UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

January 10, 2019 at 10:30 a.m.

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1. 18-90600-E-7 MDM-1 | **CORAZON HERNANDEZ** **Brian S. Haddix** | **MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR** **12-3-18 [31]**

Final Ruling: No appearance at the January 10, 2019, hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee's Attorney, and Office of the United States Trustee on December 3, 2018. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

The Motion to Extend Deadline to File a Complaint Objecting to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 is granted, and the deadline for Movant to object to Corazon Maria Hernandez's discharge is extended to March 4, 2019.

Michael D. McGranahan, Chapter 7 Trustee, ("Movant") moves to extend the deadline to file a complaint objecting to Corazon Maria Hernandez's ("Debtor") discharge because Debtor has not provided requested documents pertaining to certain real property and financial transactions, as required by 11 U.S.C. 521(a)(1)(B)(iii).

The deadline for filing a complaint objecting to discharge was December 3, 2018. Dckt. 6. The Motion requests that the deadline to object to Debtor's discharge be extended to March 4, 2019.

The court may, on motion and after a noticed hearing, extend the time for objecting to the entry of discharge for cause. FED. R. BANKR. P. 4004(b)(1). The court may extend that deadline as long as the request for the extension of time was filed prior to the expiration of the deadline. *Id.*

The instant Motion was filed on December 3, 2018, before the deadline to object to the discharge of Debtor.

The court finds that in the interest of allowing Movant to complete investigation, namely continuing to gather all necessary financial information about Debtor's assets, there is sufficient cause to justify an extension of the deadline. Therefore, the Motion is granted, and the deadline for Movant to object to Debtor's discharge is extended to March 4, 2019.

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 to File a Complaint Objecting to Discharge filed by Michael D. McGranahan, Chapter 7 Trustee, ("Movant") 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 deadline for Movant to object to Corazon Maria Hernandez's ("Debtor") discharge is extended to March 4, 2019.

2. **18-90705-E-7** **DAVID ACANTILADO** **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Pro Se **12-20-18 [33]**

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, then 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 Debtor (*pro se*), and Chapter 7 Trustee as stated on the Certificate of Service on December 22, 2018. The court computes that 19 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $31.00 due on November 5, 2018.

The Order to Show Cause is sustained, and the case is dismissed.

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Debtor: $31.00.

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, no other sanctions are issued pursuant thereto, and the case is dismissed.

3. 18-90910-E-7 STEVEN BOLTON
Scott Mitchell

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
12-18-18 [11]

Final Ruling: No appearance at the January 10, 2019 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 7 Trustee as stated on the Certificate of Service on December 20, 2018. The court computes that 21 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $335.00 due on December 4, 2018.

The Order to Show Cause is discharged, and the bankruptcy case shall proceed in this court.

DEBTOR'S RESPONSE

Debtor filed a Response on December 18, 2018. Dckt. 12. Debtor's counsel states the filing fee was unintentionally overlooked and has now been paid.

DISCUSSION

The court's docket reflects that the default in payment that 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 bankruptcy case shall proceed in this court.

4. 09-90073-E-7 SCB-3 | **TERRY/AMANNDA MONLIN** **Pro Se** | **MOTION FOR COMPENSATION BY THE LAW OFFICE OF SCHNEWEIS-COE AND BAKKEN, LLP TRUSTEE'S ATTORNEY(S)** **11-20-18 [47]**

Final Ruling: No appearance at the January 10, 2019 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's (*pro se*), Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 20, 2018. By the court's calculation, 51 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 Allowance of Professional Fees is granted.

Schneweis-Coe & Bakken, LLP, 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.

Fees are requested for the period February 13, 2018, through January 10, 2019. The order of the court approving employment of Applicant was entered on February 16, 2018. Dckt. 35. Applicant requests fees in the amount of $9,585.00 and costs in the amount of $276.66.

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). An attorney must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R.

103, 108 (B.A.P. 9th Cir. 2000)). 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.

APPLICABLE LAW

Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

In re Garcia, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis cab be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

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 demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization

to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to 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?

In re Puget Sound Plywood, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's services for the Estate include legal advice regarding general case administration and strategies for handling property of the estate, as well as assisting with the sale of 240 monthly life contingent annuity payments of %$610.00. The Estate has $48,250.00 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 3.2 hours in this category. Applicant prepared Applicant's employment and fee applications, reviewed deadlines to object to exemptions and file complaint objecting to debtor's discharge, and prepared Applicant's fee agreement.

Sale of Structured Settlement Payments: Applicant spent 29.7 hours in this category. Services included corresponding with various parties seeking to purchase the rights to Debtor's settlement annuity payments; review of purchase offers; review and revision of a transfer agreement; preparation and filing of an authorization to sell property of the estate; hearing appearances; and further correspondence regarding the bankruptcy court order approving sale and transfer.

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

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Loris L. Bakken	31	$300.00	$9,300.00
Loris L. Bakken	1.5	$150.00	$225.00
Christina Alcantara	0.4	$150.00	$60.00
Total Fees for Period of Application			$9,585.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $276.66 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage	N/A	$146.06
Copies	$0.10	$130.60
Total Costs Requested in Application		$276.66

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

First and Final Costs in the amount of $276.66 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

The court authorizes the Chapter 7 Trustee to pay the fees and costs allowed by the court.

Applicant is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$9,585.00
Costs and Expenses	$276.66

pursuant to this Application as final fees and costs 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 Schneweis-Coe & Bakken, LLP ("Applicant"), Attorney for Gary R. Farrar, the Chapter 7 Trustee, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Schneweis-Coe & Bakken, LLP is allowed the following fees and expenses as a professional of the Estate:
>
> Schneweis-Coe & Bakken, LLP, Professional employed by the Chapter 7 Trustee
>
> Fees in the amount of $9,585.00
> Expenses in the amount of $276.66,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.
>
> **IT IS FURTHER ORDERED** that the Chapter 7 Trustee is authorized to pay the fees and costs 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.

5.	**18-90683-E-7** **MDM-1**	**JORGE MARTINON AND ERIKA FLORES** **Thomas Gillis**	**MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR** **11-29-18 [21]**

Final Ruling: No appearance at the January 10, 2019 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee's Attorney, and Office of the United States Trustee on November 29, 2018. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion to Extend Deadline to File a Complaint Objecting to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 is granted, and the deadline for Movant to object to Jorge Lopez Martinon and Erika Landa Flores's ("Debtor") discharge is extended to March 18, 2019.

Michael D. McGranahan, Chapter 7 Trustee, ("Movant") moves to extend the deadline to file a complaint objecting to Jorge Lopez Martinon and Erika Landa Flores's ("Debtor's") discharge because Debtor failed to disclose an insider preference in Debtor's Schedules and Statement of Affairs, nor have they provided the documents pertaining to the transfer, as required by 11 U.S.C. 521(a)(1)(B)(iii).

The deadline for filing a complaint objecting to discharge was December 17, 2018. Dckt. 7. The Motion requests that the deadline to object to Debtor's discharge be extended to March 18, 2019.

The court may, on motion and after a noticed hearing, extend the time for objecting to the entry of discharge for cause. FED. R. BANKR. P. 4004(b)(1). The court may extend that deadline as long as the request for the extension of time was filed prior to the expiration of the deadline. *Id.*

The instant Motion was filed on November 29, 2018, before the deadline to object to the discharge of Debtor.

The court finds that in the interest of allowing Movant to complete investigation, namely continuing to gather all necessary financial information about Debtor's assets and possible insider preferences, there is sufficient cause to justify an extension of the deadline. Therefore, the Motion is granted, and the deadline for Movant to object to Debtor's discharge is extended to March 18, 2019.

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 to File a Complaint Objecting to Discharge filed by Michael D. McGranahan, Chapter 7 Trustee, ("Movant") 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 deadline for Movant to object to Jorge Lopez Martinon and Erika Landa Flores's ("Debtor's") discharge is extended to March 18, 2019.

6. 18-90892-E-7 ILOUSH ABDISHOU
Patrick Greenwell

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
12-13-18 [14]

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, then 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 Debtor, Debtor's Attorney, and Chapter 7 Trustee as stated on the Certificate of Service on December 15, 2018. The court computes that 26 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $335.00 due on November 29, 2018.

The Order to Show Cause is sustained, and the case is dismissed.

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Debtor: $335.00.

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, no other sanctions are issued pursuant thereto, and the case is dismissed.

7. 08-92594-E-7 ROBERT/STEPHANIE ACHTERBERG MDG-4
15-9054

CONTINUED MOTION FOR ASSIGNMENT ORDER AND/OR MOTION FOR ORDER RESTRAINING JUDGMENT DEBTOR
11-15-18 [109]

ACHTERBERG, JR. ET AL V.
CREDITORS TRADE ASSOCIATION,

ADVERSARY PROCEEDING CLOSED:
02/21/2017

No Telephonic Appearances permitted for Gary Looney and Douglas Provencher, Esq.

No 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.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff's Attorney, and Judgment Debtor's Attorney on November 15, 2018. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion for Assignment Order and Order Restraining Judgment Debtor has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Assignment Order and Order Restraining Judgment Debtor is XXXXXXXXXXXXXX.

MOTION FOR ASSIGNMENT ORDER AND RESTRAINING JUDGMENT DEBTOR FROM DISPOSING OF ASSETS

Robert and Stephanie Achterberg ("Plaintiff") filed this Motion for Assignment Order and For Order Restraining Judgment Debtor on November 15, 2018. Dckt. 109. Plaintiff seeks to assign debts and

judgements in favor of the Judgment Debtor in this Adversary Proceeding, Creditors Trade Association, Inc., dba Great Western Collection Bureau ("Judgment Debtor"), so Plaintiff can collect on its judgement. Judgment Debtor also seeks a restraining order preventing Judgment Debtor from assigning or disposing of the debts sought to be assigned to Plaintiff.

In its Motion Plaintiff states that it was a awarded a judgement in the amount of $36,361.29 against Judgment Debtor on February 3, 2017, after trial. Motion, Dckt 109 at ¶ 2. Plaintiff states further that Judgment Debtor has made no attempt to pay the judgement, and Plaintiff through a motion to compel has obtained a list of judgements and debtors of Judgment Debtor. *Id*. at ¶ 3.

Plaintiff supports the Motion with the Declaration of Malcolm Gross. Dckt. 111. The Gross Declaration testifies all accounts and judgments of Judgment Debtor were supplied either on March 4, 2018 pursuant to a motion to compel or at a continued hearing, May 17, 2018. *Id*. at ¶ 5. The Gross Declaration testifies further that the accounts and judgements have not been included as exhibits due to their numerosity. *Id*. at ¶ 7.

JUDGMENT DEBTOR'S OPPOSITION

Judgment Debtor filed an Opposition to the Motion on December 5, 2018. Dckt. 114. Judgment Debtor opposes the Motion on the basis the Judgment Debtor is a collection agency; the debts and judgements held by Judgment Debtor are through contractual assignment wherein Judgment Debtor generally only receives a portion of the actual debt or judgement recovery. Judgment Debtor argues further the Plaintiff would have to substitute into each case as a judgement creditor and represent itself pro per.

Judgment Debtor argues a better solution would be seeking a lien in any case pursuant to California Code of Civil Procedure section 708.410, or assignment of rights pursuant to California Code of Civil Procedure section 708.510.

Judgment Debtor requests that if the court grant Plaintiff's Motion, that the court stay the actual assignment of debts and judgements while the parties work out an appropriate process to allocate funds collected and determine how to proceed. Judgment Debtor states it has no objection to Plaintiff simply filing liens against judgements.

PLAINTIFF'S SUPPLEMENTAL EXHIBIT 1

Plaintiff filed a supplemental "Exhibit 1" on December 12, 2018. Dckt. 117. The document appears to be a list of customer accounts. However, no explanation of the document is provided.

PLAINTIFF'S REPLY

Plaintiff filed a Reply to Judgment Debtor's Opposition on December 12, 2018. Dckt. 119. Plaintiff notes it erroneous referred to California Code of Civil Procedure section "708.15," which is actually section 708.510.

Plaintiff states it is not willing to file liens or meet special accommodations of Judgment Debtor. Plaintiff argues the assignments sought would be foreclosures on Judgment Debtor's accounts "and any monies owed to their clients remain this responsibility." Judgment Debtor argues that substituting in to each case would not be acceptable unless Judgment Debtor's counsel would be ordered to draft all of the substitution paperwork and pay incidental fees and costs.

CASE HISTORY

Plaintiff filed this Adversary Proceeding on July 23, 2015. Complaint, Dckt. 1. The Complaint alleged that after Plaintiff received a discharge under Chapter 7, Judgment Debtor sought and received a Default Judgment, subsequently reporting the judgement to various Credit reporting Agencies in an attempt to collect the judgment. *Id*. at ¶ 11.

On February 3, 2017, trial having been completed, the court issued Judgment in favor of the Judgment Debtor. Judgement, Dckt. 57. The court found Judgment Debtor had obtained a judgement in violation of the the Automatic Stay in February 2009, and the Judgment Debtor knowingly, willfully, and intentionally violated the automatic stay and the discharge injunction by failing to vacate the void judgement. Memorandum Opinion and Decision, Dckt. 59 at 2:9-12.

The court awarded Plaintiff $36,361.29.00 in damages (consisting of $1,250.00 for escrow extension damages, $1,850.00 of emotional distress damages, $18,261.29 costs and attorneys' fees, and $15,000.00 punitive damages). Judgement, Dckt. 57. The court further ordered the judgment issued by the California Superior Court, County of San Francisco in *Creditors Trade Association, Inc. v. Aberg, Inc. ET al DBA El Oasis Mexican Res,* Case No. CGC-08-480700, filed February 6, 2009, is void as to Robert Achterberg, Jr. and Stephanie Achterberg, and each of them, as having been issued in violation of the automatic stay (11 U.S.C. § 362(a)) in the Chapter 7 bankruptcy case filed by Robert Achterberg, Jr. and Stephanie Achterberg on December 1, 2008 (Bankr. E.D. Cal. No. 08- 92594). *Id*.

Suspension of Judgment Debtor Creditor Trade Association, Inc.'s Corporate Powers and December 20, 2018 Hearing

At the December 20, 2018 hearing, Judgment Debtor's counsel, Douglas Provencher, appeared and advised the court that he could not represent the Judgment Debtor and was not appearing. This was based on Judgment Debtor having its corporate powers suspended. As the parties and counsel addressed, he has not been authorized to withdraw as counsel for Judgment Debtor and that the prohibition was on Judgment Debtor from seeking to appear and assert rights or defend itself when its corporate powers were suspended.

The court did not take, and Mr. Provencher did not attempt as counsel for Judgment Debtor, to act contrary to the law for a defendant whose corporate powers have been suspended.

Though Judgment Debtor's corporate powers have been suspended, such does not suspend the right of Plaintiff to enforce the judgment.

At the hearing, the Plaintiffs suggested that the matter could be continued. The court has been presented with a request for relief in enforcing this judgment which is now twenty-two (22) months final February 3, 2017 entry of judgment). The judgment is for $36,361.29, which if amortized over the past 22 months (given the low federal post-judgment rate of interest, almost every dollar paid reduces principal), a payment of $1,652 would have this obligation all but paid.

However, that has not occurred and the parties have engaged in and out of various post-judgment enforcement proceedings. In August 2017 Plaintiffs filed a motion for an order of judgment debtor examination and production of documents. Dckt. 65. In January 2018 Plaintiffs filed a motion to compel the production of documents that had not been produced in compliance with the order of examination. Dckt. 77. (The court notes that the principal of the Judgment Debtor lost his home in the Santa Rosa files of 2017 and that counsel for Plaintiffs waited until after communicating with Judgment Debtor's counsel and giving an appropriate amount of time before seeking the further order.) The Judgment Debtor complied with the order compelling production of the documents. May 11, 2018, filed Notice of Compliance, Dckt. 105.

No further proceedings ensued until the present Motion for Assignment Order for the various accounts and obligations owned to Judgment Debtor. Dckt. 109.

Plaintiffs have shown a valid basis for such an order, as discussed below, for an assignment of obligations and judgments owed to the Judgment Debtor to enforce the judgment obligation to Plaintiffs not paid by Judgment Debtor.

However, Judgment Debtor's counsel has asserted that in light of the suspension of Judgment Debtor's corporate powers he cannot attempt to advocate for or defend Judgment Debtor in this Adversary Proceeding. While the scope of the suspension and limits on a corporation to defend its rights and interests is debatable, if surprised with the suspension on the even of the December 20, 2018 hearing, such position by Judgment Debtor's counsel is not unreasonable.

As commented by the court at the hearing, it appears "suspiciously convenient" that Judgment Debtor, who has not made arrangements to pay the judgment – $1,250 escrow extension damages, $1,850.00 emotional distress damages, and $18,261.29 in attorneys' fees and costs (all of which are "actual damages" under 11 U.S.C. § 362(k)) and $15,000.00 punitive damages – comes to court on the last hearing day before a two week calendar break for the holidays and asserts that it cannot be represented in the court determining how to address the requested relief.

At the December 20, 2018, hearing, the court discussed granting the relief and assigning all of Judgment Debtor's right and interest in the proceeds of the accounts assigned to Plaintiffs. In addition, to have all of the monies collected into a blocked account, from which disbursements would be made from further order of the court.

ORDER GRANTING MOTION FOR ASSIGNMENT ORDER AND FOR ORDER RESTRAINING JUDGMENT DEBTOR AND CONTINUING HEARING

On December 21, 2018, the court issued an Order assigning to Plaintiff in this Adversary Proceeding the Defendant's interest and right to monies for any obligation assigned for collection, or for services provided. Order, Dckt. 122. The court further ordered that all monies collected be deposited into a segregated client trust account, and that certain monies may be disbursed as provided in the Order. *See* Order, Dckt. 122 at 2:18-3:3.

The court continued the hearing on the Motion to January 10, 2019 to consider whether to continue the order as issued or modify the order, and ordered that Gary Looney, officer of Judgment Debtor, and Douglas Provencher, Esq., counsel for Judgment Debtor in this Adversary Proceeding, and each of them, shall appear in person at the January 10, 2019 hearing–No Telephonic Appearances permitted. *Id*.

Additionally, the court ordered that on or before January 5, 2019, Defendant shall file an accounting of the monies collected (identified by source of payment and client to which the payment relates), the computation of the client's portion of the monies (including a copy of the contract by which the client's and Judgment Debtor's rights and interest are specified), the regular and normal expenses paid (identified by amount, recipient, and goods or services obtained, obligation paid, and reason for payment), and the monies, if any, disbursed to Plaintiffs. The accounting shall include copies of the client trust account into which the monies are deposited and include copies of the monthly statements for November and December 2018. *Id*.

DEFENDANT'S ACCOUNTING & SUPPORTING EXHIBIT

On January 4, 2019, Defendant filed the declaration of Gary Looney, president of Creditors Trade Association, Inc., entitled "CTA ACCOUNTING." Dckt. 127 (emphasis in original). Mr. Looney states under penalty of perjury Defendant has not accepted new assignments or filed new lawsuits for several years. *Id*. at ¶ 2. Mr. Looney states further he provided a printout to Plaintiff of lawsuits on which Defendant is a judgement creditor. *Id*.

As to the accounting, Mr. Looney testifies he has reviewed Defendant's records for November and December 2018, and concludes Defendant collected no funds on any existing judgements, no funds were deposited to Defendant, and no funds were disbursed by Defendant. *Id*. at ¶ 3. Mr. Looney further testifies Defendant keeps an account with Umpqua Bank in Santa Rose, California; Mr. Looney provided account information to Plaintiff and attached as Exhibit A a November 2018 account statement. *Id*. ¶¶ 4-5.

Mr. Looney also testifies the assets of Defendant are subject to hiw own senior secured obligation in excess of $600,000.00. *Id*. at ¶ 6.

In support of Defendant's accounting, Defendant filed as Exhibit A a November 2018 Umpqua Bank account statement. Exhibit A, Dckt. 128. The account statement reflects no transactions occurring in the November 1 through November 30 2018 period for this account.

APPLICABLE LAW

Federal Rule of Civil Procedure 64 applies in an Adversary Proceeding. FED. R. BANKR. P. 64. That rule provides:

(a) REMEDIES UNDER STATE LAW—IN GENERAL. At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.

(b) SPECIFIC KINDS OF REMEDIES. The remedies available under this rule include the following—however designated and regardless of whether state procedure requires an independent action:

- arrest;
- attachment;
- garnishment;
- replevin;
- sequestration; and
- other corresponding or equivalent remedies.

FED. R. CIV. P. 64.

California law provides for the assignment of right to payment as a means of collection as follows:

(a) Except as otherwise provided by law, upon application of the judgment creditor on noticed motion, **the court may order the judgment debtor to assign to the judgment creditor** or to a receiver appointed pursuant to Article 7 (commencing with Section 708.610) **all or part of a right to payment due or to become due**, whether or not the right is conditioned on future developments, including but not limited to the following types of payments:

(1) Wages due from the federal government that are not subject to withholding under an earnings withholding order.
(2) Rents.
(3) Commissions.
(4) Royalties.

(5) Payments due from a patent or copyright.
(6) Insurance policy loan value.

Cal. Civ. Proc. Code § 708.510(a)(emphasis added) whether to order an assignment or the amount of an assignment, the court may take into consideration all relevant factors, including the following:

> (1) The reasonable requirements of a judgment debtor who is a natural person and of persons supported in whole or in part by the judgment debtor.
> (2) Payments the judgment debtor is required to make or that are deducted in satisfaction of other judgments and wage assignments, including earnings assignment orders for support.
> (3) The amount remaining due on the money judgment.
> (4) The amount being or to be received in satisfaction of the right to payment that may be assigned.

Cal. Civ. Proc. Code § 708.510(c).

DISCUSSION

Judgment Debtor in this case does not argue Plaintiff is not entitled to the relief sought, but rather argues the relief is not feasible or practical, given the nature of the debts. Judgment Debtor argues the debts and judgments it holds are generally through contract and do not entitle Judgment Debtor to the entire recovery amount. Judgment Debtor also argues that the relief sought would require Plaintiff to substitute into each case as a judgement creditor and represent itself pro per.

Judgment Debtor's Opposition That It Is A Collection Agency

In the Opposition Judgment Debtor argues that:

> (1) It is a commercial collection agency;
>
> (2) It has written contracts for the collection of monies with its clients;
>
> (3) Judgment Debtor has a contractual right to only a portion of the monies it collects on the assigned debts and judgments obtained thereon.
>
> (4) Judgment Debtor's clients have the right to "the bulk" of the judgment accounts.

Opposition, p. 2; Dckt. 114.

Other than making the above arguments, Judgment Debtor asserts no law for such proposition, no law for the relationship between a collection agency and its clients, and the rights and interests of a collection agency in the obligations assigned to it and judgments obtained thereon. Judgment Debtor just "throws out the arguments."

Judgment Debtor then provides some evidence as part of the Opposition. The first is provided by Douglas Provencher, Esq., counsel for Judgment Debtor in this Adversary Proceeding. Dckt. 115. Mr. Provencher has chosen to make himself a witness in this Adversary Proceeding (as opposed "to merely being counsel for Judgment Debtor') as to substantive issues and the property of Judgment Debtor. Mr. Provencher testifies under penalty of perjury:

> (1) He is the attorney for Judgment Debtor in this Adversary Proceeding;
>
> (2) He is "familiar" (in some unstated way) with the collection contracts used by Judgment Debtor with its business clients;
>
> (3) He has represented Judgment Debtor in "many matters" (without identifying what such matters were - contract disputes with clients, collection litigation, collection practices defense);
>
> (4) He attaches a copy of a "standard Collection Agreement" used by Judgment Debtor.

No other declarations are provided and none of Judgment Debtor's officers or employees provide any testimony as to the contracts used, authentication of the contracts, or other facts argued in the Opposition.

A witness is competent to testify in federal court when that witness has personal knowledge of the matters for which the testimony is provided. Fed. R. Evid. 601 and 602. The court cannot identify how Mr. Provencher has any "personal knowledge" of the contract exhibit or that the contract exhibit is the one used for all of the accounts at issue. At best, it appears that Judgment Debtor's counsel has voluntary chosen to be a witness to testify as to what his client has told him, something that would otherwise be privileged.

Applicable California Law

Though Judgment Debtor chooses not to provide the court with law relating to the collection agency-client relationship, the court cannot merely cast about in such "is so - is not" environment. California law has very well established law dating back to the 1800's of the rights of a collection agency/debt collector, assignment of debt, and the collector's fiduciary duties. From prior unrelated research on this point, the debt collector creditor fiduciary relationship exists as follows:

The California Supreme Court addressed the issue in *Toby v. Oregon Pacific Railroad Company*, 98 C. 490 (1893). In that case, an action was brought to foreclose upon a personal property mortgage. The plaintiff in the action was an individual to whom had been transferred the note and underlying security instrument. The defendant objected alleging that the plaintiff was not a *bona fide* holder for valuable consideration since they had been transferred to the plaintiff solely for purposes of collection. The court held that the plaintiff was not a *bona fide* holder in his own right, or for a valuable consideration, but instead that he held the same for collection and as the trustee of the real owners, and that the action was being prosecuted by said plaintiff for the use and benefit of the real owners.

With respect to this issue, the California Supreme Court subsequently stated in *Ralph v. Anderson*, 187 C. 45 (1921)(emphasis added):

> Now a trustee to whom a chose in action had been transferred for collection is, in contemplation of law, so far the owner that he may sue on it in his own name [citations omitted]. In such a case the defendant may urge any defense which he could have interposed against the beneficiary had the suit been brought in his name. That is what the defendant sought to do in the case at bar, by avering the Florida Steamship Company to be the beneficiary in urging a defense against that company. Proving the steamship company was the beneficiary, or that other persons occupied that relation, was an element going to the defense, but not touching plaintiff's abstract right to maintain the action in his own name under the pleadings. **The legal to the notes and mortgage were admitted by the pleadings to be in plaintiff, and there is nothing in the findings or in the fact, that they were taken in trust for collection, which impairs the validity of such title, except as against it, and in plaintiff's hands defendants could, as before stated, urge any defense good against the beneficiaries.**

In *Ralph*, an individual's car was damaged in a collision. The owner of the car transferred his claim against the other person to Ralph. The defendant appealed the judgment entered against him based on the grounds that there was insufficient evidence to show that Ralph was the owner of the claim sued upon or was authorized to bring suit in his own name. The California Supreme Court concluded:

> If there is sufficient evidence to support the finding that the owner of the claim assigned the same to plaintiff, the judgment in plaintiff's favor must be affirmed, for it is the settled rule that an assignee of a chosen action may bring suit thereon in his own name. *(Wiggins v. McDonald*, 18 Cal. 126; *Gradwohl v. Harris*, 29 Cal. 150; *Rios v. Mardis*, 18 Cal.App. 276.) Upon the assignment phase of the case, Mr. Henderson, the owner of the damaged automobile, was called as a witness for the plaintiff. The record disclosed that he testified (1) that he assigned any claim that he might have against the defendant to Archibald S. Ralph, the plaintiff; (2) that the assignment was made shortly after the accident; (3) that the **assignment was oral** and consisted of a direction to Ralph to collect the damages from the defendant. There was no attempt to prove that the assignment was written, and, since there was no statutory provision requiring an assignment of such a claim to be in writing, parol evidence of the transfer was admissible. [Citations omitted.] In a suit by an assignee upon a claim so assigned, the oral testimony of the assignor himself to the effect that he transferred his claim is sufficient to bind the assignor in support of finding that an assignment has been made. [Citation omitted.] The testimony of the original owner of the claim that he assigned the same to the plaintiff in the instant case by oral assignment was, therefore, sufficient proof of an assignment.
>
> It is true that it also appears from the testimony of both the assignor Henderson and the assignee Ralph that Henderson was, at the time of the collision, insured in the Automobile Indemnity Exchange of Orange County, an insurance association

> organized pursuant to statutory provisions [citations omitted], of which plaintiff Ralph was the attorney in fact and manager. And it may further be gathered from the testimony that it was understood between Henderson and Ralph that the amount of any judgment collected in this action was to be turned over to said indemnity exchange. This agreement restricting the disposition of the proceeds recovered in no way detracts from plaintiff's capacity to sue, for an assignee is not deprived of his right to sue in his own name by the fact that the claim is assigned merely for collection. [*Toby v. Oregon Pacific*] **Provided the assignment, whether verbal or written, is absolute so as to vest the apparent legal title in the assignee, the latter `is entitled to sue in his own name, whatever collateral arrangements have been made between him and the assignor respecting the proceeds. The debtor is completely protected by the assignment, and cannot be exposed to a second brought by any of the parties, either the assignor or other, to whom the assignee is bound to account.' (Pomery's Code Remedies, 4th Ed., SEC. 70; *Grant v. Heverin*, 77 Cal. 263; *Ingham v. Weed*, 5 Cal. UNREP. 645.)**

The concept of, as well as the legal rights and obligations arising from an assignment of a debt for collection is discussed in 4 Witkin Cal. Proc. Plead § 109

> [§ 109] Assignment for Collection.
>
> **Even where the assignment is for collection only, the assignee takes legal title to the claim and may sue despite his lack of beneficial interest**. (*National Reserve Co. v. Metropolitan Trust Co.* (1941) 17 C.2d 827, 831, 112 P.2d 598; *Cohn v. Thompson* (1932) 128 C.A. Supp. 783, 787, 16 P.2d 364; *Marc Bellaire v. Fleischman* (1960) 185 C.A.2d 591, 596, 8 C.R. 650, citing the text; *Macri v. Carson Tahoe Hosp.* (1966) 247 C.A.2d 63, 65, 55 C.R. 276, citing the text; James 4th, §10.4; C.E.B., 1 Debt Collection Practice §§1.25, 1.26; 55 Cal. L. Rev. 1475.)
>
> This theory allows a layman to engage in the business of collecting accounts for others, by taking assignments of claims and appearing in court in pro. per., without violating the statutory prohibition against unlicensed practice of law. (See *Gresham v. Superior Court* (1941) 44 C.A.2d 664, 665, 112 P.2d 965 [resigned attorney]; 1 Cal. Proc. (4th), Attorneys, §411; on Fair Debt Collection Act, see 8 Cal. Proc. (4th), Enforcement of Judgment, §--.) But an assignee for collection cannot maintain an equitable action to set off the assigned claim against a debt that he owes personally. (*Harrison v. Adams* (1942) 20 C.2d 646, 650, 128 P.2d 9, 8 Cal. Proc. (4th), Enforcement of Judgment, §--.)

As discussed above, the assignee for collection, while having the legal right to enforce the obligation (including obtaining and enforcing a judgment) holds such claims in a fiduciary capacity. California Insurance Association v. Workers' Compensation Appeals Board et al, 203 Cal. App. 4th 1328, 1335 (2012).

Here, Judgment Debtor owes the obligation in its personal capacity, which the claims assigned to it and judgments on assigned claims are held as a fiduciary of its clients. As the money is collected, Judgment Debtor's "cut" is subject to levy and payment of the Judgment, but the assigning creditor's share is not.

Based on the arguments presented by Judgment Debtor and the Motion of Plaintiff, it appears that it is proper to assign to Plaintiffs all of Judgment Debtor's right to payment from the monies collected on assigned accounts and judgments. However, those amounts cannot be determined until Judgment Debtor, as the fiduciary of its clients, collects the gross payments from the debtors for the assigned obligations.

In addition to assigning those monies to Plaintiffs, and issuing an order compelling Judgment Debtor and its officers, employees, and agents, as well as Judgment Debtor's clients, to facilitate the proper division of the monies collected, with Judgment Debtor's full portion going to Plaintiffs and Judgment Debtor's clients receiving their portion of the monies, the court can issue an order restraining the disposition of the monies. Such an order will require Judgment Debtor to place the gross monies collected on all obligations assigned for collection into its client trust account, and then limit the disbursements therefrom as stated below.

Accounting provided by Judgment Debtor

The court has ordered the Judgment Debtor to file an accounting of all monies collected, computation of all expenses paid, and monies, if any, disbursed to Plaintiffs for the months of November and December 2018.

Judgment Debtor filed a pleading identified as the "CTA ACCOUNTING" on January 4, 2019. Dckt. 127. The accounting is in the form of a Declaration by Judgment Debtor's president, Gary E. Looney. In it, Mr. Looney testifies under penalty of perjury:

A. Judgment Debtor is a judgment creditor on many lawsuits, and that Mr. Looney has provided a printout of those judgments to Plaintiff's counsel. Dec. ¶ 2; Dckt. 127.

B. No "funds" were collected by Judgment Debtor in November and December 2018 and no "funds" were deposited or disbursed by Judgment Debtor. *Id.* ¶ 3.

C. Judgment Debtor maintains a bank account at Umpqua Bank, with a copy of the November 2018 statement (the December statement not yet received) filed as Exhibit A. *Id.* at ¶ 5.

D. All assets of Judgement Debtor are subject to a secured obligation of Gary E. Looney, the president of the Judgment Debtor, in excess of $600,000. *Id.* ¶ 6. Mr. Looney testifies that there is a UCC 1 filed with the Secretary of state. *Id.*

At the hearing, **XXXXXXXXXXXXXX**.

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 Assignment Order and Order Restraining Judgment Debtor filed by Robert and Stephanie Achterberg ("Plaintiff") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that **XXXXXXXXXXXXXXX**.