UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Thomas C. Holman
Bankruptcy Judge
Sacramento, California

January 14, 2014 at 9:32 a.m.

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1. 13-25503-B-7 SUNRISE VISTA MORTGAGE CORPORATION
13-2262 U.S. BANK N.A. V. SUNRISE VISTA MORTGAGE CORPORATION

CONTINUED MOTION FOR ENTRY OF DEFAULT JUDGMENT
11-15-13 [18]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The motion is removed from the calendar. By order signed January 13, 2014, the court continued the hearing on the motion to January 28, 2014, at 9:32 a.m.

2. 11-37711-B-7 DELANO RETAIL PARTNERS, LLC HKS-2
13-2250 C&S WHOLESALE GROCERS, INC. V. DELANO ET AL

MOTION FOR PROTECTIVE ORDER
12-31-13 [100]

Tentative Ruling: The opposition filed by the plaintiff C&S Wholesale Grocers, Inc. (suing on behalf of the chapter 7 estate)("CSWG") is sustained. The motion is denied. The plaintiff is awarded $2950.00 in attorney's fees related to opposition to the motion, which fees will be added to or subtracted from a final judgment. Except as so ordered, the motion is denied.

The movant, defendant Joseph Neri ("Neri"), seeks a protective order against the plaintiff pursuant to Fed. R. Civ. P. 26(c), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7026. Neri seeks a protective order preventing CSWG from deposing Neri in San Francisco during the time that Neri, who lives and works in San Francisco, California, is on an extended winter vacation in Hawaii. Neri's vacation runs from December 1, 2013, to "mid-March," 2014. The court's Scheduling Order applicable to this action, entered in associated adversary proceeding no. 12-2686-B on September 18, 2013, provides that the close of non-expert discovery in this adversary proceeding occurs on February 14, 2014. Neri participated in the development of the Scheduling Order by submitting, jointly with the other parties to this action, a joint discovery plan on September 11, 2013.

> Rule 26(c) of the Federal Rules of Civil Procedure states that the court may, for good cause, issue an order forbidding or limiting certain discovery in order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense.

> Rule 26(b)(2)(C) provides that on motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by the rules if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.
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> The burden of persuasion under Fed.R.Civ.P. 26(c) is on the party seeking the protective order. U.S. Equal Employment Opportunity Commission v. Caesars Entertainment, Inc., 237 F.R.D. 428, 432 (D.Nev.2006), citing Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3rd Cir.1986). In order to meet that burden, the movant must demonstrate a particular need for the protection sought. The rule requires more than "broad allegations of harm, unsubstantiated by specific examples or articulated reasoning." Id. The movant must point to specific facts that support the request, "as opposed to conclusory or speculative statements about the need for a protective order and the harm which will be suffered without one." Id. citing Frideres v. Schlitz, 150 F.R.D. 153, 156 (S.D.Iowa 1993), citing Brittain v. Stroh Brewery Company, 136 F.R.D. 408 (M.D.N.C.1991). A mere showing that the discovery may involve some inconvenience or expense does not suffice to establish good cause under Rule 26(c). Id. citing Turner Broadcasting System, Inc. v. Tracinda Corporation, 175 F.R.D. 554, 556 (D.Nev.1997).

Russo v. Lopez, 2012 WL 1463591 at *3 (D. Nev. Apr. 27, 2012)

Neri has not shown good cause for a protective order for the purposes of Rule 26(c). Neri states that it will inconvenient and a "financial burden" if he is forced to purchase round-trip tickets between San Francisco and Hawaii after November 30, 2013, and before March 15, 2015. However, Neri presents no evidence to support the conclusory statement that having to purchase airplane tickets to attend a deposition in San Francisco for a few days out of his 104-day vacation will be financially burdensome. He presents no evidence regarding the actual cost of airfare or his ability to afford it other than the aforementioned conclusory statement. The court acknowledges that Neri offered alternatives to CSWG, all of which were refused, but that is not reflective of the legal standard for obtaining a protective order. In addition, the court agrees with CSWG regarding the importance of an in-person deposition for Neri, who is a party to the adversary proceeding and a central figure in the allegations set forth in the complaint.

The court will issue a minute order.

3.	13-20645-B-7 13-2126	ROBERT/TRISTINA KITAY DEG-1	MOTION FOR ENTRY OF DEFAULT JUDGMENT
	GONZALEZ V. KITAY ET AL		12-3-13 [54]

Tentative Ruling: The motion is dismissed without prejudice.

This motion for entry of default judgment suffers from procedural

defects. The plaintiff seeks entry of default judgment against joint debtor Robert Kitay, based on the claims for relief alleged in the first amended complaint (the "FAC") filed on November 19, 2013 (Dkt. 45).

The FAC was filed by the defendant following the court's dismissal, pursuant to Fed. R. Civ. P. 12(b)(6) of claims for relief under 11 U.S.C. §§ 523(a)(2)(a), (a)(6), 727(a)(3) and (a)(4) set forth in the initial complaint filed on April 15, 2013 (Dkt. 1). The court gave the plaintiff leave to amend. In amending the complaint, the plaintiff has named joint debtor Tristina Kitay as a defendant and no longer names the Law Offices of Robert N. Kitay as a defendant. The plaintiff has also added claims for relief for breach of contract, professional negligence and constructive fraud as claims for relief in the FAC, in addition to expanding his factual allegations regarding claims for relief pursuant to 11 U.S.C. §§ 523(a)(2)(A), (a)(4) and (a)(6).

Though his answer to the initial complaint was stricken by the court by order entered August 21, 2013 (Dkt. 23), the defendant Robert Kitay has a right to file an answer or response to the FAC, which alleges new claims for relief and expands the factual allegations relating to previously dismissed claims. Fed. R. Civ. P. 15(a)(3). Defendant Tristina Kitay also has a right to respond to the FAC. Therefore, before the plaintiff can seek entry of default judgment against one or both of the named defendants, he must apply to the court clerk for entry of their default as to the FAC and obtain entry of such default. The plaintiff has not yet done so. Therefore, the motion is dismissed without prejudice.

The court will issue a minute order.

4. 13-30690-B-11 WILLIAM PRIOR
13-2288 NJR-1
PRIOR V. TRI COUNTIES BANK ET AL

MOTION FOR PROTECTIVE ORDER
12-17-13 [76]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The motion is removed from the calendar. By order entered January 7, 2014 (Dkt. 110), the court continued the motion to February 11, 2014, at 9:32 a.m. pursuant to the stipulation of the parties.

5. 13-21893-B-7 STANISLAV LAZUTKINE
MF-2

MOTION TO APPROVE STIPULATION TO CONSOLIDATION AND CONDUCT OF PROCEEDINGS RE: CLAIMS AGAINST CORRIGAN FINANCE LIMITED, COUNTERCLAIMS AND LEASING AND SALE OF REAL PROPERTY
12-17-13 [92]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The motion is removed from the calendar. On January 13, 2014, the court

signed 1.) an order transferring the bankruptcy case to Dept. E, the Honorable Ronald H. Sargis presiding, and 2.) an order continuing the hearing on the motion to January 23, 2014 at 10:30 a.m. in courtroom 33.

6.	10-20807-B-7 DRG-7	SIERRA STAIR COMPANY, INC.	MOTION FOR COMPENSATION FOR DAVID GRAVELL, CHAPTER 7 TRUSTEE(S), FEES: $6,722.80, EXPENSES: $0.00 12-13-13 [131]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 326(a), 11 U.S.C. § 330(a)(7), and Fed. R. Bankr. P. 2016, the application is approved on a first and final basis in the amount of $6,722.80 in fees and $0.00 in expenses, for a total of $6,722.80, payable as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

On January 14, 2010, the debtor filed a chapter 7 petition. On January 14, 2010, the applicant was appointed as interim chapter 7 trustee in this case (Dkt. 2). The applicant now seeks compensation for services rendered and costs incurred during the period of January 14, 2010, through the closing of the case. In the absence of opposition, the applicant has shown that there is a reasonable relationship between the work actually done and the amounts requested. The total sought divided by the total hours the trustee states that he has spent on the case reflect a reasonable hourly rate. Therefore, the court will not in this instance require the submission of contemporaneous time records. As set forth in the application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

7.	13-33107-B-7 BLL-3	BUTTE STEEL & FABRICATION, INC.	MOTION TO EMPLOY WEST AUCTION, INC. AS AUCTIONEER(S) 12-12-13 [47]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 327(a) and Fed. R. Bankr. P. 2014, the trustee's request to employ West Auctions, Inc. ("West") as auctioneer for the chapter 7 trustee is granted on the terms set forth in the application. West's fees and costs, if any, shall be paid only pursuant to application. 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016. Except as so ordered, the motion is denied.

The court finds that West is a disinterested person as that term is defined in 11 U.S.C. § 101(14).

Counsel for the chapter 7 trustee shall submit an order approving employment of West that conforms to the foregoing ruling.

8. 13-33107-B-7 BLL-4 — BUTTE STEEL & FABRICATION, INC. — MOTION TO SELL 12-12-13 [52]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted in part. Pursuant to 11 U.S.C. § 363(b), the trustee is authorized to sell the personal property of the estate listed consisting of the vehicles and rolling stock described in the motion and all registered vehicles, trailers and rolling stock in which the bankruptcy estate has an interest and which are free of liens (collectively, the "Property") in an "as-is" and "where-is" condition at public auction, as described in the motion. The trustee is authorized to execute all documents necessary to complete the approved sale. Except as so ordered, the motion is denied.

The trustee has made no request for a finding of good faith under 11 U.S.C. § 363(m), and the court makes no such finding.

The court will issue a minute order.

9. 11-48519-B-7 DL-6 — VICTOR HANNAN — CONTINUED MOTION FOR COMPENSATION BY THE LAW OFFICE OF DAHL LAW, ATTORNEY AT LAW FOR WALTER R. DAHL, DEBTOR'S ATTORNEY(S), FEES: $9,641.00, EXPENSES: $213.54 9-11-13 [145]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The motion is removed from the calendar. The movant withdrew the motion on January 2, 2013 (Dkt. 197).

10. 13-34919-B-7 JSB-1 — STEPHEN BARRY — MOTION TO COMPEL ABANDONMENT 12-13-13 [11]

Tentative Ruling: The motion is continued to February 11, 2014, at 9:32 a.m.

As the personal property for which the debtor seeks abandonment (the "Property") is alleged to be of inconsequential value and benefit to the estate solely due to the fact that the Property is claimed as exempt, the court continues the motion to a date after the period for objecting to the debtors' claims of exemption pursuant to Fed. R. Bankr. P. 4003(b)(1) has expired.

The court will issue a minute order.

11. 12-33026-B-7 RONALD SALMOND — MOTION TO EMPLOY GONZALES & SISTO, LLP AS ACCOUNTANT(S) — 12-9-13 [42]
SKS-1

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. §§ 327(a) and 328(a) and Fed. R. Bankr. P. 2014, the chapter 7 trustee is authorized to employ Gonzales & Sisto, LLP ("G&S"), effective December 3, 2013, as accountants for the estate, on the terms and for the purposes set forth in the motion. Pursuant to Fed. R. Bankr. P. 2016 and 11 U.S.C. § 330(a), the court authorizes compensation for G&S in the amount of a $1,200.00 flat fee, payable as a chapter 7 administrative expense upon completion of the tasks for which employment is authorized. Except as so ordered, the motion is denied.

The court finds that G&S is a disinterested person as that term is defined in 11 U.S.C. § 101(14). As set forth in the motion, the approved fees are reasonable compensation for actual, necessary and beneficial services to be performed.

The court will issue a minute order.

12. 13-31427-B-7 TROY MADEIROS — MOTION TO DISMISS CASE — 11-26-13 [20]
UST-1

Tentative Ruling: The debtor's written opposition is overruled. The motion is granted. The bankruptcy case is dismissed pursuant to 11 U.S.C. § 707(a) and (b)(1).

The United States trustee (the "UST") seeks dismissal of this case for cause pursuant to 11 U.S.C. § 707(a). The UST argues that the debtor is unjustifiedly refusal to complete Official Form 22A based on the assertion that his debts, the majority of which are medical debts, are not primarily consumer debts. The UST argues that this refusal constitutes an unreasonable delay that is prejudicial to creditors pursuant to 11 U.S.C. § 707(a)(1) and a failure to file information required by 11 U.S.C. § 521(a)(1), pursuant to 11 U.S.C. § 707(a)(3). The UST also argues that the totality of the debtor's financial

circumstances demonstrates abuse, pursuant to 11 U.S.C. § 707(b)(3). In opposition, the debtor argues that his medical debts are not consumer debts because they are akin to tax debts.

As an initial matter, the court finds that the motion was filed timely. This motion is brought in part under 11 U.S.C. § 707(a), seeking dismissal for cause. It is not based on a presumption of abuse which arises after an analysis of Form 22A. See In re Adolph, 441 B.R. 909, 914 n.3 (Bankr. N.D. Ill. 2011) ("Under the Rules, there is a time limit to seek dismissal under section 707(b) but no time limit to seek dismissal under section 707(a)."). It is also brought in part under 11 U.S.C. § 707(b)(1), seeking dismissal for abuse based on 11 U.S.C. § 707(b)(3); such a motion may be filed within sixty days after the first date set for the meeting of creditors. In this case, the meeting of creditors was first set for October 7, 2013. This motion was timely filed fifty days after October 7, 2013.

As for the merits of the UST's request for dismissal pursuant to 11 U.S.C. § 707(a), the court agrees with the UST that the debtor's medical debts are "consumer debts" as that term is defined in 11 U.S.C. § 101(8). Section 101(8) does not distinguish between debts which are voluntarily or involuntarily incurred. Thus, although the medical debts in this case were incurred for life-saving medical treatment for the debtor's non-filing spouse, they are "debts incurred by an individual primarily for a personal, family or household use." The UST has cited several authorities which stand for the proposition that medical debts are properly treated as consumer debts for the purposes of the Bankruptcy Code. See, e.g., In re Morse, 164 B.R. 651, 653 (Bankr. E.D. Wash. 1994) ("[T]he medical debts are personal expenses. Since the credit card debt and the medical expenses comprise 70% of Debtors' scheduled obligations, the UST has established the first element for a § 707(b) determination of substantial abuse."); In re Smith, 1995 WL 20345, at *1 (Bankr. D. Idaho Jan. 11, 1995) ("Medical expenses are consumer debt."); In re Thompson, 457 B.R. 872, 875 (Bankr. M.D. Fla. 2011) ("Debtors' debts are primarily consumer debts consisting of … medical bills ….") (§ 707(b)); In re Perkins, 304 B.R. 477, 481-482 (Bankr. N.D. Ala. 2004) ("The post-petition claims filed in the present case were incurred by the Debtors for the medical treatment of their minor daughter. Thus, the Debts are consumer debts under § 101(8), as they were incurred by the individual debtors for a family purpose.") (§ 1305); In re Traub, 140 B.R. 286, 289 (Bankr. D. N.M. 1992) ("Dr. Leech is owed $336.57 for medical services he rendered to Ms. Traub. This is clearly a consumer debt incurred for personal or family reasons.").

The court does not agree with the debtor that the medical debts can be analogized to tax debts. The medical debts were not incurred for a public purpose; the treatment received by the debtor's spouse, for which the debtor is obligated, was for the personal and family purpose of saving her life. The fact that federal legislation may require hospitals to render treatment to the debtor's spouse does not transform the debt into a debt incurred for a public purpose. The debtor has cited no authority which supports his argument, other than an American Bankruptcy Institute article which cites In re Westberry, 215 F.3d 589 (6th Cir. 2000). Westberry, however, only identifies material distinctions between income tax debt and consumer debt. Westberry does not stand for the proposition that medical debts have the characteristics of tax debts.

Because the debtor's medical debts are consumer debts, the debtor

improperly completed Form 22A when he indicated on line 1B that his debts were not primarily consumer debts. The debtor must complete Form 22A in full. His unjustified refusal to do so constitutes an unreasonable delay prejudicial to creditors and cause to dismiss the case pursuant to 11 U.S.C. § 707(a).

As to the merits of the UST's request for dismissal pursuant to 11 U.S.C. § 707(b)(1) for abuse, the court agrees with the UST that the totality of the debtor's financial circumstances demonstrate abuse in this case for the purposes of 11 U.S.C. § 707(b)(3), for the reasons stated in the motion. Specifically, the debtor's voluntary 401(k) contribution of $858.33 is not reasonably necessary for the debtor's maintenance or support. As stated by the Ninth Circuit Bankruptcy Appellate Panel in In re Ng, 477 B.R. 118, 126 (9th Cir. BAP 2012):

> No guidance is provided in § 707(b)(3)(B) as to the factors a bankruptcy court should consider in evaluating a request for dismissal of a bankruptcy case for abuse under the totality of the circumstances, other than that those circumstances should relate to "the debtor's financial situation." While BAPCPA changed the standard for dismissal in this context from "substantial abuse" to "abuse," in analyzing the new § 707(b) the courts have recognized that it is "best understood as a codification of pre-BAPCPA case law and, as such, pre-BAPCPA case law is still applicable when determining whether to dismiss a case for abuse." In re Clark, 2012 WL 1309549 *1-2, 2012 Bankr.LEXIS 1639 *4 (Bankr.N.D.Cal.2012)(quoting In re Stewart, 383 B.R. 429, 432 (Bankr.N.D.Ohio 2008)); In re Stewart, 410 B.R. 912, 922 (Bankr.D.Or.2009). These bankruptcy courts, and the bankruptcy court in this appeal, have therefore continued to apply the non-exclusive list of factors to be considered when evaluating the totality of the circumstances identified for use under pre-BAPCPA Code provisions in In re Price:
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> > (1) Whether the debtor has a likelihood of sufficient future income to fund a Chapter 11, 12, or 13 plan which would pay a substantial portion of the unsecured claims; Whether the debtor's petition was filed as a consequence of illness, disability, unemployment, or some other calamity; (3) Whether the schedules suggest the debtor obtained cash advancements and consumer goods on credit exceeding his or her ability to repay them; (4) Whether the debtor's proposed family budget is excessive or extravagant; (5) Whether the debtor's statement of income and expenses is misrepresentative of the debtor's financial condition; and (6) Whether the debtor has engaged in eve-of-bankruptcy purchases.
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> 353 F.3d at 1139-40. Although the Ninth Circuit indicated that this list was non-exclusive, it also held that:
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> > The primary factor defining substantial abuse is the debtor's ability to pay his debts as determined by the ability to fund a Chapter 13 plan. Thus, we have concluded that a "debtor's ability to pay his debts will, standing alone, justify a section 707(b) dismissal."
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> Id. at 1140 (quoting In re Kelly, 841 F.2d 908, 914 (9th Cir.1988)); see also Reed v. Anderson (In re Reed), 422 B.R. 214, 233

(Bankr.C.D.Cal.2009)(debtor's ability to pay constitutes abuse under totality of the circumstances test of § 707(b)(3)(B) even if debtor passes the means test of § 707(b)(2)).

In re Ng, 477 B.R. 118, 126 (9th Cir. BAP 2012).

With respect to retirement contributions, bankruptcy courts have discretion to determine whether retirement contributions are a reasonably necessary expense for a particular debtor, based on the specific facts of each individual case. Hebbring v. U.S. Trustee, 463 F.3d 902 (9th Cir. 2006). "In making this fact-intensive determination, courts should consider a number of factors, including but not limited to: the debtor's age, income, overall budget, expected date of retirement, existing retirement savings, and amount of contributions; the likelihood that stopping contributions will jeopardize the debtor's fresh start by forcing the debtor to make up lost contributions after emerging from bankruptcy; and the needs of the debtor's dependents." Id. at 907.

As the UST argues, in this case, there is no indication that debtor is nearing retirement age. Nor is there any indication that the debtor is planning to retire soon. According to Schedule I, debtor has a parent living in his household who is 58 years old. This suggests that debtor is decades away from retirement himself. The debtor's annual income exceeds $100,000, and his spouse also generates income from a hair-styling business. Without the 401(k) contribution, debtor has the ability to pay creditors $530.92 per month. Over 60 months, that amounts to $31,855.38, or approximately 16.5% of his scheduled non-priority unsecured debt. In light of the foregoing, the court finds that the totality of the debtor's financial circumstances demonstrate abuse in this case and additional grounds for dismissal pursuant to 11 U.S.C. § 707(b)(1).

The court will issue a minute order.

13. 11-49230-B-7 DONOHUE & SONS, INC.
DMW-4

MOTION FOR COMPENSATION FOR WEST AUCTIONS, INC., AUCTIONEER(S), FEES: $648.00, EXPENSES: $825.00
12-5-13 [70]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the application is approved on a first and final basis in the amount of $648.00 in fees and $825.00 in costs, for a total of $1473.00, payable as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

By order entered on February 27, 2012 (Dkt. 15), the court authorized the chapter 7 trustee to retain the applicant as auctioneer for the chapter 7 trustee in this case. The applicant now seeks compensation for services rendered and costs incurred in connection with a sale at auction of personal property of the estate on March 29, 2012. As set forth in the application, the approved fees are reasonable compensation for actual,

necessary and beneficial services.

The court will issue a minute order.

14. 11-49230-B-7 DMW-5 — DONOHUE & SONS, INC. — MOTION FOR COMPENSATION FOR ZEZOFF, YUEN AND CO., ACCOUNTANT(S), FEES: $1,500.00, EXPENSES: $0.00
12-10-13 [75]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. The application is approved on a first and final basis in the amount of $1,500.00 in fees and $0.00 in expenses, for a total of $1,500.00, payable as a chapter 7 administrative expense. The order approving the applicant's employment, entered on October 15, 2013, is amended to specify an effective date of employment for the applicant of September 5, 2013. Except as so ordered, the motion is denied.

Applicant seeks compensation for services rendered and costs incurred during the period of September 5, 2013 through and including September 13, 2013. By order entered on October 15, 2013 (the "Employment Order")(Dkt. 69), the court authorized the trustee to retain the applicant as accountants for the estate. No earlier effective date of employment was specified in the Employment Order, so the applicant's employment was effective as of October 15, 2013. This department does not approve compensation for work prior to the effective date of a professional's employment. DeRonde v. Shirley (In re Shirley), 134 B.R. 930, 943-944 (B.A.P. 9th Cir. 1992). However, the court construes the present application as requesting an effective date in the order approving the applicant's employment retroactive to September 5, 2013, the first date on which services were rendered, according to the invoices. The request for an earlier effective date is granted. Due to the administrative requirements for obtaining court approval of professional employment, this department allows in an order approving a professional's employment to state an effective date that is not more than thirty (30) days prior to the filing date of the employment application without a detailed showing of compliance with the requirements of In re THC Financial Corp, 837 F.2d 389 (9th Cir. 1988)(extraordinary or exceptional circumstances to justify retroactive employment). Here, the employment application was filed on September 12, 2013, only seven days after services were first rendered.

As set forth in the application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

The trustee shall submit an order entitled "Amended Order on Ex Parte Application to Employ Accountant for Trustee and Estate" which is identical to the order at Dkt. 15, but which includes an additional provision stating that the effective date of employment is September 5, 2013. Upon entry of the amended employment order, the court will issue a minute order granting the motion for approval of compensation.

15. 13-35137-B-7 LINDA NEEL
ALF-1

MOTION TO COMPEL ABANDONMENT
12-27-13 [10]

Tentative Ruling: The motion is continued to February 11, 2014, at 9:32 a.m.

As the personal property for which the debtor seeks abandonment (the "Property") is alleged to be of inconsequential value and benefit to the estate solely due to the fact that the Property is claimed as exempt, the court continues the motion to a date after the period for objecting to the debtors' claims of exemption pursuant to Fed. R. Bankr. P. 4003(b)(1) has expired.

The court will issue a minute order.

16. 12-24939-B-7 KARINA URENA
UST-2

CONTINUED MOTION FOR ASSESSMENT OF FINES AGAINST, AND FOR FORFEITURE OF FEES BY, DONNA L. CARDOZA
8-16-13 [28]

Tentative Ruling: None.

17. 13-20644-B-7 PERRY YUEN
DNL-4

MOTION FOR AUTHORITY TO OPERATE BUSINESS
12-19-13 [383]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

18. 07-21846-B-7 DANA ANDREWS
BLL-15

MOTION FOR COMPENSATION FOR GEORGE M. LEWELLEN, ACCOUNTANT(S), FEES: $1,025.00, EXPENSES: $0.00
12-17-13 [282]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11

U.S.C. § 330 and Fed. R. Bankr. P. 2016, the application is approved on an interim basis in the amount of $1025.00 in fees and $0.00 in costs, for a total of $1025.00, for the period September 18, 2012, through and including April 4, 2013, payable as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

By order entered on January 24, 2012 (Dkt. 220), the court authorized the chapter 7 trustee to retain the applicant as accountant for the estate in this case, with an effective date of employment of December 12, 2011. The applicant now seeks compensation for services rendered and costs incurred during the period September 18, 2012, through and including April 4, 2013. As set forth in the application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

19. 07-21846-B-7 BLL-16 — DANA ANDREWS — MOTION FOR COMPENSATION FOR BYRON LEE LYNCH, TRUSTEE'S ATTORNEY(S), FEES: $1,687.16, EXPENSES: $0.00
12-17-13 [277]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the application is approved on an interim basis in the amount of $0.00 in fees and $1687.16 in costs, for a total of $1687.16, for costs advanced by the applicant during the period June 18, 2012, through and including October 28, 2013, payable as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

By order entered on September 19, 2008 (Dkt. 191), the court authorized the chapter 7 trustee to retain the applicant as counsel for the estate in this case. The applicant now seeks compensation for services rendered and costs incurred during the period June 18, 2012, through and including October 28, 2013. As set forth in the application, the approved costs are reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

20. 13-24145-B-7 CAH-1 — THE CALIFORNIA HOSPITALIST PHYSICIANS, — OBJECTION TO CLAIM OF DAMERON HOSPITAL ASSOCIATION, CLAIM NUMBER 4
11-12-13 [51]

Tentative Ruling: The opposition filed by Dameron Hospital Association ("Dameron") is sustained. The objection is overruled.

The debtor objects to claim no. 4-1 on the court's claims register (the

"Claim"), filed by Dameron in the amount of $96,261.19. The full amount of the claim is claimed as secured. The debtor requests that the court disallow $7,400.68 of the Claim and allow it in the amount of $88,860.51.

A proof of claim executed and filed in accordance with the Federal Rules of Bankruptcy Procedure ("FRBP") constitutes prima facie evidence of the validity and amount of a claim. FRBP 3001(f). However, when an objection is made and that objection is supported by evidence sufficient to rebut the prima facie evidence of the proof of claim, then the burden is on the creditor to prove the claim. Litton Loan Servicing, LP v. Garvida (In re Garvida), 347 B.R. 697 (9th Cir. BAP 2006). In many cases, however, simply presenting evidence in an objection that the Claim is not prima facie valid is insufficient to invalidate the Claim. See Heath v. American Express Travel Related Services Co., et al. (In re Heath), 331 B.R. 424, 434-35 (9th Cir. BAP 2005).

In this case, the Claim is not entitled to prima facie validity. The Claim was filed with a statement itemizing interest and charges (Claim 4-1, Attachment 1), but the statement bears no relation to the filed amount of the Claim. The Claim does not comply with Fed. R. Bankr. P. 3001(c)(2)(A).

However, the fact that the Claim is not prima facie valid does not justify disallowance of the Claim in any amount in this instance. The court does not agree with the debtor's assertion in the supporting declaration of Otashe Golden, the debtor's principal, that "Dameron included $330,000.00 of unsecured debt as secured in its Proof of Claim . . . and other debt belonging to California Primary Medical Group, Inc." This assertion is belied by the filed amount of the Claim itself, which is $96,291.19. The debtor acknowledges that the foregoing amount is the "filed amount" of the Claim elsewhere in the objection. What the debtor has not provided is any evidence which supports its request for disallowance of $7,400.68 of the Claim. The only basis that the court can discern for this request is that the debtor seeks to have the filed Claim reflect the scheduled amount of the debt in its Schedules. Without more, that is insufficient to justify the relief sought by the debtor. Accordingly, the objection is overruled.

The court will issue a minute order.

21.	13-24145-B-7 DMW-3	THE CALIFORNIA HOSPITALIST PHYSICIANS,	MOTION TO EMPLOY DANIELLE HARDCASTLE AS REALTOR(S) 12-4-13 [61]

Tentative Ruling: The opposition filed by Dameron Hospital Association ("Dameron") is overruled. The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. §§ 327(a) and 328(a) and Bankruptcy Rule 2014, the debtor is authorized to employ Danielle Hardcastle ("Hardcastle") as real estate agent for the bankruptcy estate on the terms set forth in the motion. Hardcastle's fees and costs, if any, shall be paid only pursuant to application. 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016. Except as so ordered, the motion is denied.

The court finds that Hardcastle is a disinterested person as that term is

defined in 11 U.S.C. § 101(14).

Dameron's opposition makes no showing that Hardcastle is not qualified to undertake the employment contemplated by the motion, or that she is not disinterested. The court acknowledges that Dameron disputes the debtor's assertion of title in the real property which the trustee contemplates employing Hardcastle to market and sell, but the instant motion is not a motion to sell the real property, nor is it an action for a determination of ownership of the property or the extent, priority and validity of Dameron's asserted lien. In addition, Dameron's concern that estate resources will be unnecessarily wasted by employing Hardcastle is unfounded; as set forth in the motion, Hardcastle's compensation will be based on a commission from the proceeds of the sale of the real property, when and if it is sold.

Nothing in this ruling shall be construed as a finding that the real property located at 843-845 North Lincoln Street, Stockton, California, or any interest herein is property of the estate.

The court will issue a minute order.

22. 10-37129-B-11 CAPITOL PROPERTIES, LLC
WSS-6

CONTINUED MOTION FOR COMPENSATION FOR W. STEVEN SHUMWAY, DEBTOR'S ATTORNEY(S), FEES: $135,275.00, EXPENSES: $0.00
10-24-13 [581]

Tentative Ruling: The motion is granted in part. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the court approves on an interim basis mpensation for the applicant, counsel to the debtor, in the amount of $125,712.50 in fees and $0.00 in costs, for a total of $125,712.50, for services rendered during the period July 18, 2010, through and including September 11, 2013. The allowed fees and costs shall be paid as an administrative expense pursuant to the terms of the chapter 11 plan confirmed by order entered June 11, 2013 (Dkt. 560). Except as so ordered, the motion is denied.

On June 30, 2010, the debtor commenced the bankruptcy case by filing a voluntary petition under Chapter 11. By order entered August 27, 2010 (Dkt. 63), the court granted the debtor's request to employ the applicant as general bankruptcy counsel. The applicant now seeks approval of fees and costs for the period February 26, 2010, through and including September 11, 2013, in the total amount of $135,275.00 in fees.

The court disallows $9562.50 in fees for services rendered prior to July 18, 2010. The order approving the applicant's employment does not specify an effective date of employment, and therefore the effective date of applicant's employment is the date of the entry of the order, August 27, 2010. Due to the administrative requirements for obtaining court approval of professional employment, this department allows in an order approving a professional's employment an effective date that is not more than thirty (30) days prior to the filing date of the employment application without a detailed showing of compliance with the

requirements of In re THC Financial Corp, 837 F.2d 389 (9th Cir. 1988)(extraordinary or exceptional circumstances to justify retroactive employment). In this case, the court construes the motion as requesting an effective date of employment of February 26, 2010, the date on which the applicant first rendered services to the debtor has indicated on the filed billing statement. The court grants that request in part and grants the applicant an effective date of employment of July 18, 2010, 30 days before the date of the filing of the applicant's employment application on August 17, 2010. The court does not grant an effective date of employment earlier than July 18, 2010, as the applicant has shown no evidence of extraordinary or exceptional circumstances justifying an earlier date. This department does not approve compensation for work prior to the effective date of a professional's employment. DeRonde v. Shirley (In re Shirley), 134 B.R. 930, 943-944 (B.A.P. 9th Cir. 1992). Therefore, the court disallows the applicant's request for approval of compensation for services rendered prior to July 18, 2010.

The court finds, in the absence of an objection from any party in interest, that the approved fees and costs are reasonable compensation for actual and necessary services.

The applicant shall submit an amended form of employment order which is identical to the employment order entered on August 27, 2010, but which shall in addition specify an effective date of employment of July 18, 2010. Upon entry of the amended employment order, the court will issue a minute order granting the motion as set forth above.

23. 13-28253-B-7 JUDITH TEICHMER
BHS-1

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH JUDITH ANN TEICHMER
12-16-13 [34]

Tentative Ruling: The motion is granted. Pursuant to Fed. R. Bankr. P. 9019, the trustee is authorized to enter into the Settlement and Release Agreement (the "Agreement") filed as Exhibit "A" to the motion (Dkt. 37 at 2). Pursuant to 11 U.S.C. § 363(b) and the Agreement the trustee is also authorized to sell the estate's interest in the debtor's claims alleged in Teichmer v. Advanced Towing and Recycling, Nevada County Superior Court case number CU13-079348 to Catlin Specialty Insurance, on behalf of Advanced Towing and Recycling ("Advanced") for $5,000.00. The trustee is authorized to execute all documents necessary to complete the approved sale. The fourteen-day period specified in Fed. R. Bankr. P. 6004(h) is waived. Except as so ordered, the motion is denied.

The court has great latitude in approving compromise agreements. In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988). The court is required to consider all factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Protective Committee For Independent Stockholders Of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968). The court will not simply approve a compromise proffered by a party without proper and sufficient evidence supporting the compromise, even in the absence of objections.

As to the compromise, the chapter 7 trustee alleges without dispute that the Agreement is fair and equitable. The court finds that the compromise is a reasonable exercise of the trustee's business judgment. In re Rake, 363 B.R. 146, 152 (Bankr. D. Idaho 2006). Accordingly, the court finds that the trustee has carried his burden of persuading the court that the proposed compromise is fair and equitable, and the motion is granted.

The sale will be subject to overbidding on terms approved by the court at the hearing.

As to the sale, the trustee has made no request for a finding of good faith under 11 U.S.C. § 363(m), and the court makes no such finding.

Counsel for the chapter 7 trustee shall submit an order that conforms to the foregoing ruling.

24. 13-28253-B-7 JUDITH TEICHMER
BHS-2

MOTION TO EMPLOY BARRY H. SPITZER AS ATTORNEY(S) AND/OR MOTION FOR COMPENSATION FOR BARRY H. SPITZER, TRUSTEE'S ATTORNEY(S), FEES: $1,500.00, EXPENSES: $0.00
12-16-13 [40]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. §§ 327(a) and 328(a) and Fed. R. Bankr. P. 2014, the chapter 7 trustee is authorized to employ the Law Office of Barry H. Spitzer ("Spitzer"), as counsel for the estate, on the terms and for the purposes set forth in the motion. Pursuant to Fed. R. Bankr. P. 2016 and 11 U.S.C. § 330(a), the court authorizes compensation for G&S in the amount of a $1,500.00 flat fee, payable as a chapter 7 administrative expense upon completion of the tasks for which employment is authorized. Except as so ordered, the motion is denied.

The court finds that Spitzer is a disinterested person as that term is defined in 11 U.S.C. § 101(14). As set forth in the motion, the approved fees are reasonable compensation for actual, necessary and beneficial services to be performed.

The court will issue a minute order.

25. 11-46060-B-7 LAURA HIMES — CONTINUED MOTION FOR RELIEF FROM JUDGMENT
12-2046 LEH-2 — 10-22-13 [66]
ORTEGA ET AL V. HIMES

Tentative Ruling: The motion is dismissed without prejudice.

This matter continued from December 17, 2013, at 9:32 a.m. to allow the court to review the certificate of service filed by the movant, defendant debtor Laura Himes, on December 17, 2013 (Dkt. 75).

The court has reviewed the certificate of service, and finds that it does not show effective service of this contested matter on the plaintiffs to this adversary proceeding. The certificate of service indicates that the motion was served "via a notice of electronic filing." The certificate of service states that the "document will be served by the court's CM/ECF system via NEF and hyperlink to the document(s) upon all participants who are registered CM/ECF users in this case. The proof of service is accompanied by a printout from the court's roster of users consenting to service by electronic means, which indicates that the plaintiffs' counsel in this adversary proceeding consents to electronic service.

However, service of a contest motion such as this "via NEF" is not permitted in this district. LBR 7005-1(d)(1) requires that service by electronic means upon parties consenting to such service shall be accomplished "by transmitting an email which includes as a PDF attachment the document(s) served. The subject line of the email shall include the words 'Service pursuant to Fed. R. Civ. P. 5,' and the first text line of the email shall include the case or proceeding name and number and title(s) of the document(s) served." LBR 7005-1(d)(1). There is no evidence that service was accomplished in the foregoing manner in this case. Therefore, the motion is dismissed without prejudice.

The court will issue a minute order.

26. 11-46760-B-7 BRIAN/RANDI THIEL — MOTION TO DISMISS RANDI THIEL
12-2284 DNL-2 — 12-17-13 [78]
DIDRIKSEN V. THIEL ET AL

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted. Pursuant to Fed. R. Bankr. P. 7041, incorporating Fed. R. Civ. P. 41(a)(2), the adversary proceeding is dismissed as to defendant Randi Thiel.

The court will issue a minute order.

27. 09-21751-B-13 KRISTINE BOWEN
13-2328 PGM-1
FEUTZ ET AL V. BOWEN

MOTION TO DISMISS ADVERSARY PROCEEDING
11-25-13 [11]

Tentative Ruling: The motion is granted in part. Defendant Kristine Lea Bowen (the "Defendant")'s motion to dismiss plaintiffs Thomas Feutz and Richard Gregory Eyherhalde (collective, the "Plaintiffs") first claim under 11 U.S.C. § 523(a)(3)(B) is denied. Defendant's motion to dismiss Plaintiffs' second claim under 11 U.S.C. § 523(a)(4) is granted, and the second claim is dismissed pursuant to Fed. R. Bankr. P. 7012, incorporating Fed. R. Civ. P. 12(b)(6) with leave given to the Plaintiffs to amend. On or before February 4, 2014, the Plaintiffs shall file and serve on the Defendant, consistent with the requirements of Fed. R. Bankr. P. 7004, a first amended complaint which amends the claim brought under 11 U.S.C. § 523(a)(4). Nothing in this ruling grants leave to amend to add additional parties or additional claims. If the Plaintiffs do not file and serve a compliant first amended complaint on or before February 4, 2014, the Defendant may submit a proposed order dismissing the second claim in the complaint filed October 25, 2013 (Dkt. 1) (the "Adversary Complaint") without leave to amend. Defendant shall respond to the Adversary Complaint or the first amended complaint by the later of the time allowed by Fed. R. Bankr. P. 7015, incorporating Fed. R. Civ. P. 15(a)(3) or February 21, 2014. Except as so ordered, the motion is denied.

Background

The facts alleged in the Adversary Complaint include the following. On or about March 22, 2000, the Defendant was convicted in Napa County Superior Court of embezzling from her former employer, Marathon Distributors ("Marathon"), a sum of no less than $77,275.33. On or about August 10, 2000, Napa County Superior Court entered an Order for Restitution to Crime Victim, ordering Defendant to pay Marathon the sum of $77,275.33 plus interest of ten percent per annum. On or about October 18, 2005, Napa County Superior Court converted the Order for Restitution to Crime Victim to a civil judgment. On or about June 30, 2010, Marathon filed an Application for and Renewal of Judgment showing a total indebtedness of $104,326.71. Finally, on or about February 23, 2013, Marathon assigned the civil judgment to the Plaintiffs, which the Plaintiffs recorded that same day in Solano County.

The Adversary Complaint further alleges that the Defendant has filed two chapter 13 bankruptcy cases since she was convicted of embezzlement. The first case, case no. 05-33854, was filed on October 3, 2005 (the "2005 Case") and dismissed on December 8, 2008 for failure to make payments under a confirmed chapter 13 plan. The second case is the Defendant's current parent chapter 13 case, case no. 09-21751, filed on February 2, 2009 (the "Current Case"). The Adversary Complaint contends that neither the Plaintiffs nor their predecessor-in-interest, Marathon, were ever given notice of the 2005 Case at any time while it was pending. Furthermore, neither Marathon nor the Plaintiffs were ever added to the creditors' matrix or schedules in the 2005 Case. Finally, the Adversary Complaint asserts that neither Marathon nor the Plaintiffs were given notice of the Current Case at any point prior to July 17, 2013, when the

parties were negotiating a settlement of the current dispute.

As a result of these factual allegations, the Adversary Complaint asserts that neither Marathon nor the Plaintiffs were listed or scheduled under 11 U.S.C. § 521(a)(1) in time to permit the timely filing of a proof of claim and timely request for determination of dischargeability of such debt under 11 U.S.C. § 523(a)(4). Furthermore, because the Defendant was convicted of embezzlement in Napa County Superior Court on March 22, 2000, the Adversary Complaint requests that the resulting civil judgment in the amount of $104,326.71 be deemed non-dischargeable pursuant to 11 U.S.C. § 523(a)(4).

The Defendant's motion to dismiss the Adversary Complaint pursuant to Fed. R. Civ. P. 12(b)(6) alleges that the Plaintiffs' claim under 11 U.S.C. § 523(a)(3)(B) fails to state a claim because (1) the Defendant's attorney gave the Plaintiffs notice of the filing of the Current Case; (2) the Defendant timely filed a proof of claim on behalf of the Plaintiffs in the Current Case; and (3) the elements of 11 U.S.C. § 523(a)(3)(B) have not been pled. Further, the Defendant's motion to dismiss alleges that the Plaintiffs' claim under 11 U.S.C. § 523(a)(4) fails to state a claim because (1) the deadline to file such a complaint has already expired; and (2) the elements of 11 U.S.C. § 523(a)(4) have not been pled.

Legal Standard

The following sets forth the legal standard for evaluating whether a complaint states a claim upon which relief may be granted:

> The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable here under Fed. R. Bankr. P. 7012, is to test the legal sufficiency of a plaintiff's claims for relief. In determining whether a plaintiff has advanced potentially viable claims, the complaint is to be construed in a light most favorable to the plaintiff and its allegations taken as true. Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Church of Scientology of Cal. v. Flynn, 744 F.2d 694, 696 (9th Cir.1984).

Quad-Cities Constr., Inc. v. Advanta Bus. Servs. Corp. (In re Quad-Cities Constr., Inc.), 254 B.R. 459, 465 (Bankr. D. Idaho 2000).

Under the Supreme Court's most recent formulation of Rule 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." Ashcroft v. Iqbal,129 S .Ct 1937, 1954 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955, 1964-66 (2007) ("[A] plaintiff's obligation to provide 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do'"). Factual allegations must be enough to raise a right to relief above the speculative level. Id., citing 5 C. Wright & A. Miller, Fed. Practice and Procedure § 1216, at 235-36 (3d ed. 2004) ("[T]he pleading must contain something more...than...a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"). Furthermore:

> A dismissal under Rule 12(b)(6) may be based on the lack of cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001); Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir. 1988)...the Court is not required 'to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.' Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). Courts will not 'assume the truth of legal conclusions merely because they are cast in the form of factual allegations.' Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003); accord W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Furthermore, courts will not assume that plaintiffs 'can prove facts which [they have] not alleged, or that the defendants have violated . . . laws in ways that have not been alleged.' Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983).

Toscano v. Ameriquest Mortg. Co., 2007 U.S. Dist. LEXIS 81884 (E.D. Cal. 2007).

If a complaint is dismissed under Rule 12(b)(6), "[the] court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc), citing Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995). In other words, the court is not required to grant leave to amend when an amendment would be futile. Toscano, 2007 U.S. Dist. LEXIS 81884 (citing Gompper v. VISX, Inc., 298 F.3d 893, 898 (9th Cir. 2002)).

Considering the foregoing, the Court will address each claim in turn.

Count One: "Lack of Notice" Pursuant to 11 U.S.C. § 523(a)(3)(B)

11 U.S.C. § 523(a)(3) excepts from discharge any debt "neither listed nor scheduled under section 521(a)(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit-...(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request." 11 U.S.C. § 523(a)(3)(B).

The court finds that the Adversary Complaint has set forth enough factual matter to establish a plausible claim under 11 U.S.C. § 523(a)(3)(B) and that the statutory elements of the claim have been sufficiently pled. The Plaintiffs contend in both the Adversary Complaint and their opposition to the motion to dismiss (Dkt. 16) that the Defendant has provided notice of both the 2005 case and the Current Case to County of Napa c/o Robert Abernathy, but never to either them or Marathon. Paragraph 5 of the Adversary Complaint states that "Neither the Creditor Matrix nor the Schedules filed in Case No. 05-33854 listed Marathon Distributors, nor was any notice provided to Marathon Distributors of the pendency of that bankruptcy case, and Marathon Distributors did not learn of the bankruptcy case while it was pending." (Dkt. 1, p.2-3). Paragraph 9 of the Adversary Complaint clearly states that "Neither the Creditor Matrix nor the Scheduled filed in this Chapter 13 case list

Marathon Distributors." (Dkt. 1, p.3). Furthermore, Paragraphs 11 and 12 of the Adversary Complaint allege that Marathon did not have notice of the Current Case on June 30, 2010 when it filed an Application for and Renewal of Judgment, or on February 23, 2013 when it assigned the civil judgment to the Plaintiffs (Dkt. 1, p.3). In fact, the Adversary Complaint at Paragraph 13 alleges that the first time that the Plaintiffs received notice of the Current Case was sometime between July 17, 2013 and August 28, 2013 when the parties were attempting to resolve this dispute (Dkt. 1, p.3). Furthermore, written notice of the Current Case was allegedly first provided to the Plaintiffs on October 7, 2013 when they were served with a motion to avoid their judicial lien in the Current Case (Dkt. 1, p.4). The Defendant alleges in her Memorandum of Points and Authorities (Dkt. 13) (the "Memo") that the Plaintiffs received disbursements from the chapter 13 trustee in the 2005 Case totaling $12,097.14 and that the Defendant provided the Plaintiffs with notice of the Current Case to the same address where those payments were sent.

The court recognizes that both parties seek to add more specificity or additional facts to those alleged in the Adversary Complaint. However, as noted above the purpose of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is to test the adequacy of the allegations set forth in the Adversary Complaint and determine whether those particular facts create plausible grounds for the relief sought in the Adversary Complaint. In that respect, the court is constrained to the factual allegations set forth in the Adversary Complaint. The evidence presented in the motion to dismiss, the Memo, the Plaintiffs' opposition (Dkt. 16), and the Defendant's reply (Dkt. 19) can only lend support to facts already alleged and cannot add allegations of fact not already alleged in the Adversary Complaint.

The Defendant contends that the Adversary Complaint fails to sufficiently plead the statutory elements of 11 U.S.C. § 523(a)(3)(B), but she fails to identify which statutory elements, if any, are missing.

Based on the foregoing, and construing the factual allegations set forth in the Adversary Complaint in the light most favorable to the Plaintiffs, the court finds that the Adversary Complaint pleads a plausible claim for relief under 11 U.S.C. § 523(a)(3)(B) and the motion to dismiss is denied as to this claim.

Count Two: "Embezzlement" Pursuant to 11 U.S.C. § 523(a)(4)

11 U.S.C. § 523(a)(4) excepts from discharge any debt "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), "embezzlement" is defined under federal law. Under 11 U.S.C. § 523(a)(4), embezzlement "requires three elements: (1) property rightfully in the possession of a nonowner; (2) a nonowner's appropriation of the property to a use other than which [it] was entrusted; and (3) circumstances indicating fraud." In re Shahverdi, 2013 WL 2466862, slip op. at 13 (9th Cir. BAP 2013). "Embezzlement" creates a non-dischargeable debt under 11 U.S.C. § 523(a)(4) "whether or not committed by someone acting in a fiduciary capacity." In re Pemstein, 492 B.R. 274, 282 (9th Cir. BAP 2013). As the Supreme Court noted in its recent decision in Bullock v. BankChampaign, N.A., 133 S.Ct. 1754 (May 13, 2013):

> [D]ebts created by 'fraud' are associated directly with debts created by 'embezzlement.' Such association justifies, if it does not imperatively require, the conclusion that the 'fraud' referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality.

Bullock, 133 S.Ct. at 1759 (citing Neal v. Clark, 95 U.S. 704, 709 (1878)).

The court finds that the Adversary Complaint fails to sufficiently plead the facts necessary to establish that the Defendant committed embezzlement under the standard set forth in Bullock. The Adversary Complaint argues that the Defendant was convicted of embezzlement in state court and was ordered to pay restitution to Marathon, which was later converted to a civil judgment and assigned from Marathon to the Plaintiffs. As a result, the court should find that the debt allegedly owed to the Plaintiffs be deemed non-dischargeable under 11 U.S.C. § 523(a)(4) (Dkt. 1, p.4). In essence, the Adversary Complaint is asking the court to make a finding of embezzlement under the Bankruptcy Code simply because the Defendant was convicted of embezzlement in Napa County Superior Court. However, as set forth above, the Supreme Court in Bullock has made clear that embezzlement for the purposes of federal law requires a very specific showing of a "...positive fraud, or fraud in fact, involving moral turpitude or intentional wrong,..." Bullock, 133 S.Ct. at 1759 (citing Neal v. Clark, 95 U.S. 704, 709 (1878)). Simply stating that the Defendant was convicted of embezzlement in state court does not prove embezzlement for the purposes of this proceeding. The Adversary Complaint must allege facts sufficient to prove that the Defendant acted with the requisite *mens rea* and intent to constitute "positive fraud," "moral turpitude," or "intentional" conduct. The Adversary Complaint fails to do so in this instance.

Therefore, the court gives the Plaintiffs leave to amend the Adversary Complaint to allege facts supporting a finding of embezzlement under 11 U.S.C. § 523(a)(4).

The court will issue a minute order.

28. 13-23040-B-11 HERBERT MILLER — MOTION TO RECONSIDER DISMISSAL
GEM-7 OF CASE
12-16-13 [151]
CASE DISMISSED 12/2/13

Tentative Ruling: Creditors JPMorgan Chase Bank, N.A. ("Chase") and CitiMortgage, Inc. ("Citi")'s (collectively, the "Creditors") argument in their oppositions that they were not properly served with the motion is overruled. The Creditors' remaining arguments in their oppositions are sustained. The United States Trustee ("UST")'s arguments in her opposition are sustained. The motion to reconsider the order dismissing the chapter 11 case on December 2, 2013 (Dkt. 146) is denied.

The first objection raised by the Creditors is that, although their attorney was served via first-class mail with the motion, they were not properly served and the motion should therefore be denied. Federal Bankruptcy

Rule 7004(h) states that "service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution" unless one of three exceptions enumerated in Federal Bankruptcy Rule 7004(h)(1)-(3) applies. Fed. R. Bankr. P. 7004(h). Federal Bankruptcy Rule 7004(h)(1) does not require service by certified mail addressed to an officer of the institution if "the institution has appeared by its attorney, in which case the attorney shall be served by first-class mail." Fed. R. Bankr. P. 7004(h)(1). Here, the Creditors' attorney, Gregory P. Campell ("Mr. Campbell"), has appeared on behalf of the Creditors on several matters in this case, including the motion to dismiss which is the subject of this motion. As a result, Federal Bankruptcy Rule 7004(h) only requires service upon Mr. Campbell by first-class mail. The proof of serviced attached to the motion (Dkt. 157) shows that Mr. Campbell was served with the motion via first-class mail. The court finds that the debtor complied with the servicing requirements of Federal Bankruptcy Rule 7004(h) as to the Creditors for the purposes of this motion. The Creditors argue that their individual requests for special notice (Dkts. 28 and 29) did not waive their rights to receive service pursuant to Federal Bankruptcy Rule 7004(h), notwithstanding Mr. Campbell's participation in these proceedings. The court is not persuaded by this argument. The Creditors cite to no authority in support of the proposition that the language in a request for special notice can effectively override Federal Bankruptcy Rule 7004(h)(1). The Creditors' service objection is therefore overruled.

The remaining objections raised by the Creditors and UST are sustained. By this motion the debtor asks the court to reconsider its order dismissing the chapter 11 case. The debtor seeks relief under Fed. R. Civ. P. 60(b)(1), (b)(2), (b)(3), and (b)(6), incorporated by Federal Bankruptcy Rule 9024. However, as the Creditors and UST correctly point out, the motion itself contains no factual allegations in support of granting the debtor relief from the prior order. Instead, the motion sets forth various reasons as to why the motion to dismiss filed October 8, 2013 (Dkt. 135) (the "MTD"), which the debtor filed a response to thirty-four (34) days late (Dkt. 156), should have been denied. The court acknowledges the sworn declarations filed by the debtor (Dkt. 154) and his attorney, Gilbert Maines ("Mr. Maines") (Dkt. 153) (collectively, the "Declarations"). However, the court finds that the Declarations do not contain facts that warrant relief under Federal Bankruptcy Rule 9024. Specifically, the Declarations contend that the debtor failed to timely file a response to the MTD because Mr. Maines went on vacation and left the task to be handled independently by a paralegal. Upon his return, a heavy backlog of work and a lengthy trial in Santa Cruz County Superior Court were apparently sufficient to distract Mr. Maines from filing a response to the MTD. The paralegal also failed, and the response was not timely filed which resulted in dismissal of the chapter 11 case. The debtor contends that these facts warrant a finding of mistake, inadvertence, surprise, or excusable neglect under Fed. R. Civ. P. 60(b)(1). The court disagrees.

Motions for reconsideration relying on inadvertence or excusable neglect are governed by authorities which include, inter alia, the decision of the United States Supreme Court in Pioneer Investment Services, Co. v. New Brunswick Assoc. Ltd. P'ship, 507 U.S. 380 (1993). In Pioneer, the Supreme Court held that a determination of whether neglect which resulted in a late filing was excusable takes account of all relevant

circumstances, including the danger of prejudice to the opposing party, the length of delay and its potential impact on judicial proceedings, reason for delay, including whether it was within reasonable control of the movant and whether the movant acted in good faith. The motion, Declarations, and Memorandum of Points and Authorities (Dkt. 155) (the "Memo") do not address any of the foregoing factors. The court is persuaded by the arguments of the Creditors and the UST and finds that the debtor has failed to show entitlement to relief under Fed. R. Civ. P. 60(b)(1).

In support of a finding of "fraud" on the parts of the Creditors sufficient to warrant relief pursuant to Fed. R. Civ. P. 60(b)(3), the debtor's declaration contends that the Creditors mailed him letters stating that they were no longer the holders of their respective deeds of trust. The debtor claims to have attached the letter from Chase, but no such exhibit is present on the docket. The debtor asserts that a similar letter from Citi exists, but his prior attorney has refused to turn it over. The debtor has provided no evidence in support of these allegations, LBR 9014-1(d)(6), and is not entitled to relief under Fed. R. Civ. P. 60(b)(3).

Finally, the court interprets the discussion of recent repairs to his properties, new rental agreements, and an $82,000.00 debt allegedly owed by Citibank, N.A. as the debtor's attempts to show newly discovered evidence under Fed. R. Civ. P. 60(b)(2). A motion based upon newly discovered evidence must show that: 1) the evidence was discovered after the hearing; 2) the exercise of due diligence would not have resulted in the evidence being discovered at an earlier stage; and 3) the newly discovered evidence is of such magnitude that producing it earlier would likely have changed the outcome of the case. Hasso v. Mozsgai (In re La Sierra Financial Serv., Inc.), 290 B.R. 718, 733 (9th Cir. BAP 2002) (citing Defenders of Wildlife v. Bernal, 204 F.3d 920, 928-29 (9th Cir. 2000)). Importantly, "newly discovered evidence" does not include evidence of post-judgment events or facts. Corex Corporation v. United States, 638 F.2d 119, 121 (9th Cir. 1981), implied overruling on other grounds recognized by Gregorian v. Izvestia, 871 F.2d 1515, 1526 (9th Cir. 1989)("Cases construing 'newly discovered evidence,' either under 60(b)(2) or Rule 59, uniformly hold that evidence of events occurring after the trial is not newly discovered evidence within the meaning of the rules."). The debtor has failed to address the foregoing factors. Therefore, the debtor has failed to show entitlement to relief under Fed. R. Civ. P. 60(b)(2).

Conspicuously absent from the motion and its supporting papers is any explanation as to why the debtor never complied with court's Order After Status Conference (Dkt. 90) (the "Order"), which required the debtor to file a proposed chapter 11 plan and disclosure statement by no later than August 16, 2013. The court notes that the debtor's failure to comply with the Order is among the many reasons cited in its order dismissing the chapter 11 case.

The court will issue a minute order.

29. 09-46575-B-13 ROMAN BANAKH
13-2106 LDD-2
BANAKH V. BANK OF AMERICA, N.A.

AMENDED MOTION FOR ENTRY OF DEFAULT JUDGMENT
11-8-13 [32]

Tentative Ruling: The motion is dismissed without prejudice.

The motion was not properly served. A bankruptcy court lacks jurisdiction over a defendant if the defendant was not served properly under Federal Bankruptcy Rule 7004. See Scott v. United States (In re Scott), No. NV 09-1273-DHPa (9th Cir. BAP June 21, 2010), citing United States v. Levoy (In re Levoy), 182 B.R. 827, 832 (9th Cir. BAP 1995); Harlow v. Palouse Producers, Inc. (In re Harlow Props., Inc.), 56 B.R. 794, 799 (9th Cir. BAP 1985); see also Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc., 840 F.2d 685, 688 (9th Cir. 1988)(applying Fed. R. Civ. P. 4). Federal Bankruptcy Rule 7004 applies in adversary proceedings. Fed. R. Bankr. P. 7004(a).

By this motion plaintiff Roman Banakh (the "Plaintiff") seeks entry of default judgment against defendant Bank of America, N.A. (the "Defendant") in this adversary proceeding. The Defendant, as the party against whom the Plaintiff seeks relief, must be served with the motion in accordance with the rules set forth in Federal Bankruptcy Rule 7004. Federal Bankruptcy Rule 7004(h) requires that an insured depository institution in a contested matter be served via certified mail addressed to an officer of the institution unless one of the three exceptions set forth in Bankruptcy Rule 7004(h)(1)-(3) applies. Fed. R. Bankr. P. 7004(h). Here, the debtor failed to serve the motion pursuant to the general rule nor any of the exceptions contained in Bankruptcy Rule 7004(h). Accordingly, the motion is dismissed without prejudice.

The court will issue a minute order.

30. 13-30139-B-7 DONALD **SCHRAMM**
CAH-2 12-13-13 [22]

MOTION TO DELAY DISCHARGE

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted in part. The debtor's request for delay of entry of discharge in his chapter 7 case is granted, and the date of entry of discharge shall be moved to January 31, 2014. Except as so ordered, the motion is denied.

Federal Bankruptcy Rule 4004(c)(2) allows the court, on motion of the debtor, to "defer entry of an order granting a discharge for 30 days and, on motion within that,...defer entry of the order to a date certain." Fed. R. Bankr. P. 4004(c)(2). The standard for delaying entry of discharge is good cause shown. 9-4004 Collier on Bankruptcy § 4004.04 (16th ed. 2013). Here, the debtor claims to have entered into a permanent loan modification agreement with Citimortgage, Inc. that is contingent upon

court approval of a reaffirmation agreement that the debtor has attached as Exhibit "A" to the motion (Dkt. 25, p.2) (the "Reaffirmation Agreement"). The court finds that this constitutes good cause to delay entry of the debtor's discharge, and the date of entry of discharge is moved to January 31, 2014.

The court neither makes nor implies any conclusion as to whether the Reaffirmation Agreement would be approved. A delay in entry of discharge does not entitle a debtor to approval of a reaffirmation agreement. Additionally, if the deadline to file a reaffirmation agreement pursuant to Federal Bankruptcy Rule 4008(a) has already passed, a delay in entry of discharge does not cure the timeliness defect.

The court will issue a minute order.

31. 13-31642-B-7 SAM RANDO — MOTION TO VALUE COLLATERAL OF UNION BANK
11-18-13 [17]

Tentative Ruling: The motion is dismissed without prejudice.

The motion is dismissed for two reasons. First, the motion was not properly served. A bankruptcy court lacks jurisdiction over a defendant if the defendant was not served properly under Federal Bankruptcy Rule 7004. See Scott v. United States (In re Scott), No. NV 09-1273-DHPa (9th Cir. BAP June 21, 2010), citing United States v. Levoy (In re Levoy), 182 B.R. 827, 832 (9th Cir. BAP 1995); Harlow v. Palouse Producers, Inc. (In re Harlow Props., Inc.), 56 B.R. 794, 799 (9th Cir. BAP 1985); see also Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc., 840 F.2d 685, 688 (9th Cir. 1988)(applying Fed. R. Civ. P. 4). Federal Bankruptcy Rule 7004 applies in contested matters. See Fed. R. Bankr. P. 9014(b).

By this motion the debtor seeks to value the collateral of Union Bank, N.A. ("Union"), holder of a lien secured by the real property located at 2551 Fulton Square #44, Sacramento, CA (the "Property"). As a contested matter under Federal Bankruptcy Rule 9014, Union, as the party against whom the debtor seeks relief, must be served with the motion in accordance with the rules set forth in Federal Bankruptcy Rule 7004. Federal Bankruptcy Rule 7004(h) requires that an insured depository institution in a contested matter be served via certified mail addressed to an officer of the institution unless one of the three exceptions set forth in Bankruptcy Rule 7004(h)(1)-(3) applies. Fed. R. Bankr. P. 7004(h). Here, the debtor failed to serve the motion pursuant to the general rule. Further, none of the exceptions contained in Bankruptcy Rule 7004(h)(1)-(3) apply. Because the court lacks jurisdiction over Union in this instance, it neither makes nor implies any conclusion regarding the merits of Union's opposition (Dkt. 23).

Second, the debtor lacks constitutional standing to bring this motion. By this motion the debtor seeks to fix the amount of Union's secured claim at an amount less than the total value of the claim. This is a form of claim objection. The debtor has not shown that he has constitutional standing to object to claims filed in this chapter 7 case. "Standing is a jurisdictional requirement which is open to review at all

stages of litigation. . . . The burden to establish standing remains with the party claiming that standing exists." Max Recovery v. Than (In re Than), 215 B.R. 430, 434 (9th Cir. BAP 1997). In general, "'debtors only have standing to object to claims where there is 'a sufficient possibility' of a surplus to give them a pecuniary interest.'" Law v. Golden (In re Eisen), 2007 Bankr. LEXIS 4864, at *21, quoting Heath v. Am. Express Travel Related Servs. Co. (In re Heath), 331 B.R. 424, 429 (9th Cir. BAP 2005); see also In re Sandwich Islands Distilling Corp., 2009 Bankr. LEXIS 3692, at *7-8 (Bankr. D. Haw. 2009)(chapter 7 debtor has standing to object to claim only if it retains a pecuniary interest in the estate); Dellamarggio v. B-Line, LLC (In re Barker), 306 B.R. 339, 346 (Bankr. E.D. Cal. 2004)(chapter 7 debtors typically lack standing to object to claims because they have no economic interest in whether the claim is allowed or disallowed). Therefore, in order to prove that he has constitutional standing, the debtor has the burden of proving that he has a pecuniary interest in an amount of the claim, which could occur if the debtor can prove that the estate is solvent or that he has been denied a discharge in this case.

Here, the debtor has shown no evidence that there is a possibility of a distribution of surplus to the debtor. The court notes that the chapter 7 trustee filed a report of no distribution on October 16, 2013, stating that he found no property available for distribution from the estate over and above that exempted by law. In other words, the estate is insolvent and there is no possibility of a surplus distribution to the debtor. Furthermore, the debtor received his discharge on December 18, 2013. As such, the debtor has failed to show that he has constitutional standing to bring this motion under the aforementioned standard.

The court notes that even if the motion were not dismissed for the above reasons, it would be denied for two additional reasons. First, the debtor has failed to show entitlement to the relief requested. "The United States Supreme Court has specifically held that lien-stripping is *not* allowed in chapter 7...in chapter 7, 11 U.S.C. § 506, despite its language, does not allow a debtor to strip a lien that secures an allowed claim under 11 U.S.C. § 502, even 'when the value of the collateral is less than the amount of the claim secured by the lien'...an underlying principle of bankruptcy is that 'a lien on real property pass[es] through [bankruptcy] unaffected.'" In re Akram, 259 B.R. 371, 375 (Bankr. C.D. Cal. 2001) (citing Dewsnup v. Timm, 502 U.S. 410, 417 (1992)).

Second, the debtor has failed to provide any evidence, *i.e.*, a declaration or appraisal, in support of the motion. Local Bankruptcy Rule 9014-1(d)(6) requires that every motion "be accompanied by evidence establishing its factual allegations and demonstrating that the movant is entitled to the relief requested." LBR 9014-1(d)(6). A failure to comply with the requirements of the Local Bankruptcy Rules constitutes grounds to deny the motion. LBR 1001-1(g).

The court will issue a minute order.

32. 13-33459-B-7 SALVADOR/RAFAELA BAUTISTA MOTION TO COMPEL ABANDONMENT
AB-1 11-22-13 [14]

Tentative Ruling: The motion is granted in part. Pursuant to 11 U.S.C. § 554(b), the estate's interest in a 1994 Freightliner Truck Century (the "Property") is deemed abandoned. Except as so ordered, the motion is denied.

The debtors allege without dispute that the Property, after accounting for all encumbrances and claimed exemptions, has no equity available for distribution to creditors. The debtors have proven that the Property is of inconsequential value and benefit to the estate. The chapter 7 trustee has filed a statement of non-opposition to the motion.

The court does not deem abandoned any interest in a business operating under the debtors' names. The debtors state under penalty of perjury on Schedule B (Dkt. 13, p.3) that they have no interest in any incorporated or unincorporated business (Item 13). The court may only deem property of the estate as abandoned; according to the sworn schedules, there is no property of the estate consisting of a business operating under the debtors' names.

The court will issue a minute order.

33. 13-35582-B-7 LATASHA NORMAN MOTION TO COMPEL ABANDONMENT
MJH-1 12-13-13 [8]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Subject to such opposition, the court issues the following abbreviated tentative ruling.

The motion is continued to February 11, 2014, at 9:32 a.m.

As the personal property for which the debtor seeks abandonment (the "Property") is alleged to be of inconsequential value and benefit to the estate solely due to the fact that the Property is claimed as exempt, the court continues the motion to a date after the period for objecting to the debtor's claims of exemption pursuant to Fed. R. Bankr. P. 4003(b)(1) has expired.

The court will issue a minute order.

34. 13-34589-B-7 MIGUEL/VANESSA SOLIS MOTION TO EXTEND AUTOMATIC STAY
MG-2 12-23-13 [16]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Subject to such

opposition, the court issues the following abbreviated tentative ruling.

The motion is denied.

The debtors request an extension of the automatic stay pursuant to 11 U.S.C. § 362(c)(3)(B). However, 11 U.S.C. § 362(c)(3)(B) provides that "...the court may extend the stay...after notice and a hearing completed before the expiration of the 30-day period..." 11 U.S.C. § 362(c)(3)(B). Here, this case was filed on November 14, 2013, and the thirty-day period expired at 12:00 a.m. on December 15, 2013. The hearing on this motion will be completed after the thirty-day period has expired. Accordingly, the motion is denied.

The court will issue a minute order.

35. 13-34499-B-7 TPH-1 — JEAN BOEHM — CONTINUED MOTION TO COMPEL ABANDONMENT — 11-13-13 [5]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Subject to such opposition, the court issues the following abbreviated tentative ruling.

The motion is continued to February 11, 2014, at 9:32 a.m.

As much of the personal property for which the debtor seeks abandonment (the "Property") is alleged to be of inconsequential value and benefit to the estate solely due to the fact that the Property is claimed as exempt, the court continues the motion to a date after the period for objecting to the debtor's claims of exemption pursuant to Fed. R. Bankr. P. 4003(b)(1) has expired.

The court will issue a minute order.

36. 11-42866-B-11 — DAVID ZACHARY AND ANNMARIE SNORSKY — MOTION FOR COMPENSATION FOR SITKOFF/O'NEIL ACCOUNTANCY CORPORATION, ACCOUNTANT(S), FEES: $1,200.00, EXPENSES: $0.00 — 11-19-13 [322]

Tentative Ruling: The motion is denied without prejudice.

The motion was not properly noticed to all interested parties as is required by the Federal Bankruptcy Rules. Federal Bankruptcy Rule 2002(a)(6) requires that "the debtor, the trustee, all creditors and indenture trustees" be given at least twenty-one (21) days' notice of "a hearing on any entity's request for compensation or reimbursement of expenses if the request exceeds $1,000." Fed. R. Bankr. P. 2002(a)(6). By this motion, Sitkoff/O'Neil Accountancy Corporation (the "Movant") seeks compensation for fees and expenses totaling $1,200.00 on a first interim basis for accounting services performed for the debtors-in-possession in this

chapter 11 case. The Movant is therefore required to provide notice of the hearing to all interested parties pursuant to Federal Bankruptcy Rule 2002(a)(6). Here, the court notes that two separate proofs of service have been filed for this matter. The first, filed November 19, 2013, is a proof of service of the motion itself (Dkt. 323). This shows that the motion was served upon the Office of the United State Trustee, Ms. Meghan C. Sherrill of Troutman Sanders LLP, and Ms. Joan S. Huh of the California State Board of Equalization. There is no evidence that the motion was filed on all interested parties, including all creditors.

The second proof of service, filed on November 21, 2013, is a proof of service of the notice of hearing (Dkt. 325). As with the first proof of service, the second proof of service fails to demonstrate that all interested parties were served with the notice of hearing. Because the Movant has failed to establish that all interested parties were provided notice of the motion as required by Federal Bankruptcy Rule 2002(a)(6), the motion is denied without prejudice.

The court will issue a minute order.

37. 11-41079-B-7 SCF-3 — FOSTER/TERESA BROOKS — MOTION FOR COMPENSATION FOR PAUL E. QUINN, ACCOUNTANT(S), FEES: $1,695.00, EXPENSES: $0.00
12-2-13 [60]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the application is approved on a first and final basis in the amount of $1,695.00 in fees and $0.00 in costs, for a total of $1,695.00, for the period of June 1, 2012, through and including November 16, 2013, payable as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

By order entered on August 6, 2012 (Dkt. 59), the court authorized the chapter 7 trustee to retain the applicant as accountant for the chapter 7 trustee in this case, with an effective date of employment of June 1, 2012. The applicant now seeks compensation for services rendered and costs incurred during the period August 30, 2011, through and including November 16, 2013. The billing statements attached as Exhibit "1" to the motion (Dkt. 63) contain no tasks performed before the June 1, 2012 effective date of employment or after November 16, 2013. As set forth in the application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

38. 13-31040-B-11 JIMMY ALEXANDER CONTINUED MOTION TO VALUE
DSS-1 COLLATERAL OF WELLS FARGO HOME MORTGAGE
8-29-13 [8]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

This matter is removed from calendar as resolved by stipulation (Dkt. 67), which was approved by the court elsewhere on today's calendar.

39. 13-31040-B-11 JIMMY ALEXANDER CONTINUED MOTION TO VALUE
DSS-2 COLLATERAL OF GREEN TREE SERVICING
8-29-13 [13]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion to value collateral pursuant to Fed. R. Bankr. P. 3012 and 11 U.S.C. § 506(a), is granted. $0.00 of Green Tree Servicing ("GTS")'s claim secured by the second deed of trust on real property located at 565 Kearsarge Court, Alta, CA 95701 (the "Property") is a secured claim, and the balance of its claim is an unsecured claim. Nothing in this ruling affects GTS's rights under 11 U.S.C. § 1111.

Wells Fargo Home Mortgage ("WFHM") is the holder of the first deed of trust on the Property. The motion alleges without dispute that the amount secured by WFHM's first deed of trust is "approximately $384,482.30." (Dkt. 13, p.2, lines 17-19). The motion alleges without dispute that the value of the Property is $200,000, minus $50,500.00 in needed repairs, for a net value of $149,500.00. (Dkt. 13, p.2, lines 20-26). WFHM and the debtor have entered into a stipulation (Dkt. 67) whereby WFHM has agreed to a valuation of the Property at $230,000.00 and the fixing of secured portion of its claim at that amount, which is less than the entire amount of the first deed of trust. Thus, the value of the collateral available to GTS on its second deed of trust is $0.00.

The court will issue a minute order.

40. 13-31040-B-11 DSS-3 — JIMMY ALEXANDER COLLATERAL OF JON AND PEGGY SANDERS 8-29-13 [17] — CONTINUED MOTION TO VALUE

Tentative Ruling: None.

41. 13-31040-B-11 DSS-4 — JIMMY ALEXANDER COLLATERAL OF JON AND PEGGY SANDERS 8-29-13 [21] — CONTINUED MOTION TO VALUE

Tentative Ruling: None.

42. 13-31040-B-11 PD-1 — JIMMY ALEXANDER RE: TREATMENT OF CLAIM UNDER DEBTOR'S PROPOSED CHAPTER 11 PLAN OF REORGANIZATION 11-20-13 [68] — MOTION TO APPROVE STIPULATION

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the following extent: the stipulation filed November 20, 2013 (Dkt. 67) (the "Stipulation") is approved and is binding between the parties thereto. Except as so ordered, the motion is denied.

The court will issue a minute order.

43. 10-53197-B-7 RPH-3 — DARRELL/JENNIFER MOORE CHAPTER 7 TO CHAPTER 13 12-10-13 [102] — MOTION TO RECONVERT CASE FROM

Tentative Ruling: The motion is granted, and the case is reconverted to one under chapter 13. Nothing in this ruling constitutes a chapter 13 plan modification or confirmation.

Through this motion the debtors seek to reconvert their chapter 7 case to one under chapter 13. The debtors originally filed a chapter 13 petition on December 21, 2010 (Dkt. 1). Pursuant to 11 U.S.C. § 1307(a), the case was voluntarily converted to one under chapter 7 on September 6, 2013 (Dkt. 84). The debtors claim that the original conversion occurred because both debtors lost their jobs and they could no longer make payments under their confirmed chapter 13 plan (Dkt. 8). Now, the

debtors assert that they have replaced their lost income and have added support from joint debtor Jennifer Moore's father. As such, they would like to reconvert their case to one under chapter 13. 11 U.S.C. § 706(a) states that the debtors "may convert a case under this chapter to a case under chapter...13 of this title at any time, *if the case has not been converted under section 1112, 1208, or 1307 of this title*." 11 U.S.C. § 706(a) (emphasis added). Because the case was previously converted under 11 U.S.C. § 1307(a), the debtors have no unqualified right to convert back to chapter 13 under 11 U.S.C. § 706(a). Although they have no unqualified right to reconvert, the debtors may request reconversion to chapter 13 under 11 U.S.C. § 706(c). Matter of Johnson, 116 B.R. 224, 226 (Bankr. D. Idaho 1990). Reconversion under 11 U.S.C. § 706(c) is discretionary. Id. An important consideration is whether the debtors have experienced "a bona fide change in circumstances allowing confirmation of a plan." Id. at 227.

In the absence of opposition, the court finds that the debtors have demonstrated a bona fide change in circumstances sufficient to allow a reconversion of their case pursuant to 11 U.S.C. § 706(c).

The court will issue a minute order.

44. 13-23398-B-7 DNL-8 — LEONARD/ROSA CIRAULO — MOTION FOR COMPENSATION FOR GONZALES AND SISTO LLP, ACCOUNTANT(S), FEES: $2,026.00, EXPENSES: $5.60
12-17-13 [101]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the court approves on a first and final basis compensation for the bankruptcy estate's accountant, Gonzales and Sisto, LLP ("G&S"), in the amount of $2,026.00 in fees and $5.60 in costs, for a total of $2,031.60, for services rendered during the period of May 5, 2013, through and including December 4, 2013, payable as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

On March 13, 2013, the debtors commenced this bankruptcy case by filing a voluntary petition under chapter 7. By order entered June 24, 2013 (Dkt. 56) (the "Order"), the court granted the chapter 7 trustee's request to employ S&G as accountant for the bankruptcy estate. S&G now seeks approval of fees and costs for the period May 5, 2013, through and including December 4, 2013, in the total amount of $2,031.60 in fees and costs.

The Order does not specify an effective date of employment. Due to the administrative requirements for obtaining court approval of professional employment, this department allows in an order approving a professional's employment an effective date that is not more than thirty (30) days prior to the filing date of the employment application without a detailed showing of compliance with the requirements of In re THC Financial Corp, 837 F.2d 389 (9th Cir. 1988)(extraordinary or exceptional circumstances

to justify retroactive employment). Here, the court grants the motion and assigns S&G an effective date of employment of April 9, 2013, which is 30 days before the date of the filing of the applicant's employment application on May 9, 2013. The court does not grant an effective date of employment earlier than April 9, 2013, as S&G has shown no evidence of extraordinary or exceptional circumstances justifying an earlier date. This department does not approve compensation for work prior to the effective date of a professional's employment. DeRonde v. Shirley (In re Shirley), 134 B.R. 930, 943-944 (B.A.P. 9th Cir. 1992).

In the absence of an objection from any party in interest, the court finds that, as set forth in the application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

S&G shall submit an amended form of employment order which is identical to the Order, but which shall in addition specify an effective date of employment of April 9, 2013. Upon entry of the amended employment order, the court will issue a minute order granting the motion as set forth above.

45. 13-23398-B-7 DNL-9 — LEONARD/ROSA CIRAULO — MOTION FOR COMPENSATION BY THE LAW OFFICE OF DESMOND, NOLAN, LIVAICH, AND CUNNINGHAM FOR J. RUSSELL CUNNINGHAM, TRUSTEE'S ATTORNEY(S), FEES: $15,710.00, EXPENSES: $233.13
12-17-13 [106]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the application is approved on a first and final basis in the amount of $15,710.00 in fees and $233.13 in expenses, for a total of $15,943.13, payable as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

By order entered on May 23, 2013 (Dkt. 38), the court authorized the chapter 7 trustee to retain Desmond, Nolan, Livaich & Cunningham ("DNLC") as general bankruptcy counsel in this case, with an effective date of employment of May 6, 2013. The trustee now seeks compensation for services rendered and costs incurred by DNLC during the period of May 6, 2013, through and including December 4, 2013. As set forth in the application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

46. 13-35281-B-7 AVA-2 — DAMIAN AVALOS — MOTION TO CONVERT CASE FROM CHAPTER 7 TO CHAPTER 13 OR MOTION TO DISMISS CASE — 12-31-13 [22]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Subject to such opposition, the court issues the following abbreviated tentative ruling.

The motion is granted, and the case is converted to one under chapter 13.

The court construes the debtor's motion to dismiss or convert his chapter 7 case to a case under chapter 13 pursuant to 11 U.S.C. §§ 707(b)(1) and (b)(2)(A)(i) as a request to convert the case under 11 U.S.C. § 706(a). 11 U.S.C. § 706(a) allows the debtor to convert his case to one under chapter 13 as a matter of right, provided that the case has not been converted under section 1112, 1208, or 1307 of this title. 11 U.S.C. § 706(a). This case has not been previously converted. Therefore, in the absence of opposition this case is converted to one under chapter 13 pursuant to 11 U.S.C. § 706(a).

The court will issue a minute order.

47. 13-35281-B-7 AVA-1 — DAMIAN AVALOS — MOTION TO AMEND SCHEDULES — 12-31-13 [27]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. However, because the debtor is *pro se*, the court issues the following abbreviated tentative ruling.

The motion is dismissed.

Federal Bankruptcy Rule 1009(a) states that "a voluntary petition, list, schedule, or statement may be amended by the debtor 'as a matter of course' at any time before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby." Fed. R. Bankr. P. 1009(a). "No court approval is necessary for an amendment filed before the case is closed. The permissive approach to amendment has been construed to give courts no discretion to reject amendments unless the debtor has acted in bad faith or concealed property, or the amendment would prejudice creditors." 9-1009 Collier on Bankruptcy P. 1009.02 (16th ed. 2013). Therefore, court approval is typically not required for these types of requests.

The debtor should be aware that there is a required filing fee for filing amended schedules. 28 U.S.C. § 1930 requires that a $30.00 filing fee be paid for "an amendment to the debtor's schedules of creditors, lists of creditors, or mailing list." 28 U.S.C. § 1930.

The court will issue a minute order.

48. 11-36395-B-7 HLC-1 — GURJIT JOHL — OBJECTION TO CLAIM OF MELIA CAMPBELL, CLAIM NUMBER 6
11-30-13 [93]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The chapter 7 trustee's objection is sustained, and claim No. 6 filed on December 8, 2011 by Melia Campbell ("Ms. Campbell") in the amount of $500,000.00 (the "Claim"), is disallowed in its entirety.

The trustee questions the validity and nature of this claim. A proof of claim executed and filed in accordance with the Federal Rules of Bankruptcy Procedure ("FRBP") constitutes prima facie evidence of the validity and amount of a claim. FRBP 3001(f). However, when an objection is made and that objection is supported by evidence sufficient to rebut the prima facie evidence of the proof of claim, then the burden is on the creditor to prove the claim. Litton Loan Servicing, LP v. Garvida (In re Garvida), 347 B.R. 697 (9th Cir. BAP 2006).

Here, the trustee provides evidence that the Claim is based on a debt owed to Ms. Campbell by Domain Land Development. The trustee, therefore, asserts that the debtor is not liable on the Claim. In failing to respond to the objection, Ms. Campbell has offered no evidence to prove the validity of the Claim. Accordingly, Ms. Campbell has failed to carry her burden of proving the Claim, and the objection is sustained and the Claim is disallowed in its entirety.

The court will issue a minute order.

49.. 12-33980-B-7 HSM-9 — LARRY WALLER — MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR
11-22-13 [106]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted. The stipulation between the debtor and the chapter 7 trustee (Dkt. 109) is approved. Pursuant to the approved stipulation, the deadline for the chapter 7 trustee to file an objection to the debtor's discharge under 11 U.S.C. § 727 or challenge the dischargeability of certain debts under 11 U.S.C. § 523 is extended to January 31, 2014.

The chapter 7 trustee requests an extension of the deadline to file an objection to the debtor's discharge under 11 U.S.C. § 727 or challenge the dischargeability of certain debts under 11 U.S.C. § 523. When a request for an enlargement of time to file a complaint to objecting to discharge or dischargeability of certain debts is made before the time has expired, as it was here, the court may enlarge time for cause shown. Fed. R. Bankr. P. 4004(b) and 4007(c). Here, the chapter 7 trustee alleges that he needs additional time to investigate certain pre-petition

transactions as well as continue settlement talks with the debtor. This constitutes "cause" for purposes of Fed. R. Bankr. P. 4004(b) and 4007(c). The debtor, through his counsel, and the chapter 7 trustee have entered into a stipulation to extend the deadline (Dkt. 109).

Nothing in this ruling constitutes a ruling that the trustee, as opposed to any individual creditor, has standing to object under 11 U.S.C. § 523 to the dischargeability of a particular debt.

The court will issue a minute order.

50. 12-33980-B-7 HSM-11 — LARRY WALLER — MOTION TO ABANDON — 12-23-13 [120]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

51. 12-33980-B-7 HSM-12 — LARRY WALLER — MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH LARRY GENE WALLER — 12-24-13 [124]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

52. 11-29966-B-7 — CHARLIE RICE — MOTION TO REOPEN CHAPTER 7 BANKRUPTCY CASE, DECLARE FRIVOLOUS SALE INVALID, FOR SANCTIONS AND FOR DISBARMENT — 11-15-13 [41]

Tentative Ruling: The court treats this *pro se* motion as made under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Subject to such opposition, the court issues the following abbreviated tentative ruling.

The motion is converted to an adversary proceeding. Pursuant to Fed. R. Bankr. P. 9014(c), all of the rules of Part VII shall apply. The clerk shall assign an adversary proceeding number to this matter. On or before February 4, 2014, movant, debtor Charlie Leroy Rice, as plaintiff, shall (1) pay any adversary proceeding filing fee that is due and (2) file an

amended complaint that complies with Fed. R. Bankr. P. 7008 and all other applicable rules and that names Bank of America, N.A.; Miles, Bauer, Bergstrom & Winters, LLP; and Brian Tran as defendants. On or before February 4, 2014, plaintiff shall properly serve a summons and the amended complaint. Pursuant to Fed. R. Bankr. P. 7015, incorporating Fed. R. Civ. P. 15(a)(3), defendants shall have to and including the later of February 25, 2014 or the response date set forth in the summons to answer or otherwise respond to the amended complaint. The adversary proceeding will next appear on the status conference calendar date set in the summons. If no amended complaint is timely filed (with payment of any filing fee that is due), this adversary proceeding will be dismissed with prejudice without further notice or hearing. The oppositions filed by Bank of America (Dkt. 55) and Brian Tran (Dkt. 59) are overruled without prejudice to renewal as motions to dismiss or other motions if an amended complaint is filed.

This motion is converted to an adversary proceeding because it includes requests for relief that can only be obtained, if at all, by adversary proceeding.

The court will issue a minute order.