumbrances on them.

Counsel investigated the value of the receivables, and determined that the four year statute of limitations for breach of contract against Debtor's clients may have run on four of the accounts; the amounts owed on those four accounts represented \$48,862.00 of the total disclosed value of the receivables. Debtor also investigated the validity of two of Debtor's accounts secured by Family Law Attorney's Real Property Liens. These accounts made up \$41,225 of the \$54,505 value of the receivables. Counsel sent demand letters to obligors, but they did not respond; ultimately, Trustee concluded that it would be too costly to commence foreclosure proceedings on these liens, and it was uncertain if proceedings would generate a recovery for the estate. Trustee then entered into negotiations, and ultimately sold the receivables back to Debtor; Counsel prepared the sale agreement and it was approved by the court on October 2, 2013.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

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

the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

(a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?

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

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

Id. at 959.

A review of the application shows that Counsel's services helped facilitate the sale of Debtor's real property located at 233 High Street, Modesto, California. Counsel investigated the value of the property and Debtor's joint interest in the residence, and the liens and delinquent property taxes on the property. Counsel prepared the application to employ a realtor to market the property; Realtor ultimately sold the property for \$129,950 with a 23 percent down payment. Counsel also prepared the motion to sell Debtor's Receivables accounts, which generated \$5,000 for the estate. The court finds the services were beneficial to the estate and Counsel's fees to be reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$315.00/hour for counsel for 9.9 hours, \$295.00 per hour for associate at 31.6 hours, \$225.00 per hour for an associate for 17.0 hours, and \$195.00/hour for an associate for 5.2 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the reduced amount of \$6,500.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 13 case.

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

Attorneys' Fees	\$6,500.00
Costs and Expenses	\$ 0.00

For a total final allowance of \$6,500 in Attorneys' Fees and Costs in this case.

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

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

Chapter 7 Trustee, Irma Edmonds, seeks to employ counsel Nunc Pro Tunc, Alan S. Lazar of the firm of Malin & Saltzman, LLP, pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtors listed on Schedule B of their original petition and schedules, a claim in a pending medical lawsuit with an unknown amount of the award. Debtor retained the firm of Marlin & Saltzman, LLP, on September 20, 2012, to litigate her personal injury/ medical device suit. The Trustee argues that counsel's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate regarding the present personal injury suit.

DISCUSSION

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

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

Taking into account all of the relevant factors in connection with the employment and compensation of counsel, considering the declaration demonstrating that counsel does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Alan S. Lazar of the firm of Malin & Saltzman, LLP on the terms and conditions set forth in the Contingency Fee Agreement, attached as Exhibit 1 in Dckt. No. 29, the terms of which are summarized as follows: (a.) If no settlement is obtained, the bankruptcy estate and Trustee will owe no fees or expenses to special counsel appointed; (b.) If any recovery is obtained, the contingency fee counsel will be awarded 40% of any gross recovery; (c.) however, it will be the responsibilities of contingency fee counsel to provide the Trustee, as representative of Debtors' bankruptcy estate, the gross proceeds of settlement arising out of the present personal injury/ medical device case, with the understanding that Trustee, through the assistance of contingency fee counsel, and their agents and employees, will distribute and pay the residual costs and liens, if applicable, attributable to the settlement.

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

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

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

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

IT IS ORDERED that the Motion to Employ is granted and the Chapter 7 Trustee is authorized to employ Alan S. Lazar of the firm of Malin & Saltzman, LLP as counsel Nunc Pro Tunc on the terms and conditions as set forth in the Contingency Fee Employment Agreement filed as Exhibit 1, Dckt. 29.

IT IS FURTHER ORDERED that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

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

26. [13-91534-E-7](#) MARGARITA JACOBO
TOG-1 Thomas O. Gillis

MOTION TO AVOID LIEN OF
PORTFOLIO RECOVERY ASSOCIATES,
LLC
11-7-13 [[16](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditors, and Office of the United States Trustee on November 7, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required. That requirement was met.

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

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

A judgment was entered against the Debtor in favor of Portfolio Recovery Associates, LLC, for the sum of \$8,274.73. The abstract of judgment was recorded with Stanislaus County on August 27, 2013. That lien attached to the Debtor's residential real property commonly known as 2036 Mt. Whitney, Modesto, California. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$88,399 as of the date of the petition. The unavoidable consensual liens total \$139,500 on that same date according to Debtor's Schedule D. Debtor did not claim an exemption, however, on the subject property. Therefore, the fixing of this judicial lien cannot impair the Debtor's exemption of the real property and its fixing under 11 U.S.C. § 349(b)(1)(B), because no such exemption exists.

Furthermore, Debtor's Motion is insufficiently pled. Debtor's Motion is scant on grounds stated with particularity and the Points and Authorities provides the court will little, if any, legal support.

The Motion states with particularity (Fed. R. Bankr. P. 9013) the following grounds upon which Movant basis the request for relief.

A. The judgment lien is provided as Exhibit B.

- B. The judgment lien impairs an exemption in the Debtor's home.
- C. "The Motion is based on the Declaration of Debtor, the exhibits, and upon the court file."
- D. Wherefore, the court should order the lien "void."

Motion, Dckt. 16. This is clearly insufficient, and not even a minimal attempt to comply with Federal Rule of Bankruptcy Procedure 9013. Given that counsel regularly appears in this court and knows that Federal Rule of Civil Procedure 7007(b) and Federal Rule of Bankruptcy Procedure 7007 and 9014 are fairly and evenly enforced, the intentional failure to comply with these minimal requirements manifests either an incorrect belief that the court has decided to ignore these Rules or that counsel can push the court into ignoring the Rules for him. Both assumptions are incorrect. FN.1.

FN.1. Further, the Motion is really an instruction to the court, stating, "As attorney for the Debtor it's not worth my time to prepare a proper motion, so I'm instructing the court to read the declaration, exhibits, and all of the other pleadings filed in this case. Then, after reading all of those documents, to serve the function of an associate in my law firm to draft and assert for me all of the proper grounds for the relief requested. Finally, after the court does the work of an attorney for the Debtor, the court shall rule on the arguments it makes for the Debtor." The court declines the opportunity to provide legal services to the Debtor or subsidize the legal work for which counsel has been paid by the Debtor.

Debtor's Memorandum of Points and Authorities contains one, and only one, terse sentence in support of the Motion:

"This motion is authorized by Federal Rule of Bankruptcy Procedure 4003(d) and 11 U.S.C. section 552(f)."

Points and Authorities, Dckt. 20. Quite possibly if counsel had actually reviewed the language of 11 U.S.C. § 522(f) and the requirement that it may be avoided (not determined "void") if it "impairs an exemption," counsel would have made sure that an exemption had been claimed and relief from proper under § 522(f). FN.2.

FN.2. Counsel may argue that an Amended Schedule C was filed on November 11, 2013, and it is with this Amended Schedule C the exemption is claimed. However, no specific property is identified on the Amended Schedule C (Dckt. 14). Rather, an exemption is listed for some "Single Family Home," with any common street address, property description, or other identifier. While the Debtor lists one piece of real property on Amended Schedule A, *Id.*, the court can see no reason why the property in which an exemption is claimed is not identified. In light of Counsel's cryptic motion drafting, the court has a concern that this lack of description is not inadvertent, but may be intended to mislead the court.

Further, the Debtor offers no evidence as to the value of the Property. The Declaration in support of the Motion offers no testimony as to the value of the Property. Declaration, Dckt. 18. This causes the court to infer that the Debtor is unwilling to testify as to a value for the Property, quite possibly because it is worth substantially more than the senior lien against the property and the exemption, in whatever property is the subject of the motion, is not impaired.

The Motion is denied without prejudice.

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

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

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

IT IS ORDERED that the Motion to Avoid Judicial Lien of Portfolio Recovery Associates, LLC, is denied without prejudice.

27. [11-92235-E-11](#) **JAMES/LORI SARAS** **CONTINUED STATUS CONFERENCE RE:**
Mikalah R. Liviakis **VOLUNTARY PETITION**
6-22-11 [[1](#)]

Debtors' Atty: Mikalah R. Liviakis

Notes:

Continued from 10/31/13 to allow the Plan Administrators to file and have heard the fee application and motion to administratively close the case before the end of 2013.

28. [11-92235-E-11](#) JAMES/LORI SARAS
DMS-5 Mikalah R. Liviakis

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF DAVID M.
STERNBERG AND ASSOCIATES FOR
DAVID M. STERNBERG, SPECIAL
COUNSEL(S), FEE: \$67,617.00,
EXPENSES: \$700.99
11-27-13 [[770](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, all creditors, parties requesting special notice, and Office of the United States Trustee on November 27, 2013. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. That requirement was met.

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

The court's tentative decision is to grant the Final Application for Fees.

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

FEES REQUESTED

David M. Sternberg, Counsel for the Debtors-in-possession James John Saras and Lori Elsie Saras, makes a Final Request for the Allowance of Fees and Expenses in this case. Counsel is also the appointed special counsel in the Stanislaus County Superior Court trust litigation case entitled *Diana Saras v. James J. Saras, et al.*, Case No. 53693 ("the State Court Action"). The state court case concerns a claim against Debtor James Saras for the misappropriation of more than \$3,000,000.00 and breach of fiduciary duty relating to James Saras' mother's trust. The period for which the fees are requested in the bankruptcy case is for the period of October 24, 2011 through December 2, 2012. The order of the court approving employment of counsel was entered on October 24, 2011.

Applicant states that no prior fee application has been filed, and the fees sought herein by this Application are for fees in the sum of \$67,617.00 and costs in the sum of \$700.99.

Description of Services for Which Fees Are Requested

Employment of Professionals: Counsel spent 2.5 hours in this category for total fees of \$1,177.50. Counsel drafted the application to employ.

Probate State Court Defense: Counsel defended Debtor in probate court proceedings that arose out of Debtor's position as the initial trustee of his mother's trust. Debtor's sister filed a petition in December 2, 2006 to compel an accounting, for the removal of Debtor as Trustee, and the appointment of a successor Trustee; the matter was settled, and Debtor agreed to pay \$3,250.00 pre months; however, after a few years, Debtor ceased payment. It was discovered that Trustee had sold the trust property for more than one million dollars for himself, and had commingled his personal properties with the trust properties for a total claim of \$3,000,000.00. On January 2011, Debtor's sister filed another petition, and Counsel substituted into that case and attended several probate hearings.

Counsel expended a total of 43.40 hours, for a total of \$20,097.50 for this category of tasks.

Assist Debtors-In-Possession in Probate Court Trust Case Settlement and Performance Issues: Counsel spent 45.40 hours, for a total of \$22,085.00 on these tasks. Counsel helped coordinate a settlement with the secured creditors of the probate case and Debtor, in which the parties agreed that Debtor would sell his Maze Boulevard property to pay off existing loans; part of the proceeds would be paid to Debtor's mother's trust. Counsel assisted Debtors in drafting issues and negotiating the lease proceeds from 2011, and advised Debtors to draft a Plan and consummate the settlement.

Dischargeability Issues Relating to Trust Claims: Counsel assisted Debtor's counsel in moving to dismiss two adversary proceedings brought by the Trustee of the Probate Trust, and expended a total of 4.80 hours, for a total of \$2,376.00 on these tasks.

Relief from Stay: Counsel expended 14.30 hours, for a total of \$6,979.50, for the project of assisting Debtors in defending Relief from Stay Motions to allow state court proceeding to continue in state court. The bankruptcy court did ultimately grant relief from stay, but saw that Debtors were willing to litigate these trust litigation issues so that a settlement could be reached.

Assist Debtor in Lowering Secured Creditors' Interest Rate and Attorney Fees: Counsel helped general counsel Mikalah Liviakis in working with the Community Bank, Western Highlands, and Breuington in reducing their attorneys fees and default interest rates. Counsel spent 19.50 hours, for a total of \$9,603.00 on these tasks.

Automatic Relief from Stay-Chase: Counsel spent 2.40 hours, for a total of \$249.00, in defending against a Relief from Stay Motion regarding Debtor's automobile because General Counsel was unavailable for hearing.

Nora Torres-Pre-Confirmation: An administrative claim was filed by Nora Torres for financing of Debtors' employees for farm crop harvesting. Debtors believe that the claim exceeded the contract term, and the court dismissed the original Motion for Payment of Administrative Claim. The claim was settled post confirmation at a discount of approximately 33%. Counsel expended 10.20 hours for a total of \$5,049.00 on these responsibilities.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

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

(a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?

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

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

Id. at 959.

A review of the application shows that Counsel's services produced much tangible benefit to the estate. By defending the probate action, Debtor's mother's trust did not end up with all of the assets of the Debtors allowing payment in full to Debtors' creditors. If the petitions had been granted in the state court, it is probable that distribution to the creditors would have been significantly lower. Counsel's settlement with Debtor James allowed for the reduction of a \$3,000,000.00 to a \$1,250,000.00 claim, a substantial reduction in the costs of litigation with the probate court, and all creditors of the estate were paid according to the plan.

Counsel also negotiated lowered interest rate and attorney fees paid to creditors upon the sale of the estate real property, and helped Debtors keep their vehicle, which was the subject of the Automatic Relief from Stay Motion by Chase. Counsel reduced the administrative claim of Nora Torres by approximately \$50,000.00. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$495.00/hour for counsel. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$67,617.00 are approved and authorized to be paid by the Trustee from the available funds of the

Estate in a manner consistent with the order of distribution in a Chapter 13 case.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of \$700.99 for photocopies, facsimile charges, and parking. The total costs in the amount of \$700.99 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

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

Attorneys' Fees	\$67,617.00
Costs and Expenses	\$ 700.99

For a total final allowance of \$68,317.99 in Attorneys' Fees and Costs in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by the Law Office of David M. Sternberg and Associates having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that David M. Sternberg is allowed the following fees and expenses as a professional of the Estate:

David M. Sternberg and Associates, Counsel for the Estate,

Applicant's Fees Allowed in the amount of \$ 67,617.00
Applicants Expenses Allowed in the amount of \$700.99,

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that this is a final allowance of fees and the Plan Administrators are authorized to pay such fees as permitted by the Bankruptcy Code and pursuant to the terms of the confirmed Chapter 11 Plan.

29. [11-92235-E-11](#) JAMES/LORI SARAS
MRL-138 Mikalah R. Liviakis

MOTION FOR FINAL DECREE AND
ORDER CLOSING CASE
11-20-13 [[761](#)]

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 November 20, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required. That requirement was met.

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

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

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* (9th Cir. BAP 1999) 241 BR 896, 911.

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.

FRBP 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 FRBP 3022, Adv. Comm. Note (1991); see *In re John G. Berg Assocs., Inc.* (BC ED PA 1992) 138 BR 782, 786.

Here, Debtors' Plan provided that Debtors would pay the U.S. Trustee, Nora Torres Farm Services Inc., the Franchise Tax Board, the Internal Revenue Service, the Employment Development Department, Class 2 Creditor Chase Auto Finance, Class 3 Creditor the Eva L. Saras Trust, Class 5 Creditor Toyota Motor Credit, Class 8 Creditor the Stanislaus County Tax Collector, and Class 11 creditors (the General Unsecured Class) from the sale of 6061 Carver Road and 1969 Costner Road. The sales have been completed and the creditors have been paid. Debtors are current on the payments to Class 6, and as required by the Plan, have surrendered the collateral securing the Class 1 and Class 4 claims.

Debtors acknowledge that they bear the responsibility of making the appropriate distributions to consummate the Plan. While Debtors were previously in default because of the tardiness of the sales of the 6061 Carver Road and 1969 Costner Road properties, the sales have been completed and the proceeds have been distributed--with the singular exception of payments to the Ranching Workers. The Plan's Class 10 creditors, a group of ranching crew workers, have not been paid yet because Debtors have difficulty locating these individuals. Debtors state that they will continue their efforts to seek out the location of the individuals and distribute to them the funds that they are owed. Debtors are no longer in default under the terms of the Plan and, while Debtors reserve the right to seek to reopen the case should judicial intervention become necessary in the future, Debtors do not anticipate a need for the Court's further involvement in the distribution process at this time.

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. FRBP 3022, Adv. Comm. Note (1991). 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 no outstanding property transfers except the Class 10 creditors who have not been paid yet because Debtors have difficulty locating these individuals.

Upon confirmation of the Plan, the relevant property became fully vested in Debtors, who are currently managing the estate. Debtors have sold the 6061 Carver Road and 1969 Costner Road properties and have made the distributions as required under the Plan. Further, Debtors are current on the payments to Class 6, and, as required by the Plan, have surrendered the collateral securing the Class 1 and Class 4 claims. All contested matters have been resolved.

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 Fed. R. Bankr. P. 3022.

30. [11-92235](#)-E-11 **JAMES/LORI SARAS** **MOTION FOR ENTRY OF DISCHARGE**
MRL-139 **Mikalah R. Liviakis** **11-20-13 [765]**

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, all creditors, parties requesting special notice, and Office of the United States Trustee on November 20, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion for an Entry of Discharge is xxxxxx. 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:

With some exceptions, 11 U.S.C. § 1142(d)(5) permits the discharge of debts provided for in the Plan or disallowed under 11 U.S.C. § 502 after the completion of plan payments.

The Debtors' Declaration certifies that the Debtors:

1. Have completed almost all of the plan payments under the Chapter 11 Plan, as confirmed on November 16, 2012. The only creditors that remain to be paid are a group of ranching crew workers that are part of Class 10 of the Plan

and U.S. Bank, N.A. Debtors-in-Possession are current on payments to U.S. Bank, N.A. on their Class Six Claim and arrearage.

Furthermore, Debtors-in-Possession are attempting to locate and inform all of the ranching crew workers to issue payment that is due to them, pursuant to the confirmed Plan.

2. Do not have any delinquent domestic support obligations,

3. Have completed a financial management course and filed the certificate with the court,

4. Have not received a discharge in a case under Chapter 7, 11, or 12 during the four-year period prior to filing of this case or a discharge under a Chapter 13 case during the two-year period prior to filing of this case,

5. Are not subject to the provisions of 11 U.S.C. § 522(q) (1), and

6. Are not a party to a pending proceeding which implicates 11 U.S.C. § 522(q) (1).

With respect to the claim of U.S. Bank, N.A., the Plan requires that the Plan Administrator cure the arrearage over a five year period. Chapter 11 Plan, Dckt. 608. The Plan Administrators, and then the Debtors, upon cure of the arrearage, shall continue to make the regular post-confirmation payments due under the contract for this claim. The Plan further provides that in the event of a default in the regular contract payment or arrearage payment (not cured within 30 days), the property is "deemed to be abandon[ed]" and U.S. Bank, N.A. can proceed to exercise its rights in the collateral. The court deems this unpaid arrearage not to be an impediment to discharge in light of the plan terms.

While the U.S. Bank, N.A. claim does not cause the court concern with respect to entry of the discharge (based on completion of the Plan), the inability or failure to pay the Ranching Crew Workers is another story. These Class 10 creditors are listed as having \$40,000.00 of claims. This is a significant amount of money. The Declaration of James Sara does not state how many of these claims have been paid and what amount remains for creditors "to be found." The Plan Administrators have not addressed the requirements of 11 U.S.C. § 347(b) with respect to the Class 10 distributions which have not been made at this time.

Additional Information, December 19, 2013 Hearing

At the hearing on December 19, 2013, the Plan Administrators reported.....

[There being no objection, Debtors-in-Possession are entitled to a discharge.]

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

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

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

IT IS ORDERED that the Motion is xxxxxxxx [and the court shall enter the discharge for each debtor in this case].

31. [11-94146](#)-E-11 **DOMINIC/MARIA DEPALMA** **CONTINUED STATUS CONFERENCE RE:**
Naresh Channaveerappa **VOLUNTARY PETITION**
12-2-11 [1]

Debtors' Atty: Naresh Channaveerappa

Notes:

Continued from 11/21/13 to be heard in conjunction with the motion to dismiss this case.

Operating Report filed: 11/26/13

32. [11-94146-E-11](#) DOMINIC/MARIA DEPALMA
DJP-1 Naresh Channaveerappa

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

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

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

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

The Motion to Dismiss case is continued to 10:30 a.m. on January 16, 2014 pursuant to order of the court. No appearance required.

Creditor Farmers & Merchant Bank of Central California moves the court for an order dismissing the Chapter 11 case. The hearing on this Motion will be continued to January 16, 2014, per the parties' request.

HISTORY

The parties filed a Stipulation to Continue Farmers & Merchant Bank of Central California's Motion for Order Dismissing Chapter 11 Case on September 26, 2013. Dckt. 377. The court approved the continuance of the motion to October 31, 2013 to allow Trustee file the sale motion, in the order dated September 28, 2013. Dckt. 378. At the October 10, 2013 hearing, the parties agreed and the court ordered that the hearing be continued to November 21, 2013. Dckt. 383.

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

CONTINUANCE

On December 6, 2013, the court approved a stipulation between both parties to continue the hearing on F \$ M's Motion for Order Dismissing Chapter 11 Case to January 16, 2014 at 10:30 am.

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

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

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

IT IS ORDERED that the hearing on the Motion is continued to 10:30 a.m. on January 16, 2014.

33. [11-94146-E-11](#) **DOMINIC/MARIA DEPALMA** **MOTION TO PAY**
WFH-20 **Naresh Channaveerappa** **11-20-13 [404]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors', creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on November 21, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required. That requirement was met.

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

The court's tentative decision is to grant the Motion to Pay. 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:

Trustee wishes to pay secured creditor F&M Bank ("Creditor") in full by December 31, 2013, and prior to plan confirmation; Trustee believes that Creditor holds a valid claim secured by a first deed of trust on real property commonly known as 7500 Yosemite Blvd., Modesto, California. Trustee has received an estimated payoff demand as of December 31, 2013, from F&M Bank for

approximately \$232,057.33 plus any additional attorneys' fees and costs incurred from November 14, 2013 through December 31, 2013.

Since payment of Creditor's claim will be outside the ordinary course of business, Trustee seeks approval to make the payment pursuant to Section 363(b)(1). 11 U.S.C. § 363(b)(1) states that:

The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless--

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease--

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Debtors' son Gino DePalma, has gifted \$600,000 to the estate. Trustee understands that the gift represents a portion of the net sales proceeds received from the sale of the Garst Road Property--title of which was held by Gino Farming LLC prior to sale. Trustee seeks authority to use a portion of those gift monies to pay Creditor, while the remaining gift monies will be used to pay creditors through Trustee's Plan. Trustee intends to commence an adversary proceeding against Gino Farming, LLC and DePalma.

DePalma has agreed to enter into a stipulated judgment for \$720,000 in the upcoming adversary proceeding; the amount represents the difference between the estimated value of the Garst Road Property at the time of the 2010 transfer, and the actual purchase price. Since Trustee has sufficient monies on hand with monies that Debtors' counsel is holding to pay Creditor in full through this plan, Trustee desires to pay Creditor by December 31, 2013, to reduce Creditor's claim and save estate resources.

Here, the Trustee is bringing a noticed motion to use DePalma's gift of \$600,000 to Debtors, which Trustee characterizes as property of the estate. Trustee is not attempting to use funds related to the offering of a product or service, with a policy prohibiting the transfer of identifiable information about individuals not affiliated with Debtors.

Furthermore, Trustee asserts that creditors will not be prejudiced by this payment, as this is a solvent estate wherein all creditors will be paid in full with interest, except U.S. Bank. U.S. Bank asserts three claims that are fully secured by Debtors' residence, and U.S. Bank's loans will be cured

and reinstated through the Plan and be paid by Debtors thereafter. Thus, the court will authorize Trustee to pay Creditor using funds from Debtors' bankruptcy estate.

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

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

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

IT IS ORDERED that the Motion to Pay is granted.

IT IS FURTHER ORDERED that Trustee is authorized to pay F&M Bank the sum of \$232,057.33, plus additional attorneys' fees and costs incurred from November 14, 2013 through December 31, 2013, not to exceed \$xxxx.

34. [11-94146-E-11](#) DOMINIC/MARIA DEPALMA
WFH-21 Naresh Channaveerappa

MOTION TO USE CASH COLLATERAL
11-21-13 [[410](#)]

**COUNSEL TO CLARIFY THE U.S. TRUSTEE FEES IN THE CASH
COLLATERAL BUDGET (JANUARY - MARCH 2014)**

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

Notice and Service Appear to be Correct. The Proof of Service states that the Motion and supporting pleadings were served on respondent creditor, Debtors, and Office of the United States Trustee on November 21, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Authorize Use of Cash Collateral was properly set for hearing on notice required by Local Bankruptcy Rule 9014-1(f)(1). If the respondent and other parties in interest do not file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) this will be considered the equivalent of a statement of nonopposition. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995).

The court's tentative decision is to grant the Motion to Authorize Use of Cash Collateral. 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:

Trustee seeks an order authorizing the Debtors-in-Possession's use of cash collateral derived from its business operations to fund its ongoing business operations to pay ongoing crop, harvest, utility, property, and Chapter 11 expenses, and authorizing him to pay Debtors a living allowance. Trustee believes the use of these funds is necessary to preserve its operations as a going concern. Trustee has submitted a revised cash collateral budget for the period of January 1, 2014 to March 31, 2014.

Shortly after Trustee's appointment, Trustee sought authority to use cash collateral on an emergency basis, and the approval of a comprehensive budget; on July 17, 2012, the court entered an order approving Trustee's budget. After the entry of the First Cash collateral Order, a number of developments took place that warranted revisions to the cash collateral budget, compelling Trustee to file a Second and Third Motion to Authority to Use Cash Collateral, which were approved by the court on September 14, 2012 and December 26, 2012 respectively. Trustee has also sold two of Debtors' properties to satisfy the claims of secured creditors Yosemite Land Bank, FLCA and Crop Production Services.

Now, Trustee requests order authorizing him to use \$63,215.00 of cash collateral through March 2013, and providing that the total expenditures may be increased by up to 10% in any given month. Trustee also seeks authority to continue paying Debtors a living allowance; the line item has not been modified, and was previously approved by court. Trustee believes that in light of their expenses, Debtors' income of approximately \$1,200 per month from social security is insufficient. Trustee is therefore requesting that the court authorize him to continue paying Debtors a living allowance of \$2,000 per month.

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

Trustee asserts that the secured creditors are adequately protected. U.S. Bank asserts that it is the beneficiary under three deeds of trust on Debtor's property, even though U.S. Bank has only filed proofs of claim identifying two. Debtors have scheduled this property as having the value of \$750,000.00 and Trustee has obtained a broker price opinion in the amount of \$600,000.00. Even assuming the lower value, and subtracting the claimed liens and scheduled real property taxes, there is still roughly \$78,000.00 of equity in this property. Moreover, Farmers & Merchants Bank has potentially \$578,385 in equity in the property located at 7500 Yosemite Blvd., Modesto, California.

Trustee is also willing to grant appropriate adequate protection, including a post-petition lien on assets of Debtors created after the commencement of the case, to secure the amount of cash collateral used, as long as any secured creditor can establish a security interest in the proceeds from sale of Debtors' crops, and such post-petition lien shall be in the same amount, priority, and extent of such creditor's pre-petition lien.

Debtors-in-Possession propose the budget attached as Exhibit A, Dckt. 414.

Having reviewed Debtors' proposed cash collateral budget (attached as Exhibit A, Dckt. No 414), the court authorizes the use of cash collateral as requested from January 1, 2014 through March 31, 2014, and authorizes Trustee to continue paying Debtors a living allowance. No objection has been raised to the use and the payments are reasonable and necessary to maintain Debtor's operations. The court may authorize use of cash collateral so long as the creditor is adequately protected. 11 U.S.C. § 363(e). Here, the existence of a substantial equity cushion and the adequate protection payment protect U.S. Bank's and Farmers & Merchants Bank's interests.

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 Authorize Use of Cash Collateral filed by the Debtor-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the motion to use cash collateral for the payment of the expenses is granted and the cash collateral may be used to pay the following expenses:

	2014			Total
	January	February	March	
Income				
Almond Income		\$ 55,000		\$ 55,000
Peach Income (15%)				\$ -
Total Crop Income	\$ -	\$ 55,000	\$ -	\$ 55,000
Expenses				
Crop Expense				
Re-planting	\$ 728			\$ 728
Fertilizer		\$ 2,400	\$ 2,800	\$ 5,200
Herbicide	\$ 2,750			\$ 2,750
Pesticide/Fungicide		\$ 2,500	\$ 1,400	\$ 3,900
Application	\$ 1,350		\$ 200	\$ 1,550
Irrigation			\$ 700	\$ 700
Irrigation Labor			\$ 700	\$ 700
Pollination/Bees		\$ 11,000		\$ 11,000
Cultivation/Mowing			\$ 700	\$ 700
Pruning				\$ -
Brush Disposal				\$ -
Water Sanitation				\$ -
Crop Insurance				\$ -
Equipment Fuel and Oil	\$ 3,000	\$ 2,500	\$ 2,000	\$ 7,500
Equipment Repairs and Upkeep				\$ -
Property Tax				\$ -
Misc.	\$ 2,000	\$ 2,000	\$ 2,000	\$ 6,000
Consulting/Overhead	\$ 1,450	\$ 1,450	\$ 1,450	\$ 4,350
Total Crop Expense	\$ 11,278	\$ 21,850	\$ 11,950	\$ 45,078
Harvest Expense				
Harvest				\$ -
Hauling				\$ -
Packing/Processing				\$ -
Sales				\$ -
Total Harvest Expense	\$ -	\$ -	\$ -	\$ -

2014				
	January	February	March	Total
Utility/Property Expense				
Property Insurance		\$ 5,750		\$ 5,750
PG&E	\$ 127	\$ 127	\$ 127	\$ 381
Clark's Pest Control	\$ 84	\$ -	\$ 84	\$ 168
Charter	\$ 167	\$ 167	\$ 167	\$ 501
AT&T	\$ 94	\$ 94	\$ 94	\$ 282
Turlock Scavenger	\$ 60	\$ 60	\$ 60	\$ 180
Property Taxes				\$ -
Total Utility/Property Expense	\$ 532	\$ 6,198	\$ 532	\$ 7,262
Debtor's Other Expenses				
Monthly Living Allowance	\$ 2,000	\$ 2,000	\$ 2,000	\$ 6,000
Income Tax Payment				\$ -
Total Other Expenses	\$ 2,000	\$ 2,000	\$ 2,000	\$ 6,000
Chapter 11 Expenses				
U.S. Trustee Fees	\$ 4,875		\$ 4,875	\$ 9,750
Administrative Expenses		\$ -		\$ -
Total Chapter 11 Expenses	\$ 4,875	\$ -	\$ -	\$ 4,875
Total Expenses	\$ 18,685	\$ 30,048	\$ 14,482	\$ 63,215
NET INCOME	\$ (18,685)	\$ 24,952	\$ (14,482)	\$ (8,215)
Cash Flow Projection				
Beginning - Cash on Hand	\$ 129,066	\$ 110,381	\$ 135,333	\$ 374,780
estimated Monthly Cash Activity	\$ (18,685.00)	\$ 24,952.00	\$ (14,482.00)	\$ (8,215)
Ending - Cash on Hand	\$ 110,381.00	\$ 135,333.00	\$ 120,851.00	\$ 366,565

IT IS FURTHER ORDERED that the authorized use of cash collateral does not limit the post-petition effect of the liens of US Bank and Farmers & Merchants Bank on post-petition cash collateral not used by the Chapter 11 Trustee. US Bank and Farmers & Merchants Bank are each granted replacement liens on the post-petition assets of the estate to the extent that the use of cash collateral results in a reduction of the collateral which existed as of the commencement of the case.

35. [13-91848-E-7](#) JOSE SANCHEZ
Howard S. Levine

MOTION TO SUBSTITUTE ATTORNEY
10-28-13 [21]

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's Attorney on October 25, 2013. By the court's calculation, 55 days' notice was provided. 28 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Substitute Attorney was not properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Local Bankruptcy Rule 9014-1(d)(3) requires that the notice of hearing advise potential respondents whether and when written opposition must be filed, the deadline for filing and serving it, and the names and addresses of the persons who must be served with any opposition. Local Bankruptcy Rule 9014-1(d)(3) further states that if written opposition is required, the notice of hearing should advise potential respondents that the failure to file timely written opposition may result in the motion being resolved without oral argument and the striking of untimely written opposition.

Debtor's Notice in this case merely contains the caption of what appears to be an adversary proceeding or other contested matter, and not the bankruptcy case, along with the sentence, "Please take Notice that there is a correction made of hearing taking place for December 19, 2013." The original Notice, filed on November 13, 2013, states: "Please take note that Notice is given that a Hearing will take place in the Removal of Attorney, Howard S. Levine in regards to this case," and lists the address of the courthouse. There is no description of the procedures under which opposition may be filed, and the form which opposition must take.

The Motion to Substitute Attorney is continued to xx:xx x.m. on _____, 201x. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtor's Motions states the following: "Name of Party making the removal is Jose Sanchez, do to recent changes in my income I can, not afford to pay Howard S. Levine as my Attorney in this case I respectfully ask the Honorable Judge to please except my plead of Removing Attorney Howard S. Levine from my case.

Debtor alleges this Bankruptcy was filed in good faith, and has also asked the Honorable Judge to Extend Time of Schedules that was filed on 10/25/2013, do to this change in my case [sic]."

Although individuals may represent themselves in bankruptcy court, Debtor is advised that it is difficult to do so successfully, as pro se litigants are still expected to adhere to the United States Bankruptcy Code,

the Federal Rules of Bankruptcy Procedure, and the local bankruptcy rules of the court. These rules can be highly technical and a misstep may affect a debtor's rights, so it is critical that the bankruptcy case be handled correctly in order for Debtor to receive his discharge. Bankruptcy has long-term financial and legal consequences, and hiring a competent attorney is strongly recommended. Moreover, Debtor and Debtor's attorney must comply with certain procedures before Debtor may remove his attorney of record and represent himself *pro per*.

Local Bankruptcy Rule 2017-1 (e) states that, unless otherwise provided therein, an attorney who has appeared may not withdraw leaving the client in *propria persona* without leave of court upon noticed motion and notice to the client and all other parties who have appeared. The attorney shall provide an affidavit stating the current or last known address or addresses of the client and the efforts made to notify the client of the motion to withdraw. Withdrawal as attorney is governed by the Rules of Professional Conduct of the State Bar of California, and the attorney shall conform to the requirements of those Rules. The authority and duty of the attorney of record shall continue until relieved by order of the Court issued hereunder. Leave to withdraw maybe granted subject to such appropriate conditions as the Court deems fit.

Additionally, Local Bankruptcy Rule 2017-1 (h), which governs the substitution of attorneys provides that an attorney who has appeared in an action may substitute another attorney and thereby withdraw from the action by submitting a substitution of attorneys that shall set forth the full name and address of the new individual attorney and shall be signed by the withdrawing attorney, the new attorney, and the client. California Rules of Professional Conduct, Rule 3-700(2) also states that:

A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

Ca. Prof. Conduct, Rule 3-700.

Here, there is no evidence that Debtor has consulted with his attorney of record, Howard S. Levine, in advancing with his motion to substitute his attorney with self-representation in the bankruptcy case. The court is unsure whether Levine is even aware of Debtor's Motion; the Proof of Service on docket indicates that only one party, the Law Office of Anthony Drew Rowe in Modesto, California was served.

The Law Office of Anthony Drew Rowe appears to be the law office representing Woods Investments, LLC as evidenced from Rowe's Motion for Relief from Automatic Stay (Dckt. No. 8) filed on October 19, 2013. Debtor has not served Levine at either Levine's address and firm stated in the California State Bar website, listing Levine being affiliated with Howard S. Levine & Associates in Arleta, California, or the Orange, California listed as Levine's work address on Debtor's petition.

Finally, the quality of Debtor's pleadings are cause for concern for the court; in this particular Motion, Debtor has not adequately noticed the Motion, and has not served it to the appropriate parties. Debtor has not cited any legal authority for the motion, as required under Local Bankruptcy Rule 9014-1(d) (5).

The court is also concerned with respect to Mr. Levine "abandoning" his client after getting Mr. Sanchez into this bankruptcy case. The Schedules prepared by Mr. Levine and Mr. Sanchez were filed on November 12, 2013. Dckt. 32. These documents leave much to be desired, including: (1) Schedule A lists one piece of real property, but does not state the Debtor's interest, value of that interest (though \$700,000 is stated in the total box at the bottom of the page), and amount of secured claims; (2) Schedule B lists the Debtor's personal property assets as being only \$110.00 in clothing (the Debtor having no cash, no household goods, no vehicles, or any other personal property); (3) no assets are claimed exempt on Schedule C; (4) On Schedule D Wells Fargo Home Mortgage is listed as having a \$700,000 secured claim for which the collateral is not identified; (5) No priority unsecured claims are listed on Schedule E; and the Debtor has approximately \$62,000 in general unsecured claims listed on Schedule F. *Id.*

Schedule I lists income of \$3,000.00, with the Debtor "self employed" as a gardener. Though having \$3,000.00 a month in income, the Debtor has no cash or tools to engage in this business listed on Schedule B. On Schedule J the Debtor lists \$2,975.00 in monthly expenses, including \$150.00 for automobile insurance and \$500.00 for transportation expenses. *Id.* But the Debtor does not list any ownership interest in any vehicles to be insured on Schedule B.

The Statement of Financial Affairs states that the Debtor has had no income in 2013, 2012, or 2011. Question 1, *Id.* at 16-17. All of the questions on the Statement of Financial Affairs are answered "None." Further, from reviewing the docket, the court cannot identify the Statement of Compensation filed by counsel disclosing what he has been paid and what he agreed to charge the Debtor for these services.

The Debtor is represented by Howard Levine in this bankruptcy case until the court allows Mr. Levine to withdraw. Before order such a removal of counsel, the court requires Mr. Levine to appear and explain why and how the Debtor has not been abandoned in this bankruptcy case. Further, why Mr. Levine should not continue in that representation as the Debtor addresses questions for the Trustee concerning what appear to be grossly incomplete Schedules and Statement of Financial Affairs.

The court continues the hearing to afford the Debtor and Howard Levine to address these issues.

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.

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

Judgment Creditors Caroline Serrato and Cheryl Bower ("Creditors") oppose Debtor's Motion to Avoid Judicial Lien on the basis that Debtor has not submitted sufficient evidence to show that he is entitled to claim the homestead exemption under C.C.P. §704.730. Creditors claim that Debtor has not demonstrated that the subject property was his personal residence on the date of the filing of the petition, December 31, 2012, and that therefore Debtor is not entitled to avoid the judicial lien of Judgment Creditors.

Debtor claims a homestead exemption in the subject Property under California Code of Civil Procedure §704.730 in the amount of \$175,000. C.C.P. §704.730 concerns the amount of the exemption. The right to claim the exemption is defined by C.C.P. §704.710(c) and applicable California law, which indicate that the automatic homestead exemption may only be claimed if the individual has a *bona fide* intention to reside in the subject property on the petition filing date. In order to claim a dwelling exemption, the debtor must be actually residing at the claimed dwelling at the time the petition is filed. Cal. Civ. Proc. Code 704.710(a); *Kelley v. Locke* (In re Kelley), 300 B.R. 11, 21 (9th Cir. BAP 2003).

Creditors states that the appraisal that they have secured shows that the real property located at 19210 State Highway 120, Groveland, California, was vacant on the date of the inspection on November 25, 2013. Furthermore Creditors conducted an investigation revealing that the property was operated as a bed and breakfast establishment by individuals other than the debtor until shortly before the date of the filing of the petition. Thus, Creditors request that this Motion be continued to permit discovery on the issue of whether the subject property was the Debtor's residence, as defined by applicable California statutes and bankruptcy law, on the date of the filing of the petition.

Debtor's Response

Debtor asserts that Creditors' claim that Debtor is not entitled to a homestead objection is untimely. The pending motion was filed and served on October 18, 2013, and scheduled for hearing on November 21, 2013. The time for opposition to the motion was therefore set as November 7, 2013. On November 6, 2013, the parties stipulated to continue the hearing to December 19, 2013 to allow the Judgment Creditors additional time to obtain an appraisal of the property because they did not agree with Debtor's valuation of \$490,000.

Debtor challenges Creditors' description of the available evidence, arguing that there is no evidence that Debtor was not residing at the premises on December 31, 2012, and little evidence was presented showing that he is not residing there now. Debtor claims that Creditors have not submitted any evidence the debtor was not residing at the property on the date of the petition. Debtor believes that the best that can be said of the Creditors' evidence is that on November 25, 2013, an appraiser took some photos of the interior of the house which is sparsely furnished, and that one of the research links unearthed by Creditors is that Debtor's business phone is connected to a different address.

Evidentiary Hearing

Local Bankruptcy Rule 9014-1(g) states that:

If the Court determines that there is a disputed material factual issue that must be resolved before the relief requested in the motion can be granted or denied, testimony should be taken in accordance with Fed. R. Civ. P. 43(a) unless the parties waive such right or consent to proceeding under Fed. R. Civ. P. 43(c).

A disputed material factual issue remains to be resolved in this case, namely whether the property commonly known as 19210 State Highway 120, Groveland, California qualifies Debtor for his claim of the homestead exemption under C.C.P. §704.710(c). Pursuant to Local Bankruptcy Rule 9014-1(g), the court is required to set this matter for an evidentiary hearing.

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

- A. Evidence shall be presented according to Local Bankruptcy Rule 9017-1.
- B. On or before -----, 2013, Robert Hornauer, the Debtor, shall file and serve on Caroline Serrato and Cheryl Bower, the Creditors,, a list of witnesses which Debtor will present as their witnesses for their case in chief (excluding rebuttal witnesses).
- C. On or before -----, 2014,, the Creditors, shall file and serve on the Debtor, a list of witnesses which Creditors will present as their witnesses for their case in chief (excluding rebuttal witnesses).
- D. Debtor, shall lodge with the court and serve their Testimony Statements and Exhibits on or before , 2014.
- E. Creditors, shall lodge with the court and serve Direct Testimony Statements and Exhibits on or before -----, 2014.
- F. Evidentiary Objections and Hearing Briefs shall be lodged with the court and served on or before -----, 2014.
- G. Oppositions to Evidentiary Objections shall be lodged with the court and served on or before -----, 2014
- H. The Evidentiary Hearing shall be conducted at -----m. on - -----, 2014.

37. [11-93765-E-7](#) JACK BIDDLE
SSA-5 Jakrun Sodhi

MOTION BY JAKRUN SODHI TO
WITHDRAW AS ATTORNEY
11-12-13 [[40](#)]

DISCHARGED 2-8-12

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, and Office of the United States Trustee on November 13, 2013. By the court's calculation, 36 days' notice was provided. 21 days' notice is required. That requirement was met.

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

The court's tentative decision is to deny the Motion to allow Jakrun S. Sodhi, Esq. to withdraw as Attorney without prejudice. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Summary of Motion

Counsel Jakrun S. Sodhi, Esq. and Arata, Swingle, Sodhi & Van Egmond ("Sodhi") moves to withdraw as counsel for Debtor Jack Biddle, Jr, on the basis that Sodhi has fulfilled their duty and scope of representation on behalf of Debtor as agreed to in their attorney-client fee agreement. Debtor has had no contact with Sodhi in reference to the bankruptcy matter since early 2012, since after the filing of the petition, Debtor was referred to and retained Anthony Johnston to represent Debtor in an adversary proceeding filed on November 22, 2011.

Federal Rule of Bankruptcy Procedure 9013

The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

- A. The motion is made pursuant to Local Bankruptcy Rule 2017-1(e) and Rule 3-700 of the California Rules of Professional Conduct.
- B. Sodhi moves to request to withdraw as counsel for Biddle.
- C. Movant cites the wrong rule of the Local Bankruptcy Rules of Court for the proposition that opposing party must serve opposition no later than 14 days before the date set for hearing, and that failure to respond can constitute consent to the relief sought in the Motion.

Rather, Local Bankruptcy Rule 9014-1(f)(1) governs the timeline for filing and service of motions set for hearing on at least twenty-eight (28) days prior to the hearing date, and Local Bankruptcy Rule 9014-1(f)(1) mandates that opposition to the granting of motions set on at least twenty-eight days prior to the hearing date, be filed and served with the court by the responding party at least fourteen (14) days preceding the date or continued date of the hearing.

Notwithstanding the procedural issues concerning the citation to the wrong Bankruptcy Rule for time lines to submit and serve opposition to this Motion, Sodhi's Motion to Withdraw as Attorney does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief is based.

The motion merely consists of advisories to Debtor and Debtor's attorney that the hearing on this motion is taking place, and that the Motion has been properly sent to Debtor by first class mail. The Motion/ Notice of Motion also attempts to carve out procedures for Debtor and other potential opposing parties to respond, albeit under the wrong Local Bankruptcy Rule. This is not sufficient. It appears that the substance of the Motion was instead included in the Memorandum of Points of Authorities, which contains all the factual contentions that should have been incorporated into the body of the actual Motion.

The Motion does not appear to comply with the particularity requirements of Federal Rule of Bankruptcy, as Movant's request to withdraw and the basis for his request are not stated with particularity in the body of the actual Motion. Federal Rule of Bankruptcy Procedure 9013.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; see also *In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities - buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

Here, the court is forced to extract all the factual allegations of the Motion from the Memorandum of Points of Authorities. The Memorandum of Points of Authorities, rather than serving as the sole source for the moving party's recitation of facts, should instead present Movant's legal arguments and furnish legal authority, such as statutes and court cases, in support of the position advocated by the moving party. Rather, the Memorandum becomes the only document filed by Sodhi that contains all the relevant facts of this case. The Motion itself contains no reference to facts supporting Debtor's request that the court to grant the Motion to Withdraw, and does not lay out for the court Movant's grounds for relief.

In his Memorandum of Points and Authorities, Movant's discussion of Local Bankruptcy Rule 2017-1 (e) and California Rules of Professional Conduct, Rule 3-700(2) is peppered with facts regarding Sodhi's employment in representing Debtor, and elaborates on Debtor and Sodhi's agreement for Sodhi to represent Debtor, solely in Debtor's filing of his voluntary petition. Movant also alleges that he has had no contact with Debtor since early 2012, and Movant has not been apprised of any events that occurred after the filing since that time. Movant maintains that he has not been served electronically with any pleadings filed with the court since early

2012, and the law firm claims that it wasn't until September 4, 2013, when a Notice of Hearing on Objection to Claim was filed on behalf of the Trustee that Movant was served any further documents relating to this matter. Now and only now has it come to the firm's attention that it remains the attorney of record for Debtor, and this has escaped Sodhi's knowledge due to inadvertence and mistake of fact.

These are all helpful facts which would assist the court in determining whether the Motion to Withdraw should be granted. These facts, however, are not alluded to in Sodhi's Motion, and the Motion remains a bare bones bid for the court to permit Movant to withdraw as Debtor's attorney of record. This motion is thus denied for counsel's failure to comply with the particularity requirements of Federal Rule of Bankruptcy Procedure 9013.

The Motion also appears to suffer from a fatal flaw - Counsel's belief that he could be engaged just to file the Chapter 7 case, and thereafter abandon his client. See declaration of counsel, Dckt. 41. While not obligated to represent the Debtor in an adversary proceeding or for certain evidentiary hearings, counsel remains the attorney of record for the Debtor in the Chapter 7 case itself. In substance, counsel cannot attempt to unbundle his obligations in federal court, dumping the client once the bankruptcy is birthed on the court.

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

The Motion to Withdraw filed by Jakrun S. Sodhi, Esq. and Arata, Swingle, Sodhi & Van Egmond 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 Withdraw Jakrun S. Sodhi, Esq. as Attorney is denied without prejudice.

38. [12-92570-E-12](#) COELHO DAIRY
TOG-30 Thomas O. Gillis

MOTION TO INCUR DEBT
12-4-13 [[365](#)]

Local Rule 9014-1(f)(2) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on all creditors, parties requesting special notice, and the Office of the United States Trustee on December 4, 2013. 14 days' notice is required. That requirement was met.

Tentative Ruling: The Motion Incur Debt was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

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

Debtor business Coelho Dairy ("Dairy") moves to incur secured debt pursuant to 11 U.S.C. § 364. Debtor owns 81 acres of real estate with one house, three mobile homes, and a dairy facility located at 4500 Langworth Road, Modesto, California. It is the opinion of the general partner, Frank Coelho, that this real estate has a fair market value of \$2,200,000.00. This property is encumbered by a note and Deed of Trustee held by West America Bank, in the approximate amount of \$850,000. This deed of trust was perfected and is the only encumbrance on the property.

Frank Coelho, the general partner of Debtor owns an unimproved 32 acre parcel of land in Modesto, California. There is no encumbrance on this property. Mary Coelho, a partner of Debtor, owns a 39 acre farm located in Modesto, California. That farm is now encumbered by the cross collateral loan of Bank of the West. The other collateral for the loan is the herd, feed, equipment, and milk proceeds of Debtor.

The current debt owed to Bank of West is \$651,706.59 for the herd, \$208,830.02 for the feed, plus collection costs of about \$142,390.15 for a total of \$1,002,916.76. Nebraska State Bank will extend credit to Debtor in the amount of \$1,324,000.

Background

On October 16, 2013, the court granted a Motion for Relief from Automatic Stay, brought by Bank of the West (Dckt. No. 336). Debt of Bank of the West is secured by a security interest on the herd, feed equipment, milk proceeds, and the referenced parcel of real estate owned by Mary Coelho, a partner of the dairy. After Bank of the West obtained the relief from stay, they issued an "ultimatum" that Debtor pay their entire debt in a matter of weeks, or they would take the herd. Debtor had a family meeting and decided to sell Frank or Mary Coelho's land, or both, to save the herd; the herd has been in the family for generations and is presently profitable in its operation as a dairy.

In the course of offering for sale Frank and Bernadette Coelho's real estate property, a family friend, Ralph Fagundes learned of Debtor's problem and arranged to buy the notes of Bank of the West. Before that purchase was executed, however, Debtor, Frank, and Bernadette Coelho and Mary Coelho managed to secure a loan from Nebraska State Bank.

Nebraska State Bank is authorized by the U.S. Farm Service Agency to make farm loans. The Agency guarantees payment of 90% of said loans. Coelho Dairy has qualified for such a loan, as set out in letters of acceptance received by Debtor, and attached to this Motion as Exhibit E. Bank of West has agreed to wait only until December 20, 2013, before they start enforcing their rights against the herd.

Discussion

A motion to incur debt is governed by Federal Rule of Bankruptcy Procedure 4001(c). *In re Gonzales*, No. 08-00719, 2009 WL 1939850, at *1 (Bankr. N.D. Iowa July 6, 2009). Rule 4001(c) requires that the motion list or summarize all material provisions of the proposed credit agreement, "including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions." Fed. R. Bankr. P. 4001(c)(1)(B). Moreover, a copy of the agreement must be provided to the court. *Id.* at 4001(c)(1)(A). The court must know the details of the collateral as well as the financing agreement to adequately review post-confirmation financing agreements. *In re Clemons*, 358 B.R. 714, 716 (Bankr. W.D. Ky. 2007).

Pursuant to Fed. R. Bankr. P. 4001(c)(1)(A), a copy of the proposed credit agreement must be provided to the court in order to obtain the court's approval. Here, Debtor has provided copies of the Nebraska State Bank's Approval of the subject loans, as well as an email from officers of Bank of the West, stating that the Bank is willing to stop working on the agreement that Fagundes entered to buy the notes of the Bank, and to give the Debtor's partners, Mary and Frank Coelho, until December 20, 2013 to close the Nebraska State Bank loan to proceed to pay the obligation to the Bank in full.

Exhibits E(1) and E(2) are approval letters, dated October 24, 2013 and November 14, 2013 respectively, that inform Debtor that Nebraska State Bank considered and has approved Debtor for two loans. These exhibits properly summarize all material provisions of the loan agreement, fulfilling the documentation requirement of Fed. R. Bankr. P. 4001(c)(1)(B).

In their letter dated November 14, 2013, Nebraska State Bank informed Debtor that it has conditionally approved Debtor for a 30 year \$320,000 Farm Service Agency guaranteed real estate loan ("FO") and a 2 year \$922,000 Farm Service Agency guaranteed term loan ("OL"). Proceeds of these loans will be used to pay off Bank of the West and pay loan costs and fees. Estimated interest rates for these loans are as follows: 6.3% fixed interest rate on the 90% guaranteed portion, 5.95% variable interest rate on the 10% non-guaranteed portion on the FO, and a 5.95% variable interest rate on the OL loan. Nebraska State Bank's letter of conditional loan approval states that these rates may change, depending upon the current market at the time of closing. Estimated monthly payments on the FO will be \$1,981 and interest only payments of \$4,572 on the OL.

The FO loan will be secured with a first lien on the 32 acre property owned by Frank, and a second lien on the 81 acre property owned by the dairy subject to the outstanding Bank of the West debt. The OL will be secured by a first lien on livestock and a first lien on the 39 acre parcel owned by Mary Coelho. The 39 acre parcel owned by Mary Coelho will remain listed for sale, and that two years will be given to liquidate this property. When this parcel is sold, proceeds will be used to pay the balance of the OL loan in full. Excess proceeds from the sale will be available for a potential capital gains tax.

The approval of the loan, as stated by Nebraska State Bank, is contingent upon the Farm Service Agency approval for the application for guaranty, and no adverse changes as determined by Nebraska State Bank. Debtor states that the loans are fair, reasonable, and affordable for the dairy; the Coelho Dairy has been paying Bank of the West \$7,200 per month, successfully. The payments have now been raised to \$10,000 per month in the new cash collateral stipulation (Dckt. No. 360). Payments on the Nebraska State Bank loan will be less than Debtor has been paying to Bank of the West. Moreover, Debtor states that the Nebraska State Bank wants to work with the dairy, and that Frank and Mary Coelho will market their real property to pay the larger Nebraska State Bank Loan.

Any extra funds borrowed will be held in the Debtor-In-Possession account, and can be used to settle a pending lawsuit that has not yet been settled, or used as the court directs.

The court finds these terms to be fair and reasonable, given the Debtor's distressed finances, and is mindful that the FO and OL loans will be used to pay the sums owed to Bank of the West in order to avoid liquidation of Debtor's herd and feed. Debtors are current on their monthly payments to Bank of the West, and have raised their obligations to \$10,000 per month. The court's decision is to approve the proposed loans by Nebraska State Bank, and allow the secured debts to be paid to Bank of the West.

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.

Debtor's 2005 Chevrolet Utility Truck. Debtors originally sought an order compelling the Trustee to abandon the business property known as "Larry Moss Enterprises" or "Land Scope and Fences," as it was impaired by the Debtor's claimed exemption of \$23,415.00. At the initial hearing, the court granted Debtor's Motion to Compel Abandonment, and ordered the business property identified as:

- (1.) a Business Checking Account at Wells Fargo Bank, ending in 3303
- (2.) Customer List/Business Value
- (3.) Business names: "Larry Moss Enterprises" or "Land Scope and Fences"
- (4.) 1979 Ford Flatbed Truck
- (5.) 1972 Chevy Flatbed Truck
- (6.) 1971 Chevy Flatbed Truck
- (7.) 1989 Wells Cargo 14' Trailer
- (8.) 1987 Wells Cargo 16' Trailer
- (9.) 1977 Hanne Car Trailer
- (10.) 1972 Terry Camper Trailer
- (11.) 1964 Ford Bed Utility Trailer
- (12.) 1955 Lowboy Trailer; and
- (13.) Air Comp. & Misc. Lawn Care Equip, etc.,

listed on Schedule B as abandoned to Larry Moss, the Debtor. Since the exemption claimed in the property by the Debtor exceeded the value of the property, and there would be negative financial consequences of the Estate in retaining the property, the court determined that the property is of inconsequential value and benefit to the Estate, and ordered the Trustee to abandon the property.

The only asset of Debtor's business, "Larry Moss Enterprises" or "Land Scope and Fences" that was not ordered abandoned as to Debtor was Debtor's 2005 Chevrolet Utility Truck. The court continued the hearing as to this asset, to give Trustee the opportunity to investigate whether there might still be recoverable equity in Debtor's truck.

No further opposition has been filed by Trustee or any party in this matter. The court will proceed to consider Debtor's assertions regarding the lack of equity in Debtor's truck. Debtor's Schedule B lists the 2005 Chevrolet Utility Truck ("Truck") as in "Good Condition," and its current location to be 1305 Victoria Drive, Modesto California. The value of the truck is scheduled at \$12,814.00.

In his Motion to Compel Abandonment, Debtor included the truck as part of a lengthy list of business assets in Debtor's landscape and fence contracting sole proprietorship. Debtor asserted that the unavoidable liens on the group of assets for his business, which include the 2005 Chevrolet Utility Truck, to have a fair market value of \$23,415.00. Debtor claimed an exemption of \$23,415.00 in total for all of the listed assets, as shown in Debtor's Amended Schedule C (Exhibit B of this Motion). Debtor asserted that there does not appear to be any business asset that can be profitably liquidated by the Trustee over and above the exemptions in Amended Schedule C claimed by the Debtor.

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

There being no opposition or further documents regarding the recoverable value of the 2005 Chevrolet Utility Truck filed by the Trustee, the court will grant the Motion to Compel Abandonment as to Debtor's 2005 Chevrolet Utility Truck.

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

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

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

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

1. 2005 Chevy Utility Truck \$12,814.00

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

40. 13-91882-E-7 **GEORGE PRICE** **MOTION TO COMPEL ABANDONMENT**
MRG-1 **Michael R. Germain** **11-19-13 [16]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 19, 2013. By the court's calculation, 30 days' notice was provided. 28 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Abandon Real Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and 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).

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

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000). Here, the property commonly known as Sierra Village Mobile Home Park, is a trailer park operated by Debtor, California that is impaired by two trust deeds.

Real Property

Debtor states that the Sierra Village Mobile Home Park consists of two acres of real property with a small house on a permanent foundation, commercially zoned, that is operated as a trailer park. Debtor describes this tract of land and structures as the "underlying real property" of the Park, but does not provide a more comprehensive treatment of what the term "real property" refers to in the context of this Motion.

**Failure to Comply With the Minimum
Pleading Requirements of Fed. R. Bank. P. 9013**

Counsel for the Debtor is aware that Federal Rule of Bankruptcy Procedure 9013, which incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b) requires that a moving party plead with particularity the grounds upon which the requested relief is based. Law-and-motion practice in bankruptcy court demonstrates why this particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; see also *In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

For this Motion, the Debtor states with particularity the following grounds and relief requested:

- A. Debtor seeks to have the Trustee abandon property of the estate;
- B. The property is a trailer park operated by the Debtor) call Sierra Village Mobile Home Park (no address or legal description), (unidentified) "related real property, and (unidentified) "personal property."
- C. The property should be abandoned because it is of inconsequential value and/or burdensome to the estate.
- D. The court is then instructed that "for the factual and procedural background of this Motion,...the court... is referred to the supporting Memorandum of Points and Authorities [and declaration]...which are incorporated [into the Motion] by reference..."

Motion, Dckt. 16.

In substance, the Motion does not state any grounds, with the exception of the legal conclusion that the property is of inconsequential value and/or [apparently the Debtor being unable or unwilling to commit to a contention subject to Fed. R. Bankr. P. 9011] burdensome to the estate. Counsel then instructs the court to review other pleadings to determine what could be the proper grounds, state those grounds for the Debtor, advocate those grounds, and then rule on the grounds which the court drafts for the Debtor. The court declines the opportunity to be involuntarily drafted as associate counsel for the Debtor. FN.1.

FN.1. Given that this court has addressed the minimum pleading requirements for almost four years and that counsel has regularly appeared in this court, the most logical conclusion is that counsel has determined the Federal Rules of Bankruptcy Procedure do not apply to him. Further, that the court exists to do work that counsel believes not deserving of his time or too costly.

This court uniformly and fairly applies the Federal Rule of Civil Procedure, Federal Rule of Bankruptcy Procedure, Local Bankruptcy Rules, and substantive law to all parties and counsel. No attorney is ever left to guess whether the Rules apply or if there is some secret, unwritten exemption for "regulars" appearing before the court.

The court is left to surmise as to the exact real property Debtor is referring to when listing the subject "underlying real property" of this Motion.

Buried in the Debtor's declaration and the points and authorities is some additional information. In the Declaration, Dckt. 19, the Debtor says he operates a trailer park called "Sierra Village Mobile Home Park in Mi Wuk Village, California ("Non-Specific Real Property"). No address or legal description is provided. Though not stated as being included in the relief, the Debtor testifies that there are 11 old trailers on the Non-Specific Real Property (for which title is held by other persons), there are accounts receivable in the amount of \$15,530.54, there are (1) step ladders, (2) shop vac, (3) swamp cooler, (4) air conditioning unit (portable), (5) plumbing snake with motor, (6) two old commercial washers, and (7) two old commercial driers. Further, there are lease payments of \$27,994.20 relating to the Non-Specific Real Property. FN.2.

FN.2. To be fair, counsel does instruct the court to go and read the Schedules to obtain information concerning these assets, rather than counsel having taken the time to state the information in the Motion or declaration.

The court cannot, and will not, just order the Trustee to abandon general assets. The court will not dig through other pleadings, schedules, and whatever has been filed in the case to assemble for a party which must be stated in the motion.

The Chapter 7 Trustee has filed a statement of non-opposition in this matter. This is presented as a docket entry for December 2, 2013, and no other information is provided.

The court is concerned about issuing orders which cannot specifically identify the property being abandoned. Here, the real property description is nothing more than "That Old Trailer Park, Located Somewhere." Further, the court will not engage in a game of generic motions and then parties hiding information (which must be stated with particularity in the motion, Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P., 7007, 9014) in other pleadings or the files in the case, and the court being instructed to dig it out. Filing motions is not an opportunity for a movant to hide information and send parties in interest on an Easter egg hunt to find information.

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

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

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

IT IS ORDERED that the Motion to Compel Abandonment is denied without prejudice.

41. [13-91983](#)-E-7 JAIME RIVERA ORDER TO SHOW CAUSE - FAILURE
Pro Se TO PAY FEES
11-15-13 [[12](#)]

Final Ruling: The court issued an order to show cause based on Debtor's failure to pay the required fees in this case. The court docket reflects that on December 2, 2013, the Debtor paid the fees upon which the Order to Show Cause was based.

The Order to Show Cause is discharged. No appearance required.

The fees having been paid, the Order to Show Cause is discharged.

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 are ordered, and the case shall proceed.

42. [13-92083](#)-E-7 ANITA RUDDY ORDER TO SHOW CAUSE - FAILURE
Pro Se TO PAY FEES
11-27-13 [[12](#)]

CASE DISMISSED 12-13-13

Final Ruling: The case having previously been dismissed, the Order to Show Cause is dismissed as moot.

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, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is dismissed as moot, the case having been dismissed.

43. [13-91297-E-11](#) **ARIANA AVESTA, INC.**
UST-1 **W. Steven Shumway**

**MOTION TO CONVERT CASE FROM
CHAPTER 11 TO CHAPTER 7 OR
MOTION TO DISMISS CASE
10-25-13 [23]**

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, and all creditors, parties requesting special notice on October 25, 2013. By the court's calculation, 55 days' notice was provided. 28 days' notice is required. That requirement was met.

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

The Motion to Convert is granted and the case is converted to a proceeding under Chapter 7. 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 United State Trustee (UST) moves to convert or dismiss Debtor's Chapter 11 case, pursuant to 11 U.S.C. § 1112(b)(1). 11 U.S.C. § 1112(b)(1) provides that:

The court may not convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter if the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate, and the debtor or any other party in interest establishes that--

(A) there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and

(B) the grounds for converting or dismissing the case include an act or omission of the debtor other than under paragraph (4)(A)--

(i) for which there exists a reasonable justification for the act or omission; and

(ii) that will be cured within a reasonable period of time fixed by the court.

UST argues that the case should be converted or dismissed, because the Debtor failed to timely provide information reasonably requested by the United States Trustee. 11 U.S.C. § 1112(b)(1) and -(b)(4)(H). UST also states that the case should be converted or dismissed due to the Debtor's unexcused failure to file complete and accurate bankruptcy schedules and Statement of Financial Affairs. See *id.* 11 U.S.C. § 521(a) and Fed. R. Bankr. P. 1007(c).

Additionally, UST argues that the case should be converted and dismissed, because the Debtor failed to file monthly operating report for August 2013 and September 2013. See 11 U.S.C. §§ 1112(b)(1) and 1112(b)(4)(F). Upon a review of the docket, however, it appears that Debtor untimely filed three operating reports on November 19, 2013 for the months of July, August, and September, 2013, thereby rendering this part of UST's arguments in favor of conversion and dismissal moot. The court does note, however, that all four monthly operating reports filed in this case have been late, and that Debtor is not fulfilling its obligation to keep the court apprised of its financial activities--this pattern of tardy filings is cause for concern to the court, and may cause Debtor's counsel to be sanctioned for Debtor's inability to submit timely reports.

Background

Debtor, Ariana Avesta, Inc., operates a convenience store and gas station in Wallace, California. UST states that it made repeated requests to Debtor's officers for information and testimony concerning a \$120,000 "loan to shareholders" that apparently occurred in 2012, to which Debtor's officers did not reply. The \$120,000 "loan to shareholders" was not disclosed in the Debtor's schedules or Statement of Financial Affairs or any subsequent amendments. Furthermore, Debtor not filed monthly operating reports for August 2013 and September 2013.

On August 12, 2013, Debtor's bankruptcy counsel emailed to the UST's office the Debtor's 2012 federal tax return. The tax return showed that, during the 2012 tax year, the Debtor made a \$120,000 "loan to shareholders." See Declaration of Carla K. Cordero, ¶ 2. Debtor's counsel also sent a balance sheet dated June 30, 2013, which described a \$120,000 "loan to shareholder" as an asset of Debtor. At the first Meeting of Creditors on August 20, 2013, Debtor's secretary, Shaima Kakar, appeared and provided testimony; Kakar testified that she had no knowledge of the "loan to shareholders," and that Mirvais Wadan is the president of Debtor. Kakar and Wadan are the only shareholders of Debtor.

On August 20, 2013, counsel for UST continued the Meeting of Creditors to September 26, 2013, and sent an email requesting Debtor's counsel to produce documentation, including notes, corporate minutes, and resolutions describing the "\$120,000 corporate loan" on or before September 3, 2013. No such documentation was provided.

At the continued meeting, Debtor's president Wadan appeared at the continued meeting of Creditors, where she was unable to provide specific details about the \$120,000 "loan to shareholders". See Declaration of Edmund Gee, ¶10. UST's counsel requested that Debtor's counsel obtain a declaration from Debtor's account to explain the loan, including when the loan was made and to whom the loan proceeds were transferred. UST requested that this declaration be provided before October 17, 2013; UST's counsel informed Debtor's counsel that if this declaration and supporting documentation was not provided by this time, then the UST would consider moving to dismiss or convert this case, or appoint a trustee.

On October 23, 2013, Kakar provided an unsigned letter from Amir H. Zarrati of Zarrati Accounting Service ("Zarrati Letter"). The Statement of Financial Affairs, Item 21, in this case describes "Amir Zarrati" as the Debtor's bookkeeper or accountant. The Zarrati Letter indicates that the Debtor's bookkeeper or accountant could not account for a \$120,000 cash shortfall "simply because it was missing" and therefore characterized the discrepancy as being a "loan to shareholders." A copy of the Zarrati Letter is attached to this Motion as UST's Exhibit 10.

Discussion

Under 11 U.S.C. § 1112(b)(4), "cause" exists to convert or dismiss if the following are occurring in Debtor's case:

- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;
- (B) gross mismanagement of the estate;
- (C) failure to maintain appropriate insurance that poses a risk to the estate or to the public;
- (D) unauthorized use of cash collateral substantially harmful to 1 or more creditors;
- (E) failure to comply with an order of the court;
- (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;
- (G) failure to attend the meeting of creditors convened under section 341(a) or an examination ordered under rule 2004 of the Federal Rules of Bankruptcy Procedure without good cause shown by the debtor;
- (H) failure timely to provide information or attend meetings reasonably requested by the United States trustee (or the bankruptcy administrator, if any);
- (I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief;

- (J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court;
- (K) failure to pay any fees or charges required under chapter 123 of title 28;
- (L) revocation of an order of confirmation under section 1144;
- (M) inability to effectuate substantial consummation of a confirmed plan;
- (N) material default by the debtor with respect to a confirmed plan;
- (O) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan; and
- (P) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

As discussed above, Debtor has made multiple unexcused late filings of their monthly operating reports under § 1112(b) (4) (F). Debtor's officers also appeared to have engaged in stonewalling in not providing the UST complete and accurate information regarding the \$120,000 "loan to shareholders" and not testifying about the loan at the Meeting of Creditors, running afoul of their reorganization responsibilities and providing cause for conversion under §1112(b) (4) (H).

Cause also exists under U.S.C. § 1112(b) (4) (J), for Debtor-corporation and its officer's non-disclosure of the "loan to shareholders" in their schedules and Statement of Financial Affairs. The \$120,000 "loan to shareholders" was not disclosed in Schedule B, Item 16 (Accounts Receivable), Item 18 (Other liquidated debts owed to debtor), or Item 21 (Other contingent and unliquidated claims of every nature). The loan was not disclosed in the Statement of Financial Affairs, Item 10 (Other transfers) or Item 23 (Withdrawals from a partnership or distributions by a corporation), and Kakar's declaration concerning the bankruptcy schedules, filed and executed under the penalty of perjury, attested to the accuracy and truth of the petition and bankruptcy filings.

Following the Meeting of Creditors, on September 12, 2013, the Debtor filed amended schedules and an amended Statement of Financial Affairs. See Docket No. 17. See United States Trustee's Exhibit 9, filed herewith. However, the amended schedules and amended Statement of Financial Affairs contain no description of the \$120,000 "loan to shareholders."

The court is left to speculate whether Debtor's non-disclosure of the loan constitutes an oversight on Debtor's and Debtor's officer's part, or an active, bad faith concealment of the \$120,000 shareholder loan that is listed on Debtor's 2012 federal tax return. The court considers Debtor's pattern of evasive behavior, which invokes several of the grounds for conversion and dismissal as provided by 1112(b) (4), in addition to Trustee's account of Debtor's refusal to provide essential information concerning the "loan" (resulting in Trustee's filing of this Motion pursuant to 11 U.S.C.

§§ 1112(b)(1)). Debtor does not appear to have been forthcoming in supplying UST any further information and testimony regarding the \$120,000 "loan to shareholders."

Based on UST's recitation of the facts, and the UST's evidence of Debtor's equivocal behavior, the court finds cause to convert this Chapter 11 to a Chapter 11 case under Title 11 of the U.S. Code.

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

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

The Motion to Convert having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Convert is granted and the case is converted to a proceeding under Chapter 7 of Title 11, United States Code.