UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

November 20, 2014 at 10:30 a.m.

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1. 11-94410-E-7 SAWTANTRA/ARUNA CHOPRA
Robert M. Yaspan

ORDER TO SHOW CAUSE - FAILURE TO TENDER FEE FOR FILING TRANSFER OF CLAIM
10-28-14 [1127]

Final Ruling: No appearance at the November 20, 2014 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on TerraCotta Shangri-La, LLC, "Creditor," Sawtantra and Aruna Chopra, "Debtors," Trustee, and other such other parties in interest as stated on the Certificate of Service on October 30, 2014. The court computes that 21 day's notice has been provided.

The court issued an Order to Show Cause based on Creditor's failure to pay the required fees for Transfer of Claim in this case ($25.00 due on October 14. 2014).

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

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

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

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

2. 14-90910-E-7 BSH-2 RICHARD/BARBARA PAROLA Brian S. Haddix

MOTION TO AVOID LIEN OF CITIBANK (SOUTH DAKOTA), N.A. 10-6-14 [22]

Final Ruling: No appearance at the November 20, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Citibank (South Dakota), N.A., the creditor, on Ocotober 6, 2014. By the court's calculation, 45 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Citibank (South Dakota), N.A. ("Creditor") against property of Richard P. Parola and Barbara L. Parola ("Debtor") commonly known as 369 Laurel Avenue, Oakdale, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $25,185.05. An abstract of judgment was recorded with Stanislaus County on February 28, 2012, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $216,00.00 as of the date of the petition. The unavoidable consensual liens total $138,000.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of $78,000.00 on Schedule C. FN.1.

FN.1. Debtor states in the Points and Authorities that an exemption of $100,000 was claimed on Schedule C. (Dckt. 24). However in the Exhibits provided, only $78,000.00 was claimed. (Dckt. 26, Exhibit B). The claimed exemption in addition to the Deed of Trust on the Property fully encompasses the value of the Property and therefore the judicial lien encumbers the Debtor's exemption.

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

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Citibank (South Dakota), N.A., California Superior Court for Stanislaus County, recorded on February 28, 2012, Document No. 2012-0016501-00 with the Stanislaus County Recorder, against the real property commonly known as 369 Laurel Avenue, Oakdale, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

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3. 14-90521-E-7 DAVID RICE
14-9019 Pro Se
TURLOCK IRRIGATION DISTRICT V. RICE

CONTINUED STATUS CONFERENCE RE: COMPLAINT
5-22-14 [1]

Plaintiff's Atty: Ken R. Whittall-Scherfee
Defendant's Atty: unknown

Adv. Filed: 5/22/14
Answer: none

Nature of Action:
Dischargeability - fraud as fiduciary, embezzlement, larceny

The Status Conference is ----.

Notes:

Entry of Default and Order re Default Judgment Procedures filed 7/17/14 [Dckt 11]

4. **14-90521-E-7** **DAVID RICE** **CONTINUED MOTION FOR ENTRY OF DEFAULT JUDGMENT**
14-9019 **Pro Se** **8-14-14 [25]**
KWS-1
TURLOCK IRRIGATION DISTRICT V. RICE

Tentative Ruling:

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on August 14, 2014. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties 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 Entry of Default Judgment is granted and the Plaintiff is awarded $60,945.10.

The Turlock Irrigation District ("TID") filed the instant Application for Entry of Default Judgment on August 14, 2014.

MOTION

TID states that the submit the instant motion to comply with the court's Entry of Default and Order Re: Default Judgment Procedures entered July 17, 2014. Dckt. 11.

TID argues that it has provided David Rice ("Debtor") ample opportunity to provide a timely response to the complaint filed and served in this proceeding. TID argues that on June 2, 2014, counsel for TID served Debtor and his attorney of record with a summons and complaint. Debtor was served at his address of record. After receiving no timely response to the complaint, on June 30, 2014, TID sent Debtor and Debtor's bankruptcy attorney, Scott Mitchell, a

letter explaining that TID intended to file a Request for Entry of Default if an answer to the complaint was not served on or before July 7, 2014.

Counsel for TID received no response from Debtor or Mr. Mitchell which led to TID filing its Request for Entry of Default on July 8, 2014. TID alleges that at no time did Debtor request an extension of time to respond t the complain and at no time did TID agree to extend the time for an answer.

COMPLAINT

The complaint requests damages against Debtor for power theft. TID requests that the court enter default judgment against Debtor as follows:

1. For damages in the total amount of $91,416.75;

2. For attorney's fees incurred in an amount of $2,470.00;

3. For TID's costs of suit in the amount of $293.00

4. The foregoing damages are awarded to TID and against Debtor; and

5. Those amounts are not dischargeable pursuant to 11 U.S.C. § 523(a)(4).

ANSWER

The Defendant's default was entered on July 17, 2014. Dckt. 11. Entry of the default has not been vacated. Order denying motion to vacate, Dckt. 54. In denying the motion to vacate the default, the court considered the pleading titled "Answer" which Defendant sought to file. Civil Minutes, Dckt. 40. In denying the motion to vacate, the court concluded that the "answer" does not admit and deny the allegations stated in the complaint, but merely asserts,

A. Defendant did not authorize any person to alter or damage TID property at the premises.

B. During the period January 3, 2011 and January 3, 2011, Defendant did not consent to diversion of electrical services.

C. Between January 3, 2011 and January 3, 2014, power was not diverted from TID Equipment on the premises, through the use of a splice into TID's power line located on the premises.

D. Defendant did not divert any electrical power at the premises without the consent of TID.

E. There was no power theft on the premises.

F. I deny any and all allegations.

G. All allegations are incorrect.

Response, Dckt. 21, Civil Minutes, Dckt. 50.

The Debtor attempted a second time to file an answer, over a month after the first bare-bones answer submitted. Dckt. 36. This second "answer" is even more sparse than the first, with the Defendant just merely checking off a box stating "denies each and every other allegation of the complaint other than the procedural facts regarding the filing of the bankruptcy petition herein." Dckt. 36. The Debtor supplements this "answer" with a hand-written note with excuses on why Defendant has failed to follow any of the procedural requirements.

Defendant asserts that he did not engage in the alleged acts of power diversion.

EVIDENCE IN SUPPORT OF MOTION

The Complaint filed by Turlock Irrigation District ("Plaintiff") states the following as claims for relief against the Debtor (Dckt. 1),

A. Jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. § 1334, with the claims arising under the Bankruptcy Code, 11 U.S.C. § 523. Further that this is a core proceeding, citing 28 U.S.C. § 157(b)(2)(I).

B. David Rice ("Defendant-Debtor") resided in real property commonly known as 613 Danube Court, Modesto, California "Premises") during the period January 3, 2011 and January 3, 2014.

C. Defendant-Debtor was in control of the Premises during the period January 3, 2011 and January 3, 2014.

D. Prior to January 3, 2011, Defendant-Debtor requested that Plaintiff provide electrical service to the Premises in the name of Defendant-Debtor.

E. Plaintiff established electrical service to the Premises in the name of Defendant-Debtor as requested.

F. During the period of January 3, 2011 through January 3, 2014, Defendant-Debtor was the only customer of record for electrical service provided by Plaintiff to the Premises.

G. During the period of January 3, 2011 through January 3, 2014, Defendant-Debtor owned the Premises.

H. During the period of January 3, 2011 through January 3, 2014, Defendant-Debtor controlled the Premises.

I. During the period of January 3, 2011 through January 3, 2014, Defendant-Debtor received the benefit of electrical service from Plaintiff with knowledge that a bypass of the Plaintiff's meter existed.

J. Plaintiff did not authorize any person to alter or damage any of Plaintiff's property on the Premises.

K. During the period of January 3, 2011 through January 3, 2014, power was diverted from Plaintiff's equipment on the Premises through the use of a splice into Plaintiff's power line located on the Premises.

1. The splice into Plaintiff's equipment at the Premises bypassed Plaintiff's meter for the Premises.

2. Plaintiff did not authorize any splice into Plaintiff's equipment.

L. The diversion of electrical power at the Premises by Defendant-Debtor without the consent of Plaintiff constitutes larceny under applicable non-bankruptcy law.

M. Plaintiff first learned of the most recent power theft at the Premises on or about January 3, 2014.

N. Plaintiff has made a reasonable estimate of the unauthorized use of electric service at the premises for the substantiated period of use.

1. Plaintiff's reasonable estimate of electric power consumed at the Premises that bypassed Plaintiff's meter is $30,472.25.

2. California Civil Code § 1882.2 provides that Plaintiff may recover three times the actual amount of damages, plus costs of suit and attorneys' fees.

O. Plaintiff computes the treble damages to be $91,416.75 and the attorneys fees to be not less than $2,470.00.

P. Plaintiff requests that,

1. It be awarded actual damages of $30,472.23;

2. That the damages be trebles to $91,416.75 pursuant to California Civil Code § 1882.2;

3. It be awarded attorneys' fees in the amount of $2,470.00, or more, according to proof;

4. That an amount not less than $93,886.75 be determined nondischargeable pursuant to 11 U.S.C. § 523(a)(4).

Complaint, Dckt. 1.

The Declaration of Tracy Jones has been filed in support of the Motion for Entry of Default Judgment (Dckt. 27). Ms. Jones testifies,

A. She is employed as a Customer Service Division Manager by Plaintiff.

B. Her responsibilities include the Plaintiff-Debtor's account for Plaintiff providing electric service at the Premises.

C. She has personal knowledge of how Plaintiff maintains its books and records regarding electric service it provided to the Premises. These books and records are maintained in the ordinary course of business by Plaintiff.

D. Prior to January 3, 2011, Defendant-Debtor requested that Plaintiff provide electric service to the Premises.

E. Prior to January 3, 2011, in response to Defendant-Debtor's request, Plaintiff provided electric service to the Premises.

F. During the Period January 3, 2011 through January 3, 2014, Defendant-Debtor was the only customer of record with Plaintiff for electric service provided to the Premises.

G. During the period January 3, 2011 through January 3, 2014, Defendant-Debtor controlled the Premises.

H. During the period January 3, 2011 through January 3, 2014, Defendant-Debtor received the direct benefit of electric service provided by Plaintiff to the Premises.

I. During the period January 3, 2011 through January 3, 2014, electric power at the Premises was diverted through the use of a splice to bypass Plaintiff's electric meter for the premises.

J. Plaintiff did not authorize any person to alter or modify Plaintiff's electric meter at the Premises.

K. Plaintiff first learned of the diversion of electric power at the Premises on January 3, 2014.

L. Plaintiff has compared the consumption of electricity at the Premises to determine what amount of electric power was not registered by the electric meter.

    1. Plaintiff has determined that Defendant-Debtor used 163.4 kilowatt hours per day of electric power that was not registered on the meter.

    2. Plaintiff has made a reasonable estimate of the unauthorized use of electric service at the Premises for the period between January 3, 2011 and January 3, 2014.

    3. Plaintiff estimates that electric power consumed at the Premises that bypassed Plaintiff's meter resulted in $30,472.25 in "electric power theft."

M. Plaintiff has incurred not less than $2,470.00 in attorneys' fees in connection with this Adversary Proceeding.

N. Plaintiff seeks treble damages pursuant to California Civil Code § 1882.2.

In addition to Ms. Jones' Declaration, Plaintiff's counsel has provided his declaration. Dckt. 28. His declaration recounts efforts of counsel to communicate with Defendant-Debtor's counsel and the Defendant-Debtor concerning this litigation. He also testifies that attorneys' fees of $2,470.00 were billed as of the August 14, 2014 declaration, and that he anticipates an additional $600.00 relating to this Motion. In addition, he testifies that Plaintiff has incurred $293.00 of costs in connection with this litigation.

OCTOBER 2, 2014 HEARING

The court, on the evidence presented, was unable to determine whether the Plaintiff has sufficiently proven the elements under 11 U.S.C. § 523(a)(4) and whether it is entitled to treble and attorney's fees under Cal. Civ. Code § 1882.2. The amount sought by Plaintiff in the instant action is $93,886.75 which is a substantial sum, especially in light of the Defendant's bankruptcy and apparently minimum assets. The court will not haphazardly grant the Plaintiff's nearly $100,000.00 in damages and fees without properly proving the elements of the causes of actions it alleges.

While the Defendant has been given sufficient opportunity to file a proper answer or motion to set aside, neither in which has been done. While the court recognizes that Debtor is defending the Complaint in *pro se*, the court cannot abdicate simple, basic pleading and evidentiary requirements.

The court continued the hearing to November 20, 2014 to allow both Plaintiff and Defendant to file supplemental pleadings.

PLAINTIFF'S SUPPLEMENTAL PLEADINGS

On October 23, Plaintiff filed supplemental declarations and exhibits in support of their motion for default judgment. Dckts. 60–65.

The Supplemental Declaration of Tracy Jones (Dckt. 60) introduces a copy of the monthly billing statement sent to Defendant shortly after Plaintiff's discovery of the unauthorized usage in Exhibit A. Dckt. 61. It further introduces the Additional Billing Internal Summary, which shows Plaintiff's calculations of the fees, taxes, and other charges related to the unauthorized use from January 3, 2011 to January 3, 2014. Dckt. 62.

Plaintiff also filed the Declaration of Steven Chambers. Dckt. 63. Mr. Chambers is an Energy Specialist for Plaintiff and periodically reviews residential accounts for deviations in power usage that may indicate tampering. On December 27, 2013, Mr. Chambers became aware of power usage at Defendant's address that indicated that power theft was occurring. Mr. Chambers then compared the "check meter" to the meter at Defendant's address on January 2, 2014. This review and comparison showed that unmetered electrical usage had occurred at Defendant's address. Mr. Chambers then spoke to Defendant about this, stating that the address was using more power than was being billed, and offered to show Defendant where the problem was if he could be permitted to access the garage panel. Upon Defendant's refusal, Plaintiff disconnected service. A few days later, Defendant allowed Mr. Chambers to inspect the garage area and he observed breaks in the conduit for electric wires going into the

meter and marks on the service wire created by self-piercing connectors. This led Mr. Chambers to conclude that power theft had occurred.

The Chambers Declaration then introduces Mr. Chambers' Unsafe Condition report, Exhibit A. Dckt. 64. This report includes his observations of the conditions at Defendant's address. It then introduces a copy of the electrical usage at the address showing the power diversion as Exhibit B. Dckt. 65.

DEFENDANT'S RESPONSE

Defendant has not filed any responses to the supplemental filings.

APPLICABLE LAW

A. Default Judgments

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

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 Moore's Federal Practice - Civil ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which the court may consider in exercising its discretion include:

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

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

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

B. 11 U.S.C. § 523(a)(4)

Under 11 U.S.C. § 523(a)(4), a debt may be nondischargable "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" 11 U.S.C. § 523(a)(4).For purposes of 11 U.S.C. § 523(a)(4), the term "while acting in a fiduciary capacity" does not qualify the words "embezzlement" or "larceny," so any debt resulting from larceny falls within the exception of clause (4). *Transamerica Commercial Finance v. Littleton and Moore (In re Littleton)*, 942 F.2d 551 (9th Cir. 1991).

Larceny is defined under federal common law as a taking of another's property with fraudulent intent to deprive him of it permanently. *In re Stern*, 403 B.R. 58, 68 (Bankr. C.D. Cal. 2009) (citing *State v. Sokol* (*In re Sokol*), 170 B.R. 556, 560 (Bankr.S.D.N.Y.1994). "Larceny differs from embezzlement in the fact that the original taking of property was unlawful, and without the consent of the injured person." *In re Lough*, 422 B.R. 727, 735-36 (Bankr. D. Idaho 2010) (citing *Custer v. Dobbs* (*In re Dobbs*), 115 B.R. 258, 265 (Bankr. Id. 1990)) (internal quotations omitted).

To succeed under § 523(a)(4) for larceny, a creditor must prove that "the debtor has wrongfully and with fraudulent intent taken property from its owner." *In re Lough*, 422 B.R. 727, 735-36 (Bankr. D. Idaho 2010) (citing *In re Mirth*, 99.4 I.B.C.R. at 151.) To sustain a cause of action for larceny under § 523(a)(4) an objecting creditor must show that the initial possession of the property was wrongful. *In re Woodman*, 451 B.R. 31, 38 (Bankr. D. Idaho 2011).

C. California Code of Civil Procedure § 1882.1

Under California Civil Code § 1882.1:

> A utility may bring a civil action for damages against any person who commits, authorizes, solicits, aids, abets, or attempts any of the following acts:
>
> a. Diverts, or causes to be diverted, utility services by any means whatsoever.
>
> b. Makes, or causes to be made, any connection or reconnection with property owned or used by the utility to provide utility service without the authorization or consent of the utility.
>
> c. Prevents any utility meter, or other device used in determining the charge for utility services, from accurately performing its measuring function by tampering or by any other means.
>
> d. Tampers with any property owned or used by the utility to provide utility services.
>
> e. Uses or receives the direct benefit of all, or a portion, of the utility service with knowledge of, or reason to believe that, the diversion, tampering, or unauthorized connection existed at the time of the use, or that the use or receipt, was without the authorization or consent of the utility.

If a utility is successful in any civil action brought pursuant to § 1882.1, "the utility may recover as damages three times the amount of actual damages, if any, plus the cost of the suit and reasonable attorney's fees." Cal. Civ. Code § 1882.2.

DISCUSSION

Reviewing the factors in determining whether the court should grant default judgment, the court is finds that default judgment is proper. Upon review of the complaint, answer, and supplemental pleadings, the court is satisfied that Plaintiff has provided sufficient evidence to show that between January 3, 2011 and January 3, 2014 Defendant-Debtor diverted power and is entitled to relief.

A review of the supplemental declarations and exhibits provides the court with sufficient factual basis on how the unauthorized power diversion was discovered, the methodology in which the Plaintiff calculated the amount of unauthorized power, the billing statements, and the efforts taken to ensure that the unauthorized power diversion was remedied. Mr. Chambers' declaration explains how in December 2013 he became aware of possible unauthorized power usage at the Defendant-Debtor's resident. The declaration provides sufficient factual discussion on the steps Mr. Chambers' in his capacity as a Senior Energy Specialist took in order to discover the power diversion as well as the steps taken to prevent further energy theft. The attached Unsafe Condition Inspection explains in detail the events that occurred when Mr. Chambers visited the Defendant-Debtor's residence to determine whether power diversion was actually taking place.

Applying the factors in determining whether default judgment is proper, all the factors weigh in favor of granting default judgment. The Plaintiff would be prejudiced without the granting because the Defendant-Debtor has had amble opportunity to respond to the complaint and the instant motion yet the Defendant-Debtor has not provided any response outside of a mere denial of allegations. While the court is cognizant that the Defendant-Debtor is pro se, this does not excuse a complete lack of defense. The Plaintiff is incurring unnecessary attorneys' fees and costs due to the Defendant-Debtor not responding with substantive replies. Following the supplemental declarations and exhibits provided for by the Plaintiff, the substantive claim of the Plaintiff is meritorious. The complaint and the supplemental declarations and exhibits sufficiently provide information and factual grounds to justify the granting of default judgment. While the sum of money is substantial in light of Defendant-Debtor's bankruptcy and minimal assets, the scope of the power diversion over a three year period justifies the amount sought by the Plaintiff. There does not appear to be any possibility of a dispute concerning material facts, especially in light of Defendant-Debtor's lack of a substantive answer and Plaintiff's supplemental declarations and exhibits which provide evidence of the diversion. The default in answer by the Defendant-Debtor is not due to any excusable neglect. Lastly, while the Federal Rules of Civil Procedure prefer decisions to be based on the merits, the Defendant-Debtor's lack of response and the evidence provided for by the Plaintiff makes default judgment proper in this case.

Turning to the merits, to be successful on 11 U.S.C. § 523(a)(4) claim, the Plaintiff must show that "the debtor has wrongfully and with fraudulent intent taken property of its owner." Here, the Plaintiff has provided

sufficient evidence showing that sometime prior to and through January 3, 2014, power was diverted around the TID meter and was stolen from TID. For the period from the commencement of service on January 3, 2011 and January 3, 2014 (a three year period) a total of $30,472.25 of diverted power was fraudulently taken by the Defendant-Debtor.

On Exhibit B, TID provides the breakdown of the power diverted by year to be $9,384.15 for 2011, $9,571.93 for 2012, $9,959.63 for 2013; and $226.53 for 2014 (one month). In addition, there is a $250.00 tampering fees and $125.00 cut at box fees. Exhibit B, Dckt. 62.

In determining the period for which the damages are to be awarded, the court considers the evidence presented. Though the power theft usage was determined to be occurring on December 27, 2013, the theft began prior to that time. It is telling that the testimony in the Steven D. Chambers declaration is that on December 27, 2013 he requested that the Defendant allow an inspection of the interior of the garage to inspect the area behind the meter. Dckt. 63. The testimony continues that several days later the Debtor contacted Mr. Chambers to make the garage available for an inspection. The inspection occurred on January 3, 2014 and Mr. Chambers observed evidence of the energy theft. What he describes are the damages to the sheet rock, conduit, and marks on the TID electric services wires indicating the power theft. *Id.*, and Unsafe Condition Report, Exhibit A, Dckt. 64.

The evidence presented is that this was the Defendant-Debtor's home, it was under the Defendant-Debtor's control, energy theft occurred at Defendant-Debtor's home, and Defendant-Debtor barred access to the interior of the garage where there was subsequently discovered evidence of the power diversion. It has not be postulated to the court that there was any diversion of power from Defendant-Debtor's home to another property, such as a "strange wire running from Defendant-Debtor's garage to the neighbor's house." Defendant-Debtor has not asserted that he was barred from or prevent access to any portion of his house. The power diverted is substantial and not a use which Defendant-Debtor has asserted was so small that whatever was using the power could go unnoticed.

It has been proven that the Defendant-Debtor diverted the power, knew that the power was being diverted, did not with full knowledge that it was being diverted, and intended to have the power diverted. The taking of this power was wrongful, it was done surriptitously, and withtout the consent of TID. The debt for the diverted power is nondischargeable pursuant to 11 U.S.C. § 523(a)(4).

Pursuant to California Civil Code § 1882.1 & 1882.2, the Plaintiff may receive treble damages for unauthorized diverted power. The award of the additional damages is not mandatory, but is stated in the permissive "may," as determined by the court. This court interprets the "may" to provide the court with the additional discretion to award double or triple damages.

Giving the Defendant the benefit of the doubt, the court concludes that the power diversion occurred sometime during 2011, after the service was obtained from TID. The court awards the power diversion damages for the period January 1, 2012 through January 2014. These total $19,758.09. The court also awards the additional $375.00 in damages for the tampering and cut at box fees. The total of the theft damages is $20,132.09.

In providing the court with the discretion to treble the damage amount the California Legislature recognized that merely awarding damages for power stolen was little deterrent for power thieves. When caught, the civil cost was merely paying for the power stolen. In considering whether to double or triple the damages, this court what amount appears on the facts and circumstances of the case to provide an appropriate deterrent effect and not merely represent damages that the Defendant could never pay.

Doubling the damages to $40,264.09 is appropriate under the facts and circumstances as presented in the evidence. This is substantially more than the power the Defendant has stolen and will effectuate the deterrent effect desired by the California Legislature.

Therefore, the court grants the Plaintiff's Motion for Default Judgment and award $40,264.09 for the Plaintiff pursuant to 11 U.S.C. § 523(a)(4) and California Civil Code §§ 1882.1 & 1882.2.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Entry of Default Judgment filed by the Turlock Irrigation District having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Entry of Default Judgment is granted
>
> **IT IS FURTHER ORDERED** that the court grants the Plaintiff $40,264.09 in damages, which have been doubled pursuant to California civil Code § 1882.1 & 1882.2.
>
> **IT IS FURTHER ORDERED** that this judgment is nondischargeable pursuant to 11 U.S.C. § 523(a)(4).
>
> Plaintiff shall prepare and lodge with the court a judgment consistent with this order. A motion for attorneys' fees and costs bill, if either are sought, shall be filed and served on or before December 13, 2014.

5. 12-92723-E-7 JOHN/KRISTINE ROBINSON
Dan Nelson

ORDER TO SHOW CAUSE - FAILURE TO TENDER FEE FOR FILING TRANSFER OF CLAIM
11-3-14 [58]

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

The Order to Show Cause was served by the Clerk of the Court on Capital One, N.A., "Creditor," John and Kristine Robinson, "Debtors," Trustee, and other parties in interest on November 3, 2014. The court computes that 17 day's notice has been provided.

The court issued an Order to Show Cause based on Creditor's failure to pay the required fees for Transfer of Claim in this case ($25.00 due on October 20, 2014).

The court's tentative decision is to sustain the Order to Show Cause and order Capital One, N.A. to pay sanctions of $1,000.00.

The court's docket reflects that the default in payment which is the subjection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Creditor: $25.00.

The delinquent fees were not paid by Creditor Capital One, N.A. No response to the Order to Show Cause was filed by Capital One, N.A.

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 sustained.
>
> **IT IS FURTHER ORDERED** that Capital One, N.A. shall pay $1,000.00 in corrective sanctions to the Clerk of the United States Bankruptcy Court for the Eastern District of California, for deposit in the United States Treasury, on or before December 20, 2014. This Order constitutes a judgment (Fed. R. Civ. P. 54(a) and Fed. R. Bankr. P. 7054, 9014) and may be enforced pursuant to the Federal

Rules of Civil Procedure and Federal Rule of Bankruptcy Procedure (including Fed. R. Civ. P. 69 and Fed. R. Bankr. P. 7069, 9014)

IT IS FURTHER ORDERED that the Clerk of the Court, or his designated agent, may, in addition to any other enforcement remedies, enforce this monetary obligation against any right to payment which Capital One, N.A. may have in any bankruptcy case in the Eastern District of California.

6. 14-91127-E-7 AUTUMN SKULTETY — MOTION TO COMPEL ABANDONMENT
TAW-1 Todd Allen Whiteley — 11-5-14 [18]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, creditors, and Office of the United States Trustee on November 5, 2014. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The Motion to Abandon Property is granted.

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).

The Motion filed by Autumn Skultety ("Debtor") requests the court to order the Trustee to abandon property commonly known as **616 North Second Avenue, Oakdale, California (the "Property"). This Property is encumbered by the liens of Bank of America, N.A., securing a claim of** $174,432.00. Debtor has claimed $100,000.00 in exemptions on Schedule C under C.C.P. §704.730. (Dckt. 21, Exhibit B). The Declaration of Autumn Skultety has been filed in support of the motion and values the Property to be $225,000.00.

The court finds that the debt secured by the Property exceeds the value of the Property, and that there are negative financial consequences to 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 Autumn Skultety ("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 Property identified as:
>
> 1. 616 N. 2nd Avenue, Oakdale, California
>
> and listed on Schedule A by Debtor is abandoned to Autumn Skultety by this order, with no further act of the Trustee required.

7. 14-90929-E-7 SASHI PAL
UST-1 Brian S. Haddix

MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR
10-22-14 [28]

***** Stipulation to the Motion was filed on 10-22-14, dckt. No. 30.*****

Final Ruling: No appearance at the November 20, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Chapter 7 Trustee on October 22, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The U.S. Trustee filed the Motion to Extend Deadline on October 22, 2014. Dckt. 28. The U.S. Trustee requests that the deadline to file an objection to Sashi Pal's ("Debtor") discharge be extended to January 30, 2015.

The U.S. Trustee states that they and Debtor agreed to extend this deadline by stipulation, as the U.S. Trustee is investigating the veracity of Debtor's Schedules and Statement of Financial Affairs, as well as Debtor's conduct in this case. The U.S. Trustee also needs additional time to conduct a Fed. R. Bankr. P. 2004 examination of Debtor to determine what action should be taken in this case.

The U.S. Trustee filed a signed stipulation between the U.S. Trustee and Debtor's counsel in which the parties agree to extend the deadline for the U.S. Trustee to file a complaint objecting the Debtor's discharge pursuant to 11 U.S.C. § 727 to January 30, 2015. Dckt. 30.

Therefore, because the parties have stipulated to the extension and after showing cause that it is in the best interest of the parties, the deadline for the U.S. Trustee to file an objection to Debtor's discharge is January 30, 2015.

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 Extend Deadline filed by the 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 to Extend Deadline is granted and the deadline for the U.S. Trustee to file an objection to Sashi Pal's ("Debtor") discharge is January 30, 2015.

8. 09-92630-E-12 DANIEL/JANEY BAXTER
CWC-8 Carl W. Collins

CONTINUED MOTION TO MAINTAIN CHAPTER 12 CASE OPEN PENDING RESOLUTION OF POST-DISCHARGE MATTERS
5-1-14 [100]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, parties requesting special notice, and Office of the United States Trustee on May 1, 2014. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion to Maintain Chapter 12 Case Open Pending Resolution of Post-Discharge Matters has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Maintain Chapter 12 Case Open Pending Resolution of Post-Discharge Matters is xxxx.

Debtors-in-Possession Daniel and Janey Baxter ("Movant") request that their Chapter 12 case remain open pending the resolution of certain post-discharge matters. Movant states that the Chapter 12 plan was confirmed on December 8, 2009 and that they have made all payments and moved for a discharge. Movant states that until they receive their discharge in this case, they will be unable to request that the California State Board of Equalization to release its tax lien on the real property located at 11802 Sawyer Avenue, Oakdale, California, which was valued at zero by the court.

Movant also alleges that "Bank of America" has erroneously impounded property taxes and property insurance under its Note secured by a Deed of Trust which was modified by the Chapter 12 plan in violation of the Order Confirming Plan. Movant seeks to leave the case open pending either Movant's successful resolution of these issues, or for sufficient time to file contested matters or adversary proceedings.

The court continued the hearing on the Motion, in part to prevent the closing of the case, and because continuing the matter would allow the Debtors to engage in the post-plan completion documentation and determine whether the

case should remain open, an adversary proceeding is required (and the case can be closed), or that everything has been resolved and they can dismiss this motion pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rules of Bankruptcy Procedure 9014 and 7041.

SUPPLEMENTAL DECLARATION IN SUPPORT OF THE MOTION

Debtors' Attorney, Carl W. Collins, files a supplemental declaration in continued support of the Motion to Maintain Chapter 12 Case Open. Dckt. No. 112.

The declaration acknowledges that the court continued the hearing in the matter to monitor the Debtors' progress in resolving certain post-discharge matters, namely the release the tax lien of the State of California, Board of Equalization, encumbering the Debtors' residence located at 11802 Sawyer Avenue, Oakdale, California, and the allegedly erroneous impounding of property taxes and property insurance by the Bank of America under its Modified Note secured by a deed of trust, in violation of the Order Confirming Plan, and the Real Estate Settlement Procedures Act (RESPA).

At the request of the Debtors, on or about July 14, 2014, the State of California, Board of Equalization, voluntarily issued a release of lien to be recorded with the Stanislaus County Recorder resolving the dispute over the tax lien.

Debtors and Bank of America, however, have not reached a consensus in resolving the dispute over the Bank's impounding of taxes and insurance. While significant progress has been made in reducing the outstanding bank charges and the payment of the Debtors' attorney's fees and expenses in this matter, additional charges remain assessed against the Debtors on their monthly loan statements, which need to be removed. Debtors' Attorney believes that this issue with Bank of America will be resolved in the next 60 days.

Accordingly, the Debtors request that the hearing on this matter be further continued for approximately 60 days, or a future date selected by the court, to allow the parties to consummate a resolution of this post-discharge dispute.

SEPTEMBER 4, 2014 HEARING

The Debtors and Bank of America needing additional time to resolve the controversy over the impounding of property taxes and insurance under Debtors' modified promissory note, secured by a Deed of Trust valued by the court at $0.00, in alleged violation of the RESPA and the order confirming the Debtors' Chapter 12 Plan, the court continued the Motion to November 20, 2014.

No supplemental documents have been filed since the case was continued.

NOVEMBER 20, 2014 HEARING

At the hearing, ----

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

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

The Motion to Maintain Chapter 12 Case Open Pending Resolution of Post-Discharge Matters filed by Debtors-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the xxxxx

****

9. 14-91231-E-7 MALUK/RANJIT DHAMI — MOTION TO DISMISS CASE
NFG-1 Nelson F. Gomez — 10-17-14 [19]

Final Ruling: No appearance at the November 20, 2014 hearing is required.

Pursuant to the Stipulation of the Parties, the hearing is continued to 10:30 a.m. on December 18, 2014.

10. 14-90933-E-7 LUIS TRISTAN
UST-1 Pro Se

MOTION FOR DENIAL OF DISCHARGE OF DEBTOR UNDER 11 U.S.C. SECTION 727(A)
10-9-14 [25]

Tentative Ruling: The Motion for Denial of Discharge of Debtor under 11 U.S.C. Section 727(A) has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, Creditors, and Office of the United States Trustee on October 9, 2014. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion for Denial of Discharge of Debtor under 11 U.S.C. Section 727(A) has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Denial of Discharge of Debtor under 11 U.S.C. Section 727(A) is granted.

The U.S. Trustee filed the Motion for Denial of Discharge pursuant to 11 U.S.C. § 727(a)(8) on October 9, 2014. Dckt. 25. The U.S. Trustee alleges that Luis Tristan ("Debtor") is ineligible for discharge under section 11 U.S.C. § 727(a)(8) because the debtor commenced the instant case less than eight years after filing his prior case, Case No. 10-90626. Debtor received a discharge in the prior case.

DEBTOR'S ANSWER

Debtor filed an answer to the U.S. Trustee's Motion on October 24, 2014. Dckt. 35. Debtor states that he lost his wallet and all of its contents in August 2013. Debtor states that he reported the loss immediately and

reported it to the Social Security Administration and Federal Trade Commission. He later learned that someone had obtained credit cards in his name and correct social security number. Debtor states that he has attempted to contact creditors and pay on all debts, including those from the identity theft, but was unable to do so.

Debtor either seeks to discharge his debts through Chapter 7 or to convert the case to one under Chapter 13.

DISCUSSION

A debtor is ineligible to receive a discharge under Chapter 7 if that debtor has already received a discharge in a Chapter 7 case commenced within eight (8) years before the filing of the current case. 11 U.S.C. § 727(a)(8). This subsection contains no exceptions for any circumstances, including those pleaded by Debtor in his Answer to the Motion. *See Bank of N.H. v. Donahue (In re Donahue)*, 183 B.R. 666, 667 (Bankr. D.N.H. 1995) (holding that section 727(a)(8) does not allow the court to consider the difficulties debtors have faced in determining their eligibility for discharge).

Debtor argues that he was the victim of identity theft based on having lost his wallet in 2013. However, the prior bankruptcy case in which Debtor received a discharge was filed by Debtor in 2010 – three years prior to the asserted loss of the wallet with Debtor's personal information. In the Statement of Financial Affairs Debtor states that his Ex Wife is Evelyn Castillo. The 2010 bankruptcy case was filed as a joint case by Debtor with his wife, Evelyn Tristan. On Schedule I in the 2010 case Debtor states that he has two children, ages 6 and 8 years old. In the 2014 case, four years later, Debtor states that his two children are 10 and 14 years old. On the 2010 Statement of Financial Affairs Debtor lists a business with the name Team Legal Inc. On the 2014 Statement of Financial Affairs the Debtor lists a business with the name Team Legal Inc.

The court does not find credible Debtor's contention that a lost wallet and identification information in 2013 was the basis for someone other than the Debtor filing the 2010 bankruptcy case.

Because Debtor commenced a case in 2010 (Case No. 10-90626) and received a discharge in that case, Debtor is ineligible for a discharge in the instant case, as it was commenced only four (4) years later. This satisfies the bar from discharge in 11 U.S.C. § 727(a)(8). 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 Denial of Discharge of Debtors Luis Tristan, 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 granted, and the Debtor in this Chapter 7 case, Luis Tristan, is denied

discharge in this bankruptcy case, Case No. 14-90933-E-7, pursuant to 11 U.S.C. § 727(a)(8).

11. 13-91336-E-7 HCS-2 — THOMAS/TONYA OLSON, Scott D. Mitchell — AMENDED MOTION FOR COMPENSATION BY THE LAW OFFICE OF HERUM/CRABTREE/SUNTAG FOR DANA A. SUNTAG, TRUSTEE'S ATTORNEY(S) 10-20-14 [55]

Final Ruling: No appearance at the November 20, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, Creditors, and Office of the United States Trustee on October 20, 2014. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

FEES REQUESTED

Herum/Crabtree/Suntag, the Attorney ("Applicant") for Eric J. Nims the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period August 1, 2013 through October 17, 2014. The order of the court approving employment of Applicant was entered on August 14, 2014, Dckt. 26.

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

General Case Administration: Applicant spent 6.7 hours in this category.

1. Applicant assisted Client with preparing employment application and the instant application for compensation.

2. Applicant anticipates attending the hearing on this application by telephone.

Efforts to Assess and Recover Property of the Estate: Applicant spent 11.85 hours in this category.

1. Applicant prepared and filed an applicaiton to employ the Trustee's realtor, Bob Brazeal.

2. Applicant appeared at the hearing on the application where the Court entered an order authorizing Mr. Brazeal's employment.

3. Applicant prepared a purchase and sale agreement.

4. Prepared and filed a motion to sell the Property to the Debtors and compensate the realtor

5. Applicant appeared by telephone at the hearing where the Court entered an order authorizing the sale of the Property to the Debtors.

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

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

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

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

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including purchase of the 2500 Pridmore Ave, Modesto, California (“Property”). The estate has $55,000.00 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES ALLOWED

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Dana Suntag (1986)	2.2	$315.00	$693.00
Loris Bakken (2001)	15.35	$295.00	$4,528.25
Total Fees For Period of Application			$5,221.25

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $4,802.73, reduced from $5,311.25 subject to final review pursuant to 11 U.S.C. § 330 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 $197.27 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage		$94.27
Copying Costs	$0.10	$103.00
Total Costs Requested in Application		$197.27

The First and Final Costs in the amount of $197.27 subject to final review pursuant to 11 U.S.C. § 330 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 to this professional in this case:

Fees $4,802.73
Costs and Expenses $ 197.27

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Herum/Crabtree/Suntag ("Applicant"), Attorney for 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 Herum/Crabtree/Suntag is allowed the following fees and expenses as a professional of the Estate:
>
> Herum/Crabtree/Suntag, Professional Employed by Trustee
>
> Fees in the amount of $ 4,802.73
> Expenses in the amount of $ 197.27,
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

****

12. 14-91136-E-7 MARTHA JIMENEZ
ADJ-2 Pro Se

OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
11-5-14 [38]

Tentative Ruling: The Objection to Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and Federal Rule of Bankruptcy Procedure 4003(b). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), and Office of the United States Trustee on November 5, 2014. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Objection to Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and Federal Rule of Bankruptcy Procedure 4003(b). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The objection to claimed exemptions is sustained and the exemptions are disallowed in their entirety.

The Trustee objects to Martha Jimenez's ("Debtor") claiming exemption of $7,728.36 in the Savings Account ending in 9559 pursuant to the California Code of Civil Procedure §704.070. The Objection states with particularity the following grounds upon which the Objections is based:

1. After the Trustee questioned Debtor's ability to exempt the funds in the Savings Account at the Meeting of Creditors, Debtor withdrew the balance of funds from the account and transferred it to her nephew.

2. The withdrawal and transfer of the funds is bad faith and shows Debtor's goal to deprive her creditors of property of the estate.

3. Debtor had failed to disclose the Savings Account until the Trustee discovered it before the Meeting of Creditors. Only then did Debtor filed Amended Schedules B and C on October 17, 2014, listing the account.

4. The exemption claimed is for earnings and the Savings Account cannot qualify as paid earnings or wages. California Code of Civil Procedure § 704.070 allows debtors to exempt wages earned 30 days prior to the petition date up to 75%, as long as those wages were not garnished. On July 31, 2014, the account has a balance of $7,708.23. This amount was likely still on deposit on the petition date August 11, 2014. None of this amount could be exempt under California Code of Civil Procedure § 704.070 because the last deposit had occurred over 30 days prior to the filing date, on July 10, 2014. Even if Debtor had placed all of her wages from the prior 30 days into the account, she could only exempt $748.31 – her total monthly income as stated on Schedule I.

5. Debtor is judicially estopped from amending Schedule C to invoke the state created Earnings Exemption because Debtor took two inconsistent positions: that she did not own the savings account, only to admit that she did when the Trustee discovered it. These positions were taken within this case, a judicial proceeding, and were statements made under oath.

DISCUSSION

Bank Account Not Exempt Pursuant to California Code of Civil Procedure § 704.07

Debtor has claimed an exemption in the Bank Account monies pursuant to California Code of Civil Procedure § 704.070 for $7,728.36. Amended Schedule D, Dckt. 27 at 7. This exemption is,

"§ 704.070. Paid earnings

(a) As used in this section:

(1) "Earnings withholding order" means an earnings withholding order under Chapter 5 (commencing with Section 706.010) (Wage Garnishment Law).

(2) "Paid earnings" means earnings as defined in Section 706.011 that were paid to the employee during the 30-day period ending on the date of the levy. For the purposes of this paragraph, where earnings that have been paid to the employee are sought to be subjected to the enforcement of a money judgment other than by a levy, the date of levy is

deemed to be the date the earnings were otherwise subjected to the enforcement of the judgment.

(3) "Earnings assignment order for support" means an earnings assignment order for support as defined in Section 706.011.

(b) Paid earnings that can be traced into deposit accounts or in the form of cash or its equivalent as provided in Section 703.080 are exempt in the following amounts:

(1) All of the paid earnings are exempt if prior to payment to the employee they were subject to an earnings withholding order or an earnings assignment order for support.

(2) Seventy-five percent of the paid earnings that are levied upon or otherwise sought to be subjected to the enforcement of a money judgment are exempt if prior to payment to the employee they were not subject to an earnings withholding order or an earnings assignment order for support."

Cal. C.C.P. § 704.070

Debtor has not asserted, other than the claim of exemption on Schedule C, how the $7,728.36 constitutes earnings paid to the debtor during the 30-day period ending on August 11, 2014, the commencement of this bankruptcy case. In the Statement of Financial Affairs the Debtor states under penalty of perjury that her income in 2012 was $20,053.37, in 2013 was $21,388.21, and in the seven and one-half months of 2014 prior to the commencement of this bankruptcy case were $9,647.51. Debtor has not offered evidence that $7,728.36 in the Bank Account as of the Commencement of this case (which represents 80% of her total earnings in seven and one-half months of 2014) were paid during the period July 12 - August 11, 2014. Statement of Financial Affairs, Question 1, Dckt. 1 at 25.

The Objection to the Paid Earnings claim of exemption pursuant to California Code of Civil Procedure § 704.070 is sustained and the exemption in the Bank Account is disallowed in its entirety.

Judicial Estoppel

In this Objection the Trustee and Debtor venture into the new world of exemption objection after the Supreme Court ruling in *Law v. Segal*, 134 S.Ct. 1188 (2014). In short, the Supreme Court is Segal made it clear that the power of the court pursuant to 11 U.S.C. § 105(a) is to be exercised to carry out the provisions of the Bankruptcy Code – not to rewrite the Bankruptcy Code. Because California has elected to opt-out of the federal exemption scheme, bankruptcy exceptions in California are only the state law exemptions. Cal. CCP. § 703.130.

Trustee argues that under the facts of this case the Debtor is judicially estopped from now asserting an exemption in a heretofore undisclosed asset. Citing to 11 U.S.C. § 521(l), the Trustee asserts the statutory obligation of a debtor to disclose all assets and liabilities on his or her schedules. The Savings Account was not disclosed on Schedule B.

Under California law judicial estoppel works to prevent a party from asset a position in a legal proceeding that is contrary to a position that is contrary to a position taken earlier in the same or a different legal proceeding. *Jackson v. Los Angeles*, 60 Cal. App 4th 171, 181 (1997). This principle is intended to prevent the perversion of the judicial process and is applied where intentional self contradiction is being used as a means of obtaining unfair advantage. Allen v. Zurich Ins. Co, 667 F2d 1162, 1146 (4th Cir. 1982).

As discussed by the Ninth Circuit Court of Appeals in Baughman v. Walt Disney World, 685 F.3d 1131, 1334 (9th Cir. 2012),

> "Judicial estoppel is imposed at the discretion of the district court. [*New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)] at 750. In considering whether the district court abused its discretion, we look at several factors, including: (1) Is the party's later position "clearly inconsistent with its earlier position?" (2) Did the party succeed in persuading a court to accept its earlier position, creating a perception that the first or second court was misled? and (3) Will the party seeking to assert an inconsistent position "derive an unfair advantage or impose an unfair detriment on the opposing party?" *Id.* at 750-51 (internal quotation marks omitted)."

With respect to the second element, did the court accept an earlier, inconsistent position,

> "For a court to be misled, it need not itself adopt the statement; those who "induce[ ] their opponents to surrender have prevailed as surely as persons who induce the judge to grant summary judgment." See *Rissetto v. Plumbers & Steamfitters Local* 343, 94 F.3d 597, 604-05 (9th Cir. 1996) (internal quotation marks omitted). When a party settles a case involving false allegations or claims, the court is deemed to have been misled. This is because it's the coercive power of the court—the judgment it might render if the case is litigated to its conclusion—that's the driving force behind such settlements."

Id., 1334-1335.

As discussed in the Jackson case, the California Courts slighly refine the analysis, stating the elements of judicial estoppel to be,

A. The same party has taken two positions.

B. The positions take were taken in judicial or quasi-judicial administrative proceedings.

C. The party successfully asserted the first position.

D. The two positions are totally inconsistent.

E. The first position was not taken as a result of ignorance, fraud, or mistake.

Jackson v. Los Angeles, 60 Cal.App. 4th at 183.

While the exemption rights arise under state law, the judicial forum which is asserted to be the subject of the "perversion" is the federal court. The federal court principles of judicial estoppel apply. However, the principles and application of the two are sufficiently similar that a determination under one would likely result in a determination of judicial estoppel under the other. The court will consider both.

The application of judicial estoppel to enforcement of judgment proceedings is rarely discussed. This court found one recent case, *Jogani v. Jogani*, 141 Cal. App. 4th 158 (2006). In that case the judgment debtor represented in an ordered debtor examination that he was not a partner of a partnership, and in a subsequent proceeding he stated in a debtor examination that he was a partner of the partnership, dating back well before the first debtor examination. Because the court never issued an order arising from the information provided in the debtor examinations, the District Court of Appeal concluded that the debtor had not succeeded in asserting an inconsistent position as it applied to the judicial process.

As stated by the Trustee, truthful and accurate disclosures of assets and liabilities are the cornerstones of the bankruptcy process. *Payne v. Wood*, 775 F.2d 202, 205 (7th Cir. 1985). Judicial estoppel has been applied when a debtor has failed to disclosed assets and then obtained a discharge or confirmation of a bankruptcy plan based on the inconsistent information. *De Leon v. Comcar Industries,* 321 F.3d 1289 (11th Cir. 2003).

Furthermore, schedules and statements are signed under penalty of perjury. Fed. R. Bankr. P. 1008. Debtors are presumed to have read the schedules and statements before signing the documents, and are responsible for their contents. Debtors bear an independent responsibility for the accuracy of the information contained in their schedules and statements. *AT&T Universal Card Servs. Corp. v. Duplante (In re Duplante)*, 215 B.R. 444, 447 n.8 (B.A.P. 9th Cir. 1997) (noting that "schedules and statements of financial affairs are sworn statements, signed by debtors under penalty of perjury" and warning that "adopting a cavalier attitude toward the accuracy of the schedules and expecting the court and creditors to ferret out the truth is not acceptable conduct by debtors or their counsel").

In applying judicial estoppel, the Bankruptcy Appellate Panel for the Ninth Circuit has held that the court first determines that judicial estoppel is warranted, and then that the remedy must not "needlessly punish the innocent." Cheng v. K&S Diversified Invs., Inc. (In re Cheng), 303 B.R. 448, 452 (B.A.P. 9th Cir. 2005).

The court analyzes the federal judicial estoppel standards as follows:

A. Is the party's later position "clearly inconsistent with its earlier position?"

The Debtor's statement on Original Schedule B under penalty of perjury not listing the asset and not claiming it as exempt is inconsistent with

subsequently amending Schedule B to disclose the existence of the Bank Account and amending Schedule C to exempt the newly disclosed asset. The disclosure only occurred when the Bankruptcy Trustee discovered the existence of the asset and advised the Debtor that he was going to administer it as property of the bankruptcy estate for the benefit of creditors.

B. Did the party succeed in persuading a court to accept its earlier position, creating a perception that the first or second court was misled?

Consideration of this point requires review of the bankruptcy process. A debtor seeks the extraordinary relief granted by Congress under the Bankruptcy Code, which include: (1) the automatic stay stopping essentially all collection and debt enforcement – 11 U.S.C. § 362(a), (2) the ability to exempt assets and protect future appreciation in value from creditors' claims (which right does not exist under state law) – 11 U.S.C. § 522; (3) avoid liens against exempt assets and obtain all future appreciation for the debtor (which right does not exist under state law) – 11 U.S.C. § 522(f); (4) avoid payments to creditors on judgments and debt payments, and claim an exemption in the recovered monies and assets (which right does not exist under state law) – 11 U.S.C. §§ 549, 522(h); and (5) obtain a discharge enjoining creditors from ever attempting to enforce the debts against non-exempt assets of the debtor – 11 U.S.C. § 524. All that is asked of the debtor is to truthfully and honestly disclose his or her assets and liabilities.

The present situation represents the "cat and mouse game" which can develop if the law were to allow debtors to hide assets and only be truthful when caught in their lie. Then, having been caught, amend the Schedules, claim the asset as exempt, and smile at the Trustee as they walk away with the theretofore hidden asset. Such a system would reward deceit and fraud on the court. If the Trustee, realizing that hidden assets could be subsequently exempted, there is little economic justification for "policing" the property of the estate in small, or what appear to be small, cases. The court, in reliance on such misstated assets and liabilities would then proceed with entering a discharge for the misrepresenting debtor.

There is also a very specific and real order which the Debtor sought, and almost obtained, from the court based upon the Original Schedule B and her failure to disclose this Bank Account asset. The Debtor sought a waiver of the Chapter 7 Filing Fee. Dckt. 5. In the Application Debtor states that her income is $748.31 a month and her non-debtor husband's income is $867.00 a month. Attached to the Application is a copy of Schedule B, which does not disclose the Bank Account asset. The court reviews, and relies upon all of the Schedules and Statement of Financial Affairs in considering whether granting the fee waiver is proper.

The court had tentatively granted the Application for a Fee waiver, believing that the hearing (which this court requires) would be perfunctory. It was at the "perfunctory" hearing that the Trustee appeared, stated his opposition, and advised the court of the undisclosed Bank Account, and asserted that the Debtor had transferred the monies out of the Bank Account post-petition after the Trustee discovered the account. The Debtor in a very real and tangible way misled the court into granting the relief for the Fee Waiver.

C. Will the party seeking to assert an inconsistent position "derive an unfair advantage or impose an unfair detriment on the opposing party?

The very nature of this case, purportedly insolvent and all disclosed assets exempted, while hiding the Bank account does derive an unfair advantage to the Debtor, as well as imposing an unfair detriment on the Trustee. The Debtor has access to the secreted asset, using the monies to try and defeat the Trustee in fulfilling his statutory and fiduciary duties to the estate. The Debtor, under penalty of perjury tells the Trustee, Creditors, and court in the Schedules that the case is a "turnip," with nothing for anybody. The Debtor can then spend, burn, hide, and otherwise further secrete the money.

The additional express state law element is that the first position was not taken as a result of ignorance, fraud, or mistake. The Debtor has not asserted that the failure to disclose the bank account was caused by ignorance, fraud, or mistake. The evidence of the Debtor's conduct after the Trustee discovered the asset, withdrawing the money and transferring it to a relative indicates the contrary. That evidence makes it appear that the failure to disclose was intentional, and when that information slipped out the Debtor implemented the second part of the plan – take the money from the estate.

The court finds that the application of judicial estoppel is not only proper, but necessary to prevent a perversion of the federal bankruptcy judicial process. The Debtor is judicially estopped from claiming the Bank Account as exempt.

The claim of exemption in $7,728.36 in the Savings Account identified on Amended Schedule C, Dckt. 27, as "Savings Account ending in 9559 located at Bank of America" pursuant to the California Code of Civil Procedure §704.070 is disallowed in its entirety. Further, the court shall order that the Debtor is judicially estopped from claiming an exemption in said Savings Account.

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 Objection to Exemptions 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 Objection to Claim of Exemption in the asset described as $7,728.36 in the Savings Account identified on Amended Schedule C, Dckt. 27, as "Savings Account ending in 9559 located at Bank of America" pursuant to the California Code of Civil Procedure §704.070 is sustained and said claim of exemption is disallowed in its entirety.
>
> **IT IS FURTHER ORDERED** that the Debtor is judicially estopped from claiming an exemption in the asset described as $7,728.36 in the Savings Account identified on Amended Schedule C, Dckt. 27, as "Savings Account ending in 9559 located at Bank of America."

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13. 14-91136-E-7 MARTHA JIMENEZ MOTION TO COMPEL
ADJ-3 Pro Se 11-5-14 [43]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), and Office of the United States Trustee on November 5, 2014. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The Motion to Compel is granted.

Michael McGranahan, the Chapter 7 Trustee, filed the Motion to Compel Turnover of Property on November 5, 2014. Dckt. 43. The Trustee moves to compel Martha Jimenez ("Debtor") to turn over funds equal to the balance of Debtor's Savings Account on the petition date. The Trustee also requests bank statements

for the account for August, September, and October of 2014 and any future statements during the pendency of this case.

The Trustee alleges that Debtor withdrew the funds in a previously undisclosed savings account (ending in 9559) and transferred these funds to her nephew. The account balance was approximately $7,728.36 as of the petition date.

DISCUSSION

11 U.S.C. § 542 and Federal Rule of Bankruptcy Procedure 7001(1) permit a motion to obtain an order for turnover of property of the estate if the debtor fails and refuses to turnover an asset voluntarily. Federal Rule of Bankruptcy Procedure 7001(1) defines an adversary proceeding as,

> (1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002.

In this case, Trustee has initiated this proceeding to compel Debtors deliver property to the Trustee. Federal Rule of Bankruptcy Procedure permits the trustee to obtain turnover from the Debtor without filing an adversary proceeding. This Motion for the injunctive relief, in the form of a court order requiring that Debtors turnover specific items of property, is therefore appropriate under Federal Rule of Bankruptcy Procedure 7001(1).

The filing of a bankruptcy petition under 11 U.S.C. §§ 301, 302 or 303 creates a bankruptcy estate. 11 U.S.C. § 541(a). Bankruptcy Code Section 541(a)(1) defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." If the debtor has an equitable or legal interest in property from the filing date, then that property falls within the debtor's bankruptcy estate and is subject to turnover. 11 U.S.C. § 542(a).

A bankruptcy court may order turnover of property to debtor's estate if, among other things, such property is considered to be property of the estate. *In re Hernandez*, 483 B.R. 713 (B.A.P. 9th Cir. 2012); *See also* 11 U.S.C.A. §§ 541(a), 542(a). Section 542(a) requires one in possession of property of the estate to deliver such property to the Trustee. Pursuant to 11 U.S.C. § 542, a Trustee is entitled to turnover of all property of estate from Debtors. Most notably, pursuant to 11 U.S.C. § 521(a)(4), the Debtor is required to deliver all of the property of the estate and documentation related to the property of the estate to the Chapter 7 Trustee.

No opposition has been filed to this motion by the Debtor or other parties in interest.

Here, the Trustee has shown that the funds in the savings account (ending in 9559) is part of the estate as defined by 11 U.S.C. § 541(a). Due to the Debtors' failure to turnover the $7,728.36 and the fact that the funds are part of the bankruptcy estate, the court grants the Motion. Furthermore, the court orders that the Debtors turnover any and all statements connected to Debtor's Bank of America Savings Account ending in 9559 from August to October

2014 and any further bank statements that the Debtors receive in connection with that account.

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 Turnover of Property filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Turnover of Property is granted.
>
> **IT IS FURTHER ORDERED** that Debtor shall deliver on or before noon on December 1 to the Trustee, possession of the balance of Debtor's Bank of America Savings Account ending in 9559 on the petition filing date, approximately $7,728.36; and any other person or persons that Debtor allowed access to the transferred Property.
>
> **IT IS FURTHER ORDERED** that Debtors shall deliver on or before noon on December 1, 2014, any and all bank statements for Debtor's Bank of America Savings Account ending in 9559 for August through October 2014 and any further statements connected with the account to the Trustee.

14. 14-90538-E-11 REYES DRYWALL, INC. **MOTION TO CONVERT CASE TO CHAPTER 7 OR MOTION TO DISMISS CASE**
UST-1 David C. Johnston **9-30-14 [69]**

Tentative Ruling: The Motion to Convert the Bankruptcy 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).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, all creditors, and parties requesting special notice on September 30, 2014. By the court's calculation, 51 days' notice was provided. 28 days' notice is required.

The Motion to Convert the Bankruptcy 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 defaults of the non-responding parties and other parties in interest are entered.

The Motion to Convert the Chapter 11 Bankruptcy Case to a Case under Chapter 7 is granted and the case is converted to one under Chapter 7.

This Motion to Dismiss the Chapter 11 bankruptcy case of Reyes Drywall, Inc. ("Debtor") has been filed by the Acting United States Trustee ("UST" or "Movant"). Movant asserts that the case should be dismissed or converted based on the following grounds.

A. Debtor's operating report for August shows that Debtor has suffered post-petition losses of $35,776.00. The report also shows that Debtor's combined balance in its three bank accounts is -$5,641.00. These losses suggest the absence of a reasonable likelihood of rehabilitation.

B. Debtor has failed to comply with several basic requirements, including

1. Debtor paid pre-petition wages without the court's permission.

2. Debtor repaid pre-petition loans without the court's permission.

3. Debtor failed to timely close its pre-petition bank account, and additionally failed to timely open Debtor-in-Possession bank accounts as required be Local Rule 2015-2.

RULING

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson),* 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).

Cause exists to dismiss or convert this case pursuant to 11 U.S.C. § 1112(b). Debtor has made several unauthorized transfers of property in the course of this case. Additionally, Debtor has operated the business at a loss since filing the petition.

The U.S. Trustee requests that the court convert the case and afford the Chapter 7 Trustee the opportunity to administer the assets for the benefit of all creditors. The Trustee asserts that post-petition transfers were made to insiders of the Debtor, and that such transfers may be avoidable. This indicates that the best interests of creditors and the estate are best served by converting this case to one under Chapter 7.

The motion is granted and the case is converted to a case under Chapter 7.

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

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

The Motion to Dismiss the Chapter 11 case filed by the Acting United States 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 Dismiss is granted and the case is converted to a under Chapter 7 of Title 11, United States Code.

****

15. 12-93039-E-7 DAVID MCCOY MOTION TO COMPEL ABANDONMENT
SSA-1 Steven S. Altman 11-4-14 [44]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 4, 2014. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

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

The Motion to Abandon Property is granted.

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).

The Motion filed by David K. McCoy ("Debtor") requests the court to order the Trustee to abandon property commonly known as 501 Rose Avenue Apartment 22, Modesto, California (the "Property"). This Property is encumbered by the lien

of Dena Wortham, securing a claim of $92,000.00. The Declaration of David K. McCoy has been filed in support of the motion and values the Property to be $125,000.00. Debtor has exempted $100,000.00 under California Code of Civil Procedure § 704.730.

The court finds that the debt secured by the Property and the Debtor's exemption exceed the value of the Property, and that there are negative financial consequences to 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 David K. McCoy ("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 Property identified as:
>
> 1. 501 Rose Avenue Apartment 22, Modesto, California
>
> and listed on Schedule A by Debtor is abandoned to David K. McCoy by this order, with no further act of the Trustee required.

****

16. 14-90249-E-7 SCOTT MYERS — OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
JY-4 Thomas J. Polis — 10-9-14 [55]

Final Ruling: No appearance at the November 20, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on October 8, 2014. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

The Objection to Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor 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 as consent to the granting of the motion. *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 Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the Debtor and the other parties in interest are entered, the matter will be resolved without oral argument and the court shall issue its ruling from the parties' pleadings.

The objection to claimed exemptions is sustained and the claimed exemption for the Jim D. Myers 1990 Trust is disallowed in its entirety.

IMH Financial Corporation ("IMH") objects to the Debtor's claiming more in exemptions than is permitted under the California Code of Civil Procedure §704.140(b). The Objection states with particularity the following grounds which the Objection is based, that Scott Myers ("Debtor") over-exempted value in his interest in Jim D. Myers 1990 Trust. Debtor exempted $500.00 in cash, $26,225.00 in art, $200.00 in his camera equipment, and $10,000.00 in his interest in the Jim D. Myers trust under California's "wildcard" exemption, California Code of Civil Procedure § 703.140(b)(5). This totals $36,925.00. The maximum wildcard exemption is $26,925.00 (consisting of the $25,575 unused homestead exemption and the additional $1,350 wildcard). Thus, Debtor appears to have attempted to exempt $10,000.00 that exceeds the maximum amount Debtor can exempt. IMH requests that the court deny Debtor's claimed exemption in the $10,000.00 value of the Jim D. Myers 1990 Trust. In support, IMH provides the following chart:

Type of Property	**Applicable Exemption**	**Statutory Exemption Amount**	**Claimed Exemption Amount**	**Value of Property Without Deducting Exemption**
Cash	**C.C.P. § 703.140(b)(5) (wildcard)**	**Non/wildcard up to $26,925**	**$500.00**	**$500.00**
Household goods	C.C.P. § 703.140(b)(3)	Each individual item can be no more than $600.00, but there is no aggregate cap as losg as these things are “ordinary” and “reasonable”	$10,000.00	$10,000.00
Books/pictures/art (misc. artwork)	**C.C.P. § 703.140(b)(5) (wildcard)**	**Non/wildcard up to $26,925**	**$26,225.00**	**$45,000.00**
Clothes	C.C.P. § 703.140(b)(3)	Each individual item can be no more than $600.00, but there is no aggregate cap as losg as these things are “ordinary” and “reasonable”		
Furs and jewelry (Rolex watch)	C.C.P. § 703.140(b)(4)	$1,525.00	$1,525.00	$5,000.00
Hobby equipment (camera)	**C.C.P. § 703.140(b)(5) (wildcard)**	**Non/wildcard up to $26,925**	**$200.00**	**$200.00**

Other personal property (interst in Jim D. Myers 1990 Trust)	**C.C.P. § 703.140(b)(5) (wildcard)**	**Non/wildcard up to $26,925**	**$10,000.00**	**$10,000.00**

based on the chart, IMH argues that the total of the wildcard exemptions claimed is: $500.00 (cash) + $26,225.00 (art) + $200.00 (camera) + $10,000.00 (family trust) = $36,925.00. This exceeds the maximum allowance by $10,000.00.

No parties have filed an opposition to this Motion.

A review of the motion and the Debtor's Schedules, IMH's objection is well-taken. The Debtor appears to have overexempted under C.C.P. § 703.140(b)(5) by $10,000.00. Specifically, it appears that the wild card exemption attached to the Jim D. Myers 1990 Trust is the asset that has been erroneously exempted under C.C.P. § 703.140(b)(5). In light of the fact that no party has objected to IMH's objection to exemptions and IMH specifically asks that the exemption for the Jim D. Myers 1990 Trust be disallowed, the court will sustain the objection and the claimed exemption for the Jim D. Myers 1990 Trust is disallowed in its entirety.

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 Objection to Exemptions filed by IMH Financial Corporation, 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 Objection is sustained and the claimed exemption for the Jim D. Myers 1990 Trust is disallowed in its entirety.

****

17. 14-90249-E-7 SCOTT MYERS — AMENDED MOTION TO DISMISS CASE
JY-5 Thomas J. Polis — 10-8-14 [60]

DISCHARGED 6-3-14

Tentative Ruling: The Motion to Convert the Bankruptcy 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).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on October 8, 2014. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss the Bankruptcy 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 defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss the Chapter 7 Bankruptcy Case is denied without prejudice.

This Motion to Dismiss the Chapter 7 bankruptcy case of Scott Myers ("Debtor") has been filed by IMH Financial Corporation ("Movant"), a creditor. Movant asserts that the case should be dismissed based on the following grounds:

A. Debtor demonstrates in his Schedules and Statements that he has only minimal assets in the United States. In Schedule A, Debtors lists that he has no interest in real property. In

Schedule B, Debtor claims he owns only $89,750.00 in personal property, but acknowledges that artwork and furniture valued at $55,000.00 may be located either in California or at Debtor's address in Germany. Debtor later admitted under oath that the artwork valued at $45,000.00 is actually located in Germany. Further, since Debtor's California address is listed online as being only 800 square feet, it is plausible that most of the furniture is in Germany, as well. This leaves only $34,750.00 in personal property in the United States, consisting of a car valued at $17,500.00, a trust account with $10,000.00, a $5,000.00 watch, and $1,000.00 in clothing. Debtor also discloses that he has no bank account in the United States, but does have an account in Germany, along with ownership interests in two German businesses.

B. Debtor's testimony during his Rule 2004 Examination demonstrates that many assets Debtor claimed were in the United States are actually in Germany, leaving de minimus property in the U.S. Debtor further stated that he has €3,800.00 in a German bank account, which is about $5,100.00, not the $500.00 as stated on his Schedules. Debtor's testimony also disclosed Debtor's intent to return to Germany after he discharges his debts. Debtor's wife and children still reside in Germany, and Debtor pays rent of about €3,900.00 ($5,250.00) for his family's residence in Germany, in addition to expenses for that residence. In contrast, Debtor pays $590 in monthly rent for the 800 square-foot property in Modesto. Additionally, Debtor transferred about $10,000.00 in funds held by one of his trusts in the United States to Germany and is using those funds for living expenses, all after filing the instant case. Movant alleges that Debtor is merely renting a residence in Modesto to create the façade of eligibility to file bankruptcy here and return to Germany after he has discharged his debt to U.S. creditors.

C. Debtor has failed to answer questions about his traveling habits. Debtor has stated that he cannot remember where he was when he signed his voluntary petition in February 2014. Debtor has also been vague in testifying about how much time he spends in the United States versus in Germany. Debtor also listed his children as dependents on his Schedules and noted that they all live with him. However, the children live in Germany and Debtor states that the children live with him "to the extend [he is] in Germany."

OPPOSITION STATED BY DEBTOR

Debtor filed opposition to the Motion on November 6, 2014 (Dckt. 64), asserting that:

1. It is undisputed that Debtor resided in Modesto, California for a majority of the 180 days preceding his petition date. Debtor's personal property (mainly clothes, household furnishings, and other daily necessities) are all located at the Modesto residence on Corson Avenue. The fact that some of

Debtor's property is in Germany, along with the property of his non-debtor spouse and children, does not make Debtor ineligible to file. Both pre-petition and post-petition, Debtor was the trustee and sole beneficiary of his father's trust. Debtor was the residuary trustee of assets including a partial interest in a shopping mall in the San Francisco Bay area and cash in the amount of $10,000.00. Debtor also reconnected with former business colleagues about restarting various real-estate business opportunities in the Modesto/Stockton/San Joaquin area. Despite Movant's argument, the fact that Debtor has "insubstantial assets" in Modesto is not the focus of 11 U.S.C. § 109(a). Debtor has the requisite real and personal property connections and substantial pre-petition and post-petition business connections within the court's district.

2. Dismissal for cause under 11 U.S.C. § 707(a) is not appropriate here, since Debtor does not meet the requirements listed in *In re Padilla*, 222 F.3d 1184, 1189 (9th Cir. 2000). Debtor has not violated any technical or procedural requirements because he is eligible to file a Chapter 7 based on his past and present connections to Modesto and Stanislaus County. Debtor has paid all filing fees and filed all necessary information in this case. Debtor has not falsified bankruptcy forms or cause delay during the administration of the proceedings.

MOVANT'S REPLY

Movant filed a reply in support of their Motion on November 13, 2014. Dckt. 74. Movant states that:

1. Debtor has signed his petition under penalty of perjury stating that his address is 238 Corson Avenue, Modesto, California. However, when Movant originally filed its Motion to Dismiss for Cause on September 22, 2014, it served a copy on Debtor at his Corson Avenue address. On October 10, 2014, the envelope was returned with a "return to sender" sticker, stating that Debtor had moved and not left a forwarding address. Someone had written "not at this address! Stop sending!" on the envelope as well, indicating that Debtor has not resided at the address for some time. Exh. 1, Dckt. 76. Movant at minimum requests a discovery into Debtor's residence before an order is entered on the Motion to see whether Debtor actually lives at the address he claims he does under penalty or perjury.

2. Movant issued a request for production for a copy of Debtor's passport, which would ideally show when he had been in the U.S. and when he had been in Germany. This would show whether Debtor has been in the United States for the greater part of the 180 days preceding the petition date, as is required. The Request for Production was served on October 8, 2014, but Debtor has not yet responded. This indicates that Debtor is not acting in good faith.

3. Even if Debtor meets the requirements in 11 U.S.C. § 109 to be a debtor, it does not mean that Debtor is entitled to a

discharge. Dismissal under 11 U.S.C. § 707(a) is still appropriate because Debtor has manufactured eligibility solely to discharge debt. In *In re Xacur*, 219 B.R. 956 (Bankr. S.D. Tex. 1998) (as cited by Debtor), the court determined that the debtor satisfied section 109 because the debtor's property was substantial. Debtor here has only de minimus property in the United States. In *In re Global Ocean Carriers, Ltd.*, 251 B.R. 31 (Bankr. D. Del. 2000), also cited by Debtor, the most important date for determining eligibility is the day the petition is filed. Thus, it matters most where Debtor and his property was on February 24, 2014. On that date, Debtor had de minimus property in the United States, placed for the purpose of allowing Debtor to achieve the court's jurisdiction. This lacks good faith and is cause for dismissal under 11 U.S.C. § 707(a).

RULING

In order for the court to grant dismissal under 11 U.S.C. § 707(a), cause must be established. This can "include unreasonable delay prejudicial to creditors and non-payment of fees or charges." *In re Garrow*, 50 B.R. 796, 798 (Bankr. D. Vt. 1985). The court may also dismiss for other grounds showing "cause." *Id.* There are limits, however, including that bad faith is not generally considered "cause" under section 707(a). *In re Mitchell*, 357 B.R. 142, 154, n. 11 (Bankr. C.D. Cal. 2006). The BAPCPA amendments to the Bankruptcy Code added 11 U.S.C. § 707(b)(3), which expressly states that bad faith is grounds for dismissal. *Id.*

Movant, pleading solely under 11 U.S.C. § 707(a) has failed to show sufficient cause for dismissal aside form Debtor's alleged bad faith. Movant has raised very concerning issues regarding whether Debtor fits the requirements to be a debtor under 11 U.S.C. § 109, but has not supported these allegations with sufficient evidence. Without more evidence or further explanation for why dismissal is proper, the court does not find that the Movant has sufficiently pleaded for dismissal under 11 U.S.C. § 707(a).

The motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 7 case filed by IMH Financial Corporation, 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 Dismiss is denied without prejudice.

****

18. 09-90452-E-7 CWC-10 — DELIDDO AND ASSOCIATES, INC. — David C. Johnston — MOTION FOR COMPENSATION FOR RYAN, CHRISTIE, QUINN & HORN, ACCOUNTANT(S) — 10-16-14 [261]

Final Ruling: No appearance at the November 20, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 16, 2014. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

FEES REQUESTED

Ryan, Christie, Quinn, and Horn, the Accountant ("Applicant") for Stephen C. Ferlmann the Chapter 7 Trustee ("Client"), makes a Second and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period August 10, 2011 through August 4, 2014. The order of the court approving employment of Applicant was entered on September 23, 2010, Dckt. 158.

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

General Case Administration: Applicant spent 21.2 hours in this category. Applicant assisted Client with case correspondence, negotiations with the IRS, and preference recovery.

Tax Preparation and Tax-related Issues: Applicant spent 99.6 hours in this category. Applicant preparing and filing federal and state tax returns

for tax years 2008 through 2013 and summarized the transactional activity for the 2014 tax year.

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

Even if the court finds that the services billed by professional are "actual," meaning that the fee application reflects time entries properly

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including preparation of multiple years' tax returns. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES ALLOWED

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Paul Quinn (CPA, CFF)	55.4	$250.00	$13,850.00
Deborah Monis (CPA)	65.4	$175.00	$11,445.00
Total Fees For Period of Application			$25,295.00

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

Application	Interim Approved Fees	Interim Fees Paid

First Interim	$9,750.00	$9,750.00
	$0.00	
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	$9,750.00	

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. Second and Final Fees in the amount of $25,295.00 are approved pursuant to 11 U.S.C. § 330 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 does not seek the allowance and recovery of costs and expenses pursuant to this applicant.

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

Fees $25,295.00
Costs and Expenses $ 0.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Ryan, Christie, Quinn, and Horn (“Applicant”), Accountant for 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 Ryan, Christie, Quinn, and Horn is allowed the following fees and expenses as a professional of the Estate:
>
> Ryan, Christie, Quinn, and Horn, Professional Employed by Trustee
>
> Fees in the amount of $ 25,295.00
> Expenses in the amount of $ 0.00,
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

****

19.	**09-90452-E-7** **CWC-11**	**DELIDDO AND ASSOCIATES, INC.** **David C. Johnston**	**MOTION FOR COMPENSATION FOR CARL W. COLLINS, TRUSTEE'S ATTORNEY** **10-16-14 [267]**

Final Ruling: No appearance at the November 20, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 16, 2014. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

FEES REQUESTED

Carl W. Collins, the Attorney ("Applicant") for Stephen C. Ferlmann the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period April 14, 2010 through October 15, 2014. The order of the court approving employment of Applicant was entered on May 5, 2010, Dckt. 119.

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

General Case Administration: Applicant spent 0.5 hours in this category. Applicant assisted Client with coordination and compliance, including preparing the statement of financial affairs, schedules, and list of contracts. Applicant also responded to general creditor inquiries.

Efforts to Assess and Recover Property of the Estate: Applicant spent 74.9 hours in this category. Applicant identified potential assets of the bankruptcy estate, including pending litigation in San Bernardino Superior Court. Applicant also conducted sales, leases, abandonment, and other transactional work.

Adversary Proceedings: Applicant spent 11.7 hours in this category. Applicant drafted and filed a complaints to recover an avoidable transfer and for turnover of property against numerous defendant creditors.

Significant Motions and Other Contested Matters: Applicant spent 4.3 hours in this category. Applicant prepared and filed a motion to set Chapter 11 Administrative Expenses Bar Date and related pleadings.

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including recovering avoidable transfers and conducting necessary case administration. The estate has $366,168.94 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES ALLOWED

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Carl Collins (Attorney)	199	$295.00	$58,705.00
Claudia Alarcon (Paralegal)	59.1	$90.00	$5,319.00

Melissa Morena (Paralegal)	3.8	$90.00	$342.00
Total Fees For Period of Application			$64,366.00

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $64,366.00 are approved pursuant to 11 U.S.C. § 330 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 $914.84 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Mail/Postage		$488.34
Copying	$0.10	$343.50
Filing Fees		$59.00
Certified Copy Charges		$24.00
Total Costs Requested in Application		$914.84

The First and Final Costs in the amount of $914.84 are approved pursuant to 11 U.S.C. § 330 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 to this professional in this case:

Fees $64,366.00
Costs and Expenses $ 914.84

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Carl W. Collins (“Applicant”), Attorney for 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 Carl W. Collins is allowed the following fees and expenses as a professional of the Estate:

Carl W. Collins, Professional Employed by Trustee

Fees in the amount of $ 64,366.00
Expenses in the amount of $ 914.84,

IT IS FURTHER ORDERED that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

****

20. 00-90665-E-7 GMW-4 | **JAY/MARGARET HARP** | **Pro Se** | **AMENDED MOTION TO AVOID LIEN OF CBSJ FINANCIAL CORP., AND/OR ITS PURPORTED SUCCESSORS, JAMES CRUZ INCORPORATED, OR ARCADIA RECOVERY BUREAU, LLC** | **10-30-14 [43]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, Arcadia Recovery Bureau, LLC (formerly CBSJ Financial Corp.), parties requesting special notice, and Office of the United States Trustee on October 6, 2014. By the court's calculation, 24 days' notice was provided. 14 days' notice is required.

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

The Motion to Avoid Judicial Lien is denied without prejudice.

This Motion requests an order avoiding the judicial lien of CBSJ Financial Corp. ("Creditor"). against property of Jay and Margaret Harp ("Debtors") commonly known as 312 Adrienne Street, Stockton, California (the "Property"). Debtors have since passed away, Mr. Harp in 2002 and Mrs. Harp in 2004. Steven Harp, Jay Edward Harp, and Ronnie Harp ("Debtors' Successors") succeeded Debtors' interest in the Property through an order from the San Joaquin County Superior Court recorded on August 7, 2014. The court granted the Motion of Substitution of Parties on October 30, 2014.

A judgment was entered against Debtor in favor of Creditor in the amount of $13,071.84. An abstract of judgment was recorded with San Joaquin County on February 2, 2000, which encumbers the Property. Creditor applied to renew the judgment in 2009 and an abstract of judgment was recorded with San Joaquin County on September 2, 2009. The total renewed judgment amount is $25,793.99.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $35,000.00 as of the date of the petition. The unavoidable consensual liens total $2,000.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of $75,000.00 on Schedule C.

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

OCTOBER 30, 2014 HEARING

The court continued the hearing to November 20, 2014 to allow Debtors to properly identify the creditor having an interest in the lien they seek to avoid.

DEBTORS' AMENDED MOTION

On October 30, 2014, Debtors filed an amended Motion to Avoid Lien of CBSJ Financial Corp. Dckt. 43. In an attempt to properly identify the creditor who has an interest in the subject judicial lien, Debtors amended the motion to seek relief against "CBSJ Financial Corp. ("CBSJ"), and/or its purported successors, James Cruz Incorporated, or Arcadia Recovery Bureau, LLC." This is insufficient to cure the problem raised by the court in the initial hearing.

IDENTITY OF REAL PARTY IN INTEREST

The Motion clearly states that relief is sought only against CBSJ Financial Corp. No relief is sought against any other person. In his declaration counsel for Debtors states that his research indicates that CBSJ

Financial Corp. no longer exists, having been merge out into Golden State Collections, Ltd. However, the corporation number for that entity is related to James Cruz Incorporated. He also discovered that the website for Arcadia Recovery Bureau states that its business was formerly known as CBSJ Financial Corp. He contacted that business and was told by a Thomas Pendergrst that Arcadia Recovery Bureau and was told that Arcadia purchased the assets of CBSJ Financial Corp. Further, that Arcadia was the owner of the judgment for which the lien is sought to be avoided. Declaration, Dckt. 38.

It appears that counsel has uncovered a long and winding trail of transfers and mergers, with ultimately Arcadia Recovery Bureau being the real party in interest with whom the Debtors seek to have their claim or controversy adjudicated. U.S. Constitution Article III, Section 2. However, Arcadia Recovery Bureau is not a party to this contested matter, but only CBSJ Financial Corp., an entity which Debtors assert no longer exists.

The Debtors have still only requested relief against CBSJ Financial Corp., the court cannot effectively issue and order purporting to adjudicate the asserted claims of the Debtors against the actual owner of the rights. The court appreciates the challenge facing Debtors, and it may well be that they have to file a motion which seeks to have the lien avoided as to as to all and each of the various entities which have appeared in this chain of title. This would not include the use of "and/or," which does not communicate to the court whether the action is sought against CBSJ ***and*** its successors or whether it is sought against CBSJ ***or*** its successors. The court could then issue an order against each and every of the named parties avoid the lien, to the extent they have an interest.

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 hearing on the Motion to Avoid the judgment lien of CBSJ Financial Corp. is denied without prejudice.

21. 12-92570-E-12 COELHO DAIRY
JPJ-2 Thomas O. Gillis

OBJECTION TO CLAIM OF STATE FUND, CLAIM NUMBER 28
10-2-14 [535]

Final Ruling: No appearance at the November 20, 2014 hearing is required.

Local Rule 3007-1 Objection to Claim - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Debtor's Attorney, State Fund (the "Creditor"), and Office of the United States Trustee on October 2, 2014. By the court's calculation, 49 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(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(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties 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 Objection to Proof of Claim number 28 is sustained and the claim is disallowed in its entirety.

Jan P. Johnson, the Trustee ("Objector") requests that the court disallow the claim of State Fund ("Creditor"), Proof of Claim No. 28 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $2,749.39. Objector asserts that the Claim has not been timely not timely filed. *See* Fed. R. Bankr. P. 3002(c). The deadline for filing proofs of claim in this case is January 29, 2013. Notice of Bankruptcy Filing and Deadlines, Dckt. 30.

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United*

Student Funds, Inc. v. Wylie (In re Wylie), 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

Creditor filed Claim No. 28 on April 23, 2013, approximately three (3) months after the deadline to file claims in this case had passed. No opposition to this Objection has been filed.

The deadline for filing a Proof of Claim in this matter was January 29, 2013. The Creditor's Proof of Claim was filed April 23, 2013. No order granting relief for an untimely filed proof of claim for Creditor has been issued by the court.

Based on the evidence before the court, the creditor's claim is disallowed in its entirety as untimely. The Objection to the Proof of Claim is sustained.

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 Objection to Claim of State Fund ("Creditor") filed in this case by Jan P. Johnson, 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 objection to Proof of Claim Number 28 of State Fund is sustained and the claim is disallowed in its entirety.

****

22. 13-90377-E-7 CAMILO VALENCIA
HCS-2 Thomas P. Hogan

AMENDED MOTION FOR COMPENSATION BY THE LAW OFFICE OF HERUM\CRABTREE\SUNTAG FOR DANA A. SUNTAG, TRUSTEE'S ATTORNEY(S)
10-20-14 [50]

Final Ruling: No appearance at the November 20, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 20, 2014. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

FEES REQUESTED

Herum/Crabtree/Suntag, the Attorney ("Applicant") for Gary R. Farrar the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period April 15, 2013 through October 31, 2014. The order of the court approving employment of Applicant was entered on April 21, 2013, Dckt. 20.

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

General Case Administration: Applicant spent 7.2 hours in this category. Applicant assisted Client with preparing stipulations to extend

deadlines to object to exemptions, filing complaints objecting to Debtor's discharge, and preparing employment and compensation motions.

Efforts to Assess and Recover Property of the Estate: Applicant spent 10.3 hours in this category. Applicant negotiated a settlement with Debtor regarding a preferential transfer by Debtor's wife. A transfer of $4,884.84 was settled by Debtor's payment of a $4,000.00 initial payment, a payment upon signing the agreement of $2,250.00, and then five (5) monthly payments of $350.00 each.

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including filing motions objecting to discharge and settling a preferential transfer to recover money from the estate. The estate has $3,300.00 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES ALLOWED

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Audrey Dutra (staff)	1	$90.00	$90.00
Dana Suntag (shareholder)	2.1	$315.00	$661.50
Loris Bakken (associate attorney)	13.7	$295.00	$4,041.50

Ricardo Aranda (associate attorney)	1.0	$250.00	$250.00
Total Fees For Period of Application			$5,043.00

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. However, Applicant seeks only $1,100.00 in fees and costs for this work. First and Final Fees in the amount of $1,100.00 are approved pursuant to 11 U.S.C. § 330 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 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage		$36.26
Copying	$0.10	$51.20
Total Costs Requested in Application		$87.46

Applicant seeks to be paid a single sum of $1,100.00 for its fees and expenses incurred for the Client. First and Final Fees and Costs in the mount of $1,100.00 are approved pursuant to 11 U.S.C. § 330 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 to this professional in this case:

Fees and Expenses $1,100.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Herum/Crabtree/Suntag (“Applicant”), Attorney for 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 Herum/Crabtree/Suntag is allowed the following fees and expenses as a professional of the Estate:

Herum/Crabtree/Suntag, Professional Employed by Trustee

Fees and expenses in the amount of $ 1,100.00,

IT IS FURTHER ORDERED that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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23. 14-91183-E-7 JDP-1 — MARVIN/CECELIA WENNEKAMP — Christian J. Younger — MOTION TO AVOID LIEN OF KBR, INC. — 10-20-14 [33]

Final Ruling: No appearance at the November 20, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, KBR Inc. parties requesting special notice, and Office of the United States Trustee on October 20, 2014. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of KBR Inc. ("Creditor") against property of Marvin Richard Wennekamp and Cecelia M. Wennekamp("Debtors") commonly known as 20120 Panoz Road, Patterson, California (the "Property").

A judgment was entered against Debtors in favor of Creditor in the amount of $1,922.93. An abstract of judgment was recorded with Stanislaus County on October 30, 2012, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $440,000.00 as of the date of the petition. The unavoidable consensual liens total $469,420.53 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $1.00 on Schedule C.

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

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of KBR Inc., California Superior Court for Stanislaus County Case No. VG09461361, recorded on October 30, 2012, Document No. DOC-2012-0097115-00 with the Stanislaus County Recorder, against the real property commonly known as 20120 Panoz Road, Patterson, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

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