UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

January 30, 2014 at 10:30 a.m.

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1. 11-94410-E-11 SAWTANTRA/ARUNA CHOPRA
13-9042 Robert S. Marticello
FARRAR V. TRIUNFO ONE ACQUISITION LLC ET AL

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
1-10-14 [9]

Final Ruling: The court issued an order to show cause based on Trustee's failure to pay the required fees in this case ($293.00 due on December 17, 2013). The court docket reflects that on January 14, 2014, the Trustee paid the fees upon which the Order to Show Cause was based.

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

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

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

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

2. 13-92028-E-7 JUANA ANDRADE — MOTION TO AVOID LIEN OF MODESTO IRRIGATION DISTRICT
TOG-8 Thomas O. Gillis — 1-16-14 [24]

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

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

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

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

A "Certificate Regarding Unpaid Charges" for the amount of $47,000.39 was recorded with Stanislaus County, against the Debtor, on September 27, 2013, pursuant to California Water Code § 25806. It is asserted that this recording perfected a lien on the Debtor's residential real property commonly known as 1100 Windy Court, Modesto, California.

DISCUSSION

The motion is denied pursuant to 11 U.S.C. § 522(f)(1)(A), which allows avoidance of "judicial" liens. A judicial lien is "obtained by judgment, levy, sequestration or other legal or equitable process or proceeding." 11 U.S.C. § 101(36). Here, Debtor seeks to avoid a statutory lien for unpaid water or other charges to the Modesto Irrigation District, created pursuant to California Water Code § 25806. A statutory lien is a "lien arising solely by force of a statute on specified circumstances or conditions...." 11 U.S.C. § 101(53). Statutory liens are not subject to avoidance under 11 U.S.C. § 522(f)(1)(A). 4 COLLIER ON BANKRUPTCY ¶ 522.11[2] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.).

A plain language reading of Cal. Water Code § 25806, together with 11 U.S.C. § 101(53), makes clear that the lien created by California Water

Code § 25806 is a statutory lien within the meaning of the Bankruptcy Code. California Water Code § 25806(a)(2) provides,

> "[i]n case any charges for water and other services or either remain unpaid, the amount of the unpaid charges may, in the discretion of the district... [b]e secured at any time by filing for record in the office of the county recorder of any county, a certificate specifying the amount of the charges and the name and address of the person liable therefor. From the time of recordation of the certificate, the amount required to be paid together with interest and penalty constitutes a lien upon all real property in the county owned by the person."

Because the lien arises simply by filing a certificate with the county recorder, and not from any judicial action taken by the utility district/creditor, the lien arises solely by force of statute. Additionally, this plain language reading of California Water Code § 25806 and 11 U.S.C. § 101(53) is supported by case law. *See Graffen v. City of Philadelphia* 984 F.2d 91, 96 (3d Cir. 1992) (holding that a City's water lien constituted "statutory lien," rather than "judicial lien," within meaning of 11 U.S.C. §§ 101(36, 53), 522(f) because there was no legal process or proceeding employed, rather the Water Department administratively determined the amount of the lien and then recorded it.). Therefore, the subject lien may not be avoided pursuant to 11 U.S.C. § 522(f) because it is a statutory lien and not a judicial lien.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.
>
> The court denies the Motion without prejudice to avoid the appearance that this Contested Matter adjudicated other rights, if any, arising other than under 11 U.S.C. § 522(f), concerning this lien.

3.	04-94131-E-7 FWP-17	UNIQUE HEALTHCARE MANAGEMENT, INC. David C. Johnston	MOTION FOR AUTHORITY TO ENTER INTO STIPULATION TO AMEND SUBORDINATION AGREEMENT O.S.T. 1-16-14 [346]

Local Rule 9014-1(f)(3) Motion.

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

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

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

Jonathan Tesar, Chapter 7 Trustee ("Trustee"), seeks an order from the Court authorizing him to enter into a stipulation to amend subordination agreement with Med-1 Medical Center, Professional Corporation (dba Med-1 Medical Center, Inc.)("Med-1"). Trustee seeks to enter into the 2014 Amendment to the 2008 Subordination Agreement as a transaction outside the ordinary course of business pursuant to 11 U.S.C. §§ 363(b)(1) and 105(a).

FAILURE TO COMPLY WITH PLEADING REQUIREMENTS OF FEDERAL RULE OF BANKRUPTCY PROCEDURE 9013

This Motion, Dckt. 346, does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief is based. Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the

Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id*. A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id*. It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plan statement" standard for a complaint.

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

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

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

Weatherford, 434 B.R. at 649-650; see also *In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or

a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The Courts of Appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] shall state with particularity the grounds therefor, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's Federal Practice, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

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

FILING OF SUPPLEMENTAL PLEADING

In apparent recognition of the above identified pleading defect, the Trustee filed Supplemental Pleadings in which the grounds upon which the requested relief is based are stated with particularity. Dckt. 366. When such pleading deficiency occurs and counsel or the law firm is not a repeat offender, the court will often continue the hearing to allow for the filing of such supplemental pleadings. Counsel having already provided the Supplemental Pleadings, that has been addressed. Further, in light of the relief requested, the court finds that further continuance will not be necessary to understand this matter.

REVIEW OF MOTION

Trustee states that the Debtor was a corporation that was primarily engaged in providing administrative support to medical professionals. Prior

to and on a limited basis after the bankruptcy filing, the Debtor provided administrative support for Med-1. The services were provided pursuant to a Facility License and Management Services Agreement, executed on or about January 1, 2003 (the "Services Agreement"). During the Chapter 11 case, the Trustee entered into an agreement with Med-1 to reject the Services Agreement and to transfer the remaining operating assets to Med-1 (the "Rejection Agreement"). The Trustee was authorized to enter into the Rejection Agreement pursuant to this Court's Order dated June 29, 2005 (the "Rejection Order"). The Rejection Order approved a letter agreement between Med-1 and the Trustee that acknowledged Med-1's obligations to the Debtor for amounts due under the Services Agreement and provided a schedule for repaying those amounts. The Chapter 11 bankruptcy case was subsequently converted to a case under Chapter 7 in an Order dated July 7, 2005.

The Trustee asserts that during the Chapter 7 case, Med-1 defaulted under the terms of the Rejection Agreement, and the Trustee brought an adversary proceeding to recover the amounts due (the "Med-1 Adversary Proceeding"). On or about April 3, 2007, a Judgment was entered in the Med-1 Adversary Proceeding against Med-1 and in favor of the Trustee in the amount of $522,631.33 plus post-judgment interest (the "Med-1 Judgment").

On or about May 2, 2007, a notice of Amended Lien to reflect the amounts due in the Med-1 Judgment was filed and served on all parties, including counsel, in the following workers' compensation proceedings: *Eduardo Alberdin, et al. v. State Compensation Insurance Fund, et al.* Consolidation Master File: STK 00169879; *San Juana Ortega, et al. v. Travelers Property Casualty Company of America, et al.* Proposed Consolidation Master File: STK 0149158; *Robert Wileman, et al. v. California Insurance Guarantee Association, et al.* Proposed Consolidation Master File: STK 0161013; *Ignaci Alvarado, et al. v. Zenith Insurance Company, et al.* Proposed Master File: STK 157154 (the "Workers' Compensation Proceedings").

Carlson & Jayakumar as counsel to Med-1 in the Workers' Compensation Proceedings claimed a first priority attorney lien on any proceeds that resulted and are paid to Med-1 from the Workers' Compensation Proceedings (the "Attorneys' Lien"). Carlson & Jayakumar requested in 2008 that the Bankruptcy Estate acknowledge that Attorneys' Lien and also stipulate that it had priority over the Bankruptcy Estate's Amended Lien on any recoveries in the Workers' Compensation Proceedings.

Trustee asserts the 2008 Subordination Agreement resolved any dispute as to any proceeds that may become due to Med-1 as a result of the conclusion of the Workers' Compensation Proceedings or any later actions or proceedings that arise from the same facts and circumstances in any way related to the Workers' Compensation Proceedings (the "Litigation Proceeds").

In 2013, the Trustee states he was approached by Med-1 concerning a modification of the terms of the 2008 Subordination Agreement so that Med-1 would have sufficient incentive to actively assist in and fund the costs for the trial phase of the Workers' Compensation Proceedings. Med-1 estimates approximately $145,000 in additional costs through the trial on the numerous individual workers' compensation claims.

Med-1 further has represented that the cooperation of Wilmer D. Origel, D.C., the owner of the Debtor, is necessary to the litigation, and Med-1 facilitated an agreement by and between the Trustee and Wilmer D. Origel, D.C. respecting a malpractice action he has commenced against the former accountants of the Debtor (the "Accountant Malpractice Stipulation"). In order to address the issues raised by Med-1 concerning the need to provide the necessary incentives for it to aggressively and competently pursue the Workers' Compensation Proceedings, the Trustee has agreed, subject to Bankruptcy Court approval, to the following reallocation of the Litigation Proceeds:

a. From the first million dollars ($1,000,000) in Litigation Proceeds:

I. All costs advanced prior to execution of this Stipulation shall be distributed to Carlson & Jayakumar;

ii. Then, forty percent (40%) of all Litigation Proceeds to Carlson & Jayakumar pursuant to the terms of their contingency agreement;

iii. Then, $330,000 to the Trustee; and

iv. Then, $145,000 to Carlson & Jayakumar for the additional anticipated costs to be advanced by Carlson & Jayakumar or Med-1 through trial of the Workers' Compensation Proceedings.

b. From all Litigation Proceeds received in excess of one million dollars ($1,000,000):

I. Forty percent (40%) of all Litigation Proceeds to Carlson & Jayakumar pursuant to the terms of their contingency agreement;

ii. Then, 25% of the net after attorneys' contingent fees to the Trustee until the Med-1 Judgment including all accrued and unpaid interest is fully satisfied.

iii. Then, the balance to Med-1.

In addition to other minor provisions, the Trustee further agrees that to the extent Med-1 has previously paid a claim jointly owed by Med-1 and the Debtor, such as an Internal Revenue Service claim, Med-1 will automatically be subrogated to such creditor's claim(s) at the same priority as such creditor held in the Case prior to the Med-1 payment. The Trustee will distribute to Med-1 on account of such subrogated claim if (a) there has been a valid assignment of such claim filed in the bankruptcy case by the creditor who was paid by Med-1; (b) a Bankruptcy Court order is entered determining that a withdrawal of a claim was based on a payment by Med-1; and/or (c) if a creditor refunds a distribution based on it previously being paid by Med-1 and a Bankruptcy Court Order is entered determines that the refund was based on payment by Med-1.

The Trustee argues that grounds exist to approve the 2014 Stipulation outside the ordinary course of business because of the business necessity to maximize Med-1's incentive to aggressively pursue and fund the costs for the continuing litigation and trials that might be incurred in the Workers' Compensation Proceedings. The Trustee and his counsel assert they considered of all the information provided including a detailed description of the status of the Workers' Compensation Proceedings, and the Trustee negotiated the provisions contained in the 2014 Amendment. The Trustee believes the approval of these sharing terms to be in the best interests of the bankruptcy estate based on his independent business judgment.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). The Trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate. *In re Walsh Construction*, 669 F.2d at 1328. The reasonableness of a compromise is determined by the particular circumstances of each case. *Id.*

Here, grounds exist to approve the Stipulation as it appears necessary to maximize Med-1's incentive to pursue and fund the costs for the continuing litigation and trials incurred with the Workers' Compensation Proceedings. The court finds the terms agreed to by the parties reasonable and that the business judgment used by the Trustee is sound. Based on the foregoing, the motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Authority to Enter Into Stipulation filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and the court approves the 2014 Amendment to the 2008 Subordination Agreement, filed as Exhibit A, Dckt. 350, between Jonathan Tesar, Chapter 7 Trustee and Med-1 Medical Center, Professional Corporation (dba Med-1 Medical Center, Inc.).

4. 04-94131-E-7 FWP-18 — UNIQUE HEALTHCARE MANAGEMENT, INC. — David C. Johnston — MOTION FOR AUTHORITY TO ENTER INTO STIPULATION TO RESOLVE OWNERSHIP OF MALPRACTICE ACTION — O.S.T. — 1-16-14 [353]

Local Rule 9014-1(f)(3) Motion.

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

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

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

Jonathan Tesar, Chapter 7 Trustee ("Trustee"), seeks an order from the Court authorizing him to enter into a Stipulation to Resolve Ownership of Malpractice Action with Dr. Wilmer D. Origel, D.C. ("Dr. Origel"). Trustee seeks to enter into the Stipulation as a transaction outside the ordinary course of business pursuant to 11 U.S.C. §§ 363(b)(1) and 105(a) and approve the abandonment of the Estate's interest, if any, in the subject malpractice action, *nunc pro tunc* to the petition date pursuant to 11 U.S.C. § 544.

FAILURE TO COMPLY WITH PLEADING REQUIREMENTS OF FEDERAL RULE OF BANKRUPTCY PROCEDURE 9013

This Motion, Dckt. 353, does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief is based. Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements

enunciated by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id*. A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id*. It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plan statement" standard for a complaint.

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

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

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

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

The Courts of Appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] shall state with particularity the grounds therefor, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's Federal Practice, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

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

FILING OF SUPPLEMENTAL PLEADING

In apparent recognition of the above identified pleading defect, the Trustee filed Supplemental Pleadings in which the grounds upon which the requested relief is based are stated with particularity. Dckt. 368. When such pleading deficiency occurs and counsel or the law firm is not a repeat offender, the court will often continue the hearing to allow for the filing of such supplemental pleadings. Counsel having already provided the Supplemental Pleadings, that has been addressed. Further, in light of the relief requested, the court finds that further continuance will not be necessary to understand this matter.

REVIEW OF MOTION

The Trustee states that the owner of the Debtor, Dr. Wilmer Origel, was charged with criminal billing violations, which led certain insurance companies to cease reimbursing for services rendered by Med-1 Medical Center, Professional Corporation (dba Med-1 medical Center, Inc., hereafter referred to as "Med-1"), which gave rise to the Workers' Compensation Proceedings.

During the criminal trial, Dr. Origel first learned of the facts and circumstances that gave rise to the filing of the complaint for malpractice as well as other causes of action. Dr. Origel filed the Malpractice Action believing that he owned the causes of action and that the bankruptcy case, being so old, had given up any interest it had in such claims.

This Motion seeks Court approval of the Stipulation, which generally provides:

(a) an upfront payment of $5,000 by Dr. Origel;

(b) Dr. Origel's agreement to fully cooperate with Carlson & Jayakumar (Med-1's counsel) in the Workers' Compensation Proceedings;

(c) the abandonment of the Estate's interest, if any, in the Malpractice Action *nunc pro tunc* to the petition date; and

(d) for 33% of the net litigation proceeds from the Malpractice Action to be paid to the Estate by Dr. Origel's counsel upon the receipt of the litigation proceeds.

The Trustee asserts he learned of the Malpractice Action in the summer of 2013T and that he has been informed that the defendants in the Malpractice Action vigorously dispute the contentions in the Malpractice Action. The Trustee has also been informed that Dr. Origel's counsel does not presently carry malpractice insurance. It is the Trustee's belief that it would be extremely difficult and expensive to replace Dr. Origel's current counsel in the Malpractice Action. Trustee also states Med-1's counsel made it very clear that the cooperation of Dr. Origel in the prosecution of the Workers' Compensation Proceedings could be crucial to the success of those proceedings.

Based on the importance of Dr. Origel to the Workers' Compensation Proceeding, the Trustee's conclusion that bringing the Malpractice Action in the face of the malicious prosecution risk with a counsel not carrying malpractice insurance, and the uncertainty and expense of replacing existing counsel, Trustee concludes that participation in the Malpractice Action would be extremely burdensome to the bankruptcy estate.

The Trustee strongly believes that approval of the Stipulation and abandonment of the Malpractice Action is decidedly in the Estate's interests, and that even in the absence of the provisions of the Stipulation, the Trustee independently believes that abandonment of the Malpractice Action is appropriate as in its present posture, it is burdensome and presents undue risk to the Estate.

The Trustee argues that he exercised his reasonable business judgment in negotiating a stipulation that called for Dr. Origel's cooperation in the prosecution of the Workers' Compensation Proceedings and a payment of $5,000 to the Estate, as well as 33% of any recoveries in the Malpractice Action, and that approval of the Stipulation is warranted.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). The Trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate. *In re Walsh Construction*, 669 F.2d at 1328. The reasonableness of a compromise is determined by the particular circumstances of each case. *Id.*

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). FN.1.

FN.1. The court notes that this Motion seeks to have the court approve a stipulation and to abandon certain property. While Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure allow for a plaintiff to join multiple claims against a defendant in one complaint in an adversary proceeding, those rules are not applicable to contested matter in the bankruptcy case. Federal Rule of Bankruptcy Procedure 9014, which does not incorporate Rule 9018 for contested matters. The Movant has improperly attempted to join a motion to compromise with a motion to abandon.

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

However, the two requests for relief being so interrelated, the court will consider the motion.

The Stipulation calling for Dr. Origel's cooperation in the prosecution of the Worker's Compensation Proceedings and payment of $5,000 to the Estate, as well as 33% of any recoveries in the Malpractice Action,

the Stipulation appears warranted based on the Trustee's reasonable business judgment.

Here, the Malpractice action does appear burdensome to the estate based on the Trustee's research and investigation. However, the court has not been presented with reasoning or legal authority as to why the abandonment must be *nunc pro tunc* back to the date of the petition.

Based on the foregoing, the Stipulation is granted and the property is abandoned to the Debtor.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Authority to Enter Into Stipulation filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and the court approves the Stipulation to Resolve Ownership of Malpractice Action, filed as Exhibit A, Dckt. 358, between Jonathan Tesar, Chapter 7 Trustee and Dr. Wilmer D. Origel, D.C.
>
> **IT IS ORDERED** that the Malpractice Action against Rebecca Marie Benedict, Jeffrey R. Hamilton, Hamilton and Company and Does 1-50, Case No. 657019 in the Stanislaus County Superior Court is abandoned to Unique Healthcare Management, Inc., the Debtor by this order, with no further act of the Trustee required.

5. 13-91848-E-7 JOSE SANCHEZ **CONTINUED MOTION TO SUBSTITUTE ATTORNEY**
Howard S. Levine **10-28-13 [21]**

CONT. FROM 12-19-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney on October 25, 2013. By the court's calculation, 55 days' notice was provided. 28 days' notice is required. That requirement was met.

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

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

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

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

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

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

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

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

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

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

The court is also concerned with respect to Mr. Levine "abandoning" his client after getting Mr. Sanchez into this bankruptcy case. The Schedules prepared by Mr. Levine and Mr. Sanchez were filed on November 12, 2013. Dckt. 32. These documents leave much to be desired, including: (1) Schedule A lists one piece of real property, but does not state the Debtor's interest, value of that interest (though $700,000 is stated in the total box at the bottom of the page), and amount of secured claims; (2) Schedule B lists the Debtor's personal property assets as being only $110.00 in clothing (the Debtor having no cash, no household goods, no vehicles, or any other personal property); (3) no assets are claimed exempt on Schedule C;

(4) On Schedule D Wells Fargo Home Mortgage is listed as having a $700,000 secured claim for which the collateral is not identified; (5) No priority unsecured claims on listed on Schedule E; and the Debtor has approximately $62,000 in general unsecured claims listed on Schedule F. *Id.*

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

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

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

The court continued the hearing to afford the Debtor and Howard Levine to address these issues. The court issued an order stating that on or before January 10, 2014, Howard Levine shall file and serve a motion to withdraw as counsel, if he so desires to no longer represent the Debtor.

CONTINUED HEARING

No supplemental pleadings were filed by the Debtor and no Motion to Withdraw as Counsel was filed by Howard Levine. The court has no idea whether this Debtor is being actively represented by his counsel or abandoned.

The court notes that the Docket states that mail sent to the address provided by Howard Levine on the Petition have been returned undeliverable. A review of the California State Bar website discloses that Howard Stephen Levine, Cal. Bar No. 61881, is an active member of the bar, and lists his address as "Howard S. Levine & Associates, 9482 Urbana Ave, Arleta, California 91331." http://members.calbar.ca.gov/fal/Member/Detail/61881. This is the same Bar No. as listed for Howard S. Levine on the Petition.

The court directs the Clerk of the Court to forward a copy of these Civil Minutes and the Order denying the Motion to the Office of the United States Trustee for Region 17, Attn: Antonia Darling, Esq. This is forwarded for informational purposes and the court does not direct the U.S. Trustee to undertake any investigation or inquiry, commence any proceedings, or provide the court with any reports.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Substitute Attorney filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Substitute Attorney is denied.

6.	**13-91964-E-7**	**JEFFREY RAMOS AND ALIDA**	**MOTION TO EMPLOY PMZ REAL**
	SLF-2	**MANAOIS - RAMOS**	**ESTATE AS REALTOR(S)**
		Steele Lanphier	**12-26-13 [19]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, and Office of the United States Trustee on December 26, 2013. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion to Employ is granted. No appearance required.

Chapter 7 Trustee, Gary R. Farrar, seeks to employ real estate agent Bob Brazeal (California real estate broker license No. 00800029) of PMZ Real Estate, pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Section 327. Trustee seeks the employment of a real estate agent to assist the Trustee in valuing, marketing, and possibly listing for sale two pieces of real property listed on the Debtor's Schedule A, commonly known as 5508 Courtyard Way, Riverbank, California, ("Riverbank property") and 2308 Ustick Road, Modesto, California ("Modesto property"). Mr. Brazeal has conducted an initial review of the properties, and the Trustee believes one or both of the properties has equity for the estate.

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including real estate agents, to represent or assist the trustee in carrying out the trustee's duties under Title 11. *See In re Avon Townhomes Venture*, 433 B.R. 269, 313 (Bankr. N.D. Cal. 2010) aff'd, BAP NC-11-1068-HDOD, 2012 WL 1068770 (B.A.P. 9th Cir. Mar. 29, 2012) ("a real estate broker is a "professional person" as contemplated by § 327."). To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate, and be a disinterested person.

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

Taking into account all of the relevant factors in connection with the employment and compensation of Mr. Brazeal, considering the declaration demonstrating that Mr. Brazeal does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Bob Brazeal of PMZ Real Estate as real estate agent for the Chapter 7 estate for the purpose of valuing, marketing, and possibly listing for sale the Riverbank and Modesto properties. Mr. Brazeal's employment by the estate shall be on the terms and conditions set forth in Mr. Brazeal's Declaration filed in support of the motion (Docket No. 21), specifically, that Mr. Brazeal may apply for an order authorizing his compensation pursuant to § 330(a) at a reasonable hourly billing rate for his consulting services on properties that the Trustee decides not to list for sale, and for a sales commission of six percent of the gross sales price upon the closing of a court approved sale of the Riverbank and/or Modesto properties. The approval of the fee is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted and the Chapter 7 Trustee is authorized to employ real estate agent Bob Brazel of PMZ Real Estate on the terms and conditions set forth in Mr. Brazeal's Declaration filed in support of the motion (Docket No. 21).

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

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court. The court approves a 6% commission to be paid from the proceeds from sale of the real property, which percentage is subject to the provisions of 11 U.S.C. § 328. If a percentage commission is requested, the court will not allow additional fees computed on an hourly basis.

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

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

7. 13-92164-E-7 DONALD/TERESA PETERSON MOTION TO COMPEL ABANDONMENT
MLP-1 Martha Lynn Passalaqua 1-2-14 [9]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on January 2, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Compel Abandonment has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Abandon Real Property is granted and the Trustee is ordered to abandon the property. No appearance required.

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b).

Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000). Here, the personal property that the Debtors seek to abandon consists of assets of the Debtors' business, specifically: a business checking account with a balance of $283.05, a 2005 Chevrolet Astro Cargo Van valued at $5,928.00, a computer, printer, television, and two desks valued at $600, various installation tools and television displays valued at $500, cable and installation materials valued at $200, and the business name of "Valley Dish Pro" valued at $0, for a total value of $7,511.05. These assets were disclosed in the Debtors' Schedule B, and claimed as fully exempt on the Debtors' Schedule C, attached to the motion as Exhibits "A" and "B," respectively. Because the assets are fully exempt, the property has no available equity.

Since the property is fully exempt, and because of the negative financial consequences of the Estate retaining the property, the court determines that the property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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

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

> The Motion to Compel Abandonment filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the personal property identified as:
>
> 1. Business Checking Account- Value $283.05
>
> 2. 2005 Chevrolet Astro Cargo Van- Value $5,928
>
> 3. Computer, Printer, 2 Desks, & TV- Value $600
>
> 4. TV displays, Installation Tools- Value $500
>
> 5. Cable & Installation Material- Value $200
>
> 6. Business Name of "Valley Dish Pro"- Value $0
>
> as described on Schedule B are abandoned to Donald Irving Peterson and Teresa Louise Peterson, the Debtors, by this order, with no further act of the Trustee required.

8. 13-90481-E-7 HENRY STACHER **MOTION FOR ENTRY OF DEFAULT**
13-9022 GMW-2 **JUDGMENT**
STACHER V. STACHER **12-20-13 [30]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendants and Defendant's Attorney on December 20, 2013. By the court's calculation, 39 days' notice was provided. 28 days' notice is required. That requirement was met.

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

The Motion for Entry of Default is granted. No appearance required.

Plaintiff, Kelly Rae Stacher ("Plaintiff") moves the court for an entry of default judgment against the Defendant Debtor, Henry Eugene Stacher ("Defendant") in this case. Plaintiff and Defendant were previously married. Their marriage was dissolved pursuant to a judgment entered by the Superior Court of California, County of Calaveras, Case No. 10FL36437.

As part of their marital dissolution proceeding, the family law court entered an order on December 1, 2010, awarding Plaintiff $3,000.00 in attorneys' fees, to be paid by Plaintiff by the Defendant. This award was made in connection with Plaintiff's order to show cause for a motion to correct or modify a prior support order. On November 7, 2012, the court in the dissolution proceeding entered a second order, whereby Debtor was to pay Plaintiff the additional sum of $7,000.00 in attorneys' fees. This attorney fee award was made as part of the dissolution judgment, and was based on the disparity of assets and income between the Plaintiff and Defendant. As of the date that this motion was filed, Defendant has only paid Plaintiff the sum of $522.37, leaving a balance of $9,477.63. Plaintiff states that both of these attorney fee awards were in the nature of a support obligation and were issued as part of a dissolution proceeding.

The Defendant filed a voluntary Chapter 7 bankruptcy petition on April 16, 2013, and seeks to discharge these attorney fee awards. This adversary proceeding was filed on June 21, 2013. Plaintiff asserts that these attorney fee awards were nondischargeable under Bankruptcy Code Sections 523(a)(5) and (15). Defendant and his counsel were both served

with the Summons and Complaint. No answer was timely filed and on July 24, 2013, the Defendant's default judgment was entered.

DISCUSSION

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

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

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

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

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

ANALYSIS

In applying these factors, the court finds that the Plaintiff will be prejudiced if Defendant does not satisfy his attorney fees obligations. 11 U.S.C. § 523(a)(5) excepts from discharge any debt for a domestic support obligation.

11 U.S.C. § 523 provides, in relevant part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

(5) for a domestic support obligation;

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;

The Bankruptcy Code, through 11 U.S.C. § 101(14a), defines the phrase 'domestic support obligation' as follows:

(14A) The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is--

(A) owed to or recoverable by--

(I) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of--

(I) a separation agreement, divorce decree, or property settlement agreement;

(ii) an order of a court of record;

or (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. § 101(14A).

Here, the Plaintiff's two attorneys' fee awards constitute debt incurred before the Defendant filed bankruptcy. The debt is owed to Defendant's former spouse, and was established prior to the order for relief by virtue of the applicable provisions of the Defendant and Plaintiff's divorce decree, fulling the requirements of 11 U.S.C. § 523(a)(15).

Additionally, the family court's ruling on Plaintiff's attorney fees, and second order granting an additional attorney's fees award of $3,000, are recoverable by Plaintiff, the former spouse of Defendant. Exhibit A: Findings and Order After Hearing Filed December 1, 2010; Exhibit B: Order / Judgment Filed November 7, 2012 (Dckt. No. 33). Plaintiff in this case is an individual, and not a governmental entity. Thus, the elements of 11 U.S.C. § 101(14a)(A), (C), and (D) are roundly met.

The question of whether a state court's award of attorney fees--in connection with marital dissolution--constitutes nondischargeable alimony, maintenance, or support as demanded by 11 U.S.C. § 523(a)(5) and U.S.C. § 101(14a)(B) is more complex. A bankruptcy court may consider a variety of factors that are potentially relevant on a case-by-case basis to the federal question of what constitutes "support" in the analysis of whether an award in a dissolution decree is nondischargeable within the meaning of 11 U.S.C. § 523(a)(5). *In re Gionis*, 170 B.R. 675 at 681 (B.A.P. 9th Cir. 1994). These factors include need, intent of the state court, presence of minor children in the marriage, and disparity of income between parties. *Id.* at 681-684.

In the Dissolution Judgment entered by the Calaveras County Superior Court in the parties' dissolution proceeding, issued on November 7, 2012, the court carves out an "Attorney Fees" section at the end of the ruling, stating simply that the "Petitioner's request for $7,000 in additional attorney's fees is granted." The court further states that there is a "substantially equal offset for respondent's payment of petitioner's share of community obligations after separation."

The family law court considers the Plaintiff's current income, and prospective employment as a taxidermist, but does not explicitly address whether the determination of Plaintiff's attorneys' fees award was made as a result of the court's evaluation of the parties' disparities in income. The 'Attorneys' Fees" section is discussed independently of the division of the parties' community assets, the Plaintiff's right to spousal support, and apportionment of the parties' 401K retirement account. Exhibit B: Rulings After Trial, *In re: Stacher Dissolution of Marriage*, Calaveras County Superior Court, Case No. 10FL36437 (Dckt. No. 33).

The family law court's 'Findings and Order After Hearing' issued on December 1, 2010, affords more insight into whether the attorneys' fees award can be characterized as in the nature of alimony, maintenance, or support under 11 U.S.C. § 523(a)(5). The court examines the parties' changed financial circumstances, and discusses Plaintiff's imputed minimum wage ability, and the fact that Plaintiff remains unemployed with no income but is expected to provide for herself and her child. Findings and Order After Hearing, *In re: Stacher Dissolution of Marriage*, Calaveras County Superior Court, Case No. 10FL36437. The court also considers the rental income which the parties are to share equally; acknowledges the Plaintiff's

obligation to provide support for herself as well as her minor child and Plaintiff's child visitation time; and considers insufficient evidence of cohabitation in increasing the amount of spousal support paid by the Defendant to the Plaintiff. *Id.*

The court proceeds to adjust and increase the amounts of child support and spousal support, as well as attorneys' fees to be paid by the Defendant to Plaintiff under the dissolution order as a result of these changed circumstances. *Id.* This adjustment, following an analysis of the parties' changed financial circumstances, suggests that the attorney fees is based on the assessment of the recipient's financial need, thus rendering the award a nondischargeable "support" debt as contemplated by 11 U.S.C. § 523(a)(5). The court adjusts the award based on the parties' changed income, suggesting that the additional award amount was at least partially based on Plaintiff' financial need.

The ruling sufficiently indicates that Plaintiff's attorneys' fees were granted by way of the family law's court's desire to award Plaintiff 'support'. After all, an express designation that the award constitutes 'support' is not necessary under 11 U.S.C. § 101(14a)(A). The family court ties in its weighing of Defendant and Plaintiff's income in deciding to increase the amount of alimony paid, and awards an additional sum of money to Plaintiff for her attorney fees. Although the family law court ordered that the fees be paid to Plaintiff directly, it is immaterial that the obligation is payable directly to the attorney or that the debtor was not ordered to pay anything labeled as "support." *In re Gionis*, 170 B.R. 675 at 681-684 (9th Cir. BAP 1994).

Thus, the court finds that the attorneys' fees awarded by the Calaveras County Superior court, in connection with Plaintiff and Defendant's marital dissolution proceedings, are nondischargeable debts under the 11 U.S.C. §§ 523(a)(5) and 523(a)(15).

Adversary Proceeding

Additionally, the court finds that the Complaint is sufficient and the requests for relief requested therein are meritorious. Plaintiff's Complaint, filed on June 21, 2013, sufficiently alleges the nondischargeability of the debt arising from Plaintiff's attorney fees award in the amount of $3,000 under 11 U.S.C. § 523(a)(5) and 11 U.S.C. § 523(a)(15). It has not been shown to the court there is or may be any dispute concerning material facts. Defendant has not contested any facts in this Adversary Proceeding, nor did Defendant dispute facts presented in the Plaintiff's bankruptcy case. Further, there is no evidence of excusable neglect by the Defendants.

Although the Federal Rules of Civil Procedure favor decisions on the merits through the crucible of litigation, Defendant has been given several opportunities to respond and there is no indication that Defendant has a meritorious defense or disputes Plaintiff's right to judgment in this Adversary Proceeding. Failing to fulfill one's contractual and statutory obligations, and then failing to respond to judicial process, is not a basis for denying relief to an aggrieved plaintiff. The court finds it necessary and proper for the entry of a default judgment against the Defendant.

CONCLUSION

The court grants the default judgment in favor of Plaintiff and against Defendant for the total amount of $10,000 in attorneys' fees, incurred by Plaintiff in her retention of an attorney in her marital dissolution action. The court further determines that the attorneys' fees in the sum of $10,000.00 from the state court action are nondischargeable pursuant to 11 U.S.C. §§ 523(a)(5) and 523(a)(15).

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Entry of Default Judgment filed by the Plaintiff having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Entry of Default Judgment is granted and Plaintiff, Kelly Rae Stacher, is awarded attorneys' fees against Defendant, Henry Eugene Stacher, for the amount of $10,000.00, incurred by Plaintiff in the parties' dissolution proceedings of *In re: Stacher Dissolution of Marriage*, Superior Court of California, County of Calaveras, Case No. 10FL36437.
>
> **IT IS FURTHER ORDERED** that the debt arising from the $10,000.00 attorneys' fees award, granted in favor of Plaintiff, Kelly Rae Stacher, against Henry Eugene Stacher in their marital dissolution case, is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(5) and 523(a)(15).
>
> Counsel for the Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this Order. The judgement shall provide that a costs bill and motion for attorneys' fees, if any have been pleaded as a claim in the Complaint (Fed. R. Bankr. P. 7008(b)) and which a basis exists in contract or statute, shall be filed and served on or before February 15, 2014. The judgement shall state that any costs and attorneys' fees awarded in this Adversary Proceeding shall be enforced as part of the judge.

9. 13-91588-E-12 MARY JO MEIRINHO **CONTINUED STATUS CONFERENCE RE: CHAPTER 12 VOLUNTARY PETITION 8-29-13 [1]**

Debtor's Atty: Scott A. CoBen

Notes:

Continued from 12/19/13 to be heard in conjunction with other matters on calendar.

[SAC-1] Order denying motion to confirm Chapter 12 Plan filed 12/26/13 [Dckt 76]

10. 13-91588-E-12 MARY JO MEIRINHO **CONTINUED MOTION TO DISMISS CASE**
EDC-1 Scott A. CoBen **12-3-13 [61]**

CONT. FROM 12-19-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 12 Trustee, parties requesting special notice, and Office of the United States Trustee on December 3, 2013. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

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

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

Kay Vlach, Trustee of the Vlach Family Trust, dated March 1, 1995, ("Creditor") moves for an order dismissing Debtor's chapter 12 case on the

grounds that the proposed Chapter 12 plan is not feasible and cannot be confirmed; the proposed plan is not proposed in good faith; Debtor will not be able to propose a confirmable plan in light of their liabilities and limited disposable income; and Debtor has failed to confirm a plan within 45 days of the filing of the plan as required by 11 U.S.C. § 1224.

Pursuant to 11 U.S.C. § 1224, a party in interest may object to the confirmation of the plan. Except for cause the hearing shall be concluded not later than 45 days after the filing of the plan.

This bankruptcy case was filed on August 29, 2013. The proposed plan was filed on September 12, 2013. The hearing for confirmation was held on December 19, 2013. The court denied the motion and the Chapter 12 Plan was not confirmed based on several deficiencies with the proposed plan. The Debtor-in-Possessions' plan provided for payments to begin immediately to creditors with secured claims, but the payments to creditors with unsecured claims do not start until after five years, which is a treatment that is not permitted by the Bankruptcy Code and in violation of 11 U.S.C. § 1222(c).

Furthermore, the plan did not appear feasible given Debtor's stipulation regarding the claim of Union Bank, which provided that payments for the on-going mortgage as well as catch-up payments for the arrears be included in the plan. The stipulation further stated that Trustee is to start disbursement on this claim to the creditor in December 2013. These terms were in contradiction to those proposed in the plan; additionally, the plan did not appear to be properly funded, and also did not provide for the arrearage of the Vlach claim to be paid back in a reasonable time under 11 U.S.C. § 1222(b)(3) and (b)(5).

AMENDED CHAPTER 12 PLAN

On January 23, 2014 (a month after denial of confirmation of the prior plan), the Debtor in Possession filed a First Amended Chapter 12 Plan. Dckt. 77. The basic terms of the First Amended Plan are:

A. The Plan Payments to be made by the Debtor are

1. On or before November 1, 2013, payments totaling $41,355.00.

2. On or before June 1, 2014, payments totaling $30,000, or such other amount as sufficient to complete the Plan. Additional Provisions. Plan ¶ 6.02, sub-¶ 6.

B. $10,000.00 to counsel for the Debtor in Possession from the pre-petition retainer. Plan ¶ 2.06.

C. $0.00 for Chapter 12 Administrative Expenses. Plan ¶ 2.07.

D. Class 1 Secured Claim of Union Bank, N.A. – $559.60 monthly contractual payment and $201.59 monthly to cure $12,096.00 arrearage. Plan ¶ 2.08.

E. Class 2 Secured Claims – None. Plan ¶ 2.09.

F. Class 3 Secured Claims, Surrender of Collateral – None. Plan ¶ 2.10

G. Class 4 Secured Claims, Direct Payment Not by Trustee – None. Plan ¶ 2.11.

H. Class 5 Priority Unsecured Claims – None. Plan ¶ 2.13.

I. Class 6 Designated Unsecured Claims – None. Plan ¶ 2.14.

J. Class 6 General Unsecured Claims – 100% of projected $82,711.00 in claims. Plan ¶ 2.15.

K. Secured Claim of Kay Vlach, paid with interest computed at rate of 4.75% per annum,

1. The first day of the month after the month in which the plan is confirmed, $10,708.00, which "represents the interest on the claim from the petition date to June 1, 2014."

2. On or before June 1, 2014, payment of the claim in full from the sale of the real property securing the claim. Plan ¶ 6.02, sub-¶ 1.

L. Secured Claim of CNH Capital America LLC, paid with interest computed at the rate of 4.75% per annum,

1. The first day of the month after the month in which the plan is confirmed, $10,708.00, which "represents the interest on the claim from the petition date to June 1, 2014."

2. On or before June 1, 2014, payment of the claim in full from the sale of the real property securing the Kay Vlach claim. Plan ¶ 6.02, sub-¶ 2.

M. The Secured Claim of Union Bank, N.A. will be paid pursuant to the terms of the Stipulation attached as Exhibit A to the Plan. No Stipulation is attached to the Plan.

1. The court has previously approved aa stipulation between the Debtor in Possession and Union Bank, N.A. which provides,

   a. The Debtor in Possession must tender the regular monthly contractual payments to the Chapter 12 Trustee for disbursement to Union Bank, N.A. until the outstanding balance has been paid in full.

   b. In addition, the Debtor in Possession shall tender arrearage cure payments of $201.59 a month for 60 months, to cure a $12,095.24 arrearage. Order, Dckt. 58.

c. The court's findings of fact and conclusions of law clearly state that the Stipulation was not approved to the extent that it purported to state the terms of a confirmed Chapter 12 Plan. Civil Minutes, Dckt. 56.

On January 23, 2014, the Debtor in Possession filed a Motion to Confirm the First Amended Chapter 12 Plan. Dckt. 78. The hearing on the Motion to Confirm is scheduled for March 6, 2014. In addition, on January 23, 2014, the Debtor in Possession filed a Motion to Employ a real estate agent. Dckt. 82. The Motion states the following grounds with particularity (Fed. R. Bankr. P. 9013) in support of employment of the professional:

A. The bankruptcy case was commenced on August 29, 2013.

B. The Debtor in Possession needs the assistance of a real estate agent to list her home for sale.

C. The Debtor in Possession desires to employ George Rocha.

D. The Debtor in Possession has selected George Rocha "due to his real estate with farm land in [Debtor's in Possession] area."

E. The fees to be paid George Rocha is a 6% commission, which may be split with the buyer's agent.

F. George Rocha "has indicated a willingness" to act on the Debtor's in Possession behalf."

G. To the best of the Debtor's in Possession knowledge, George Rocha has no conflicts with respect to serving as a professional in this case.

Id.

George Rocha provides his declaration in support of his employment. Dckt. 83. He testifies that he is a real estate agent with White House Real Estate and has been selling farmland for 10 years. Further, that he has no connection to the Debtor, Debtor in Possession, or U.S. Trustee, and does not represent any adverse interests to the Debtor or the bankruptcy estate. A copy of the Listing Agreement is provided as Exhibit B. Dckt. 84.

The Listing Agreement is not with George Rocha, the person to be employed, but with White House Real Estate. The agreement states that the listing price is to be $1,050,750.00. It further states, "Seller to remain in the house for 90 days after close of escrow to complete a 1031 exchange."

The Schedules disclose that the property to be sold, 3818 Shoemaker Avenue is not merely the Debtor's "home," but "Home and Farm." Schedule A, Dckt. 14 at 3. The Vlach Family Trust has filed Proof of Claim No. 3, asserting a claim in the amount of $298,143.73 which is secured by the

Shoemaker Property. The arrearage for this claim is listed in the amount of $298,143.73.

CNH Capital America, LLC has filed Proof of Claim No. 1, asserting a secured claim in the amount of $109,265.15. This claim is identified as being secured by a Case IH Steiger 400 Tractor serial number ZBF126535. The arrearage for this claim is stated to be $23,583.88.

On January 23, 2014, the Debtor in Possession filed a Status Report for the January 30, 2014 Status Conference. She reports that an interested buyer for in excess of $1.3mm has been found, with an inspection of the property to occur on January 24, 2014. The Debtor in Possession projects that by the January 30, 2014 she will be in contract to sell the property and that escrow will close within 60 days.

DISCUSSION

The proposed plan, while promising to get a quick payment in full to creditors, causes the court some concerns. First, it does not disclose the "secret condition" that the Debtor in Possession/Plan Administrator will sell the Property, but retain possession of it for 90 days after the close of escrow. The Real Estate Agent offers no opinion as to how this will effect the marketability of the Property. Second, the Plan makes no provision of what will occur if the Plan Administrator defaults and fails to sell the Property. Third, for more than 180 days of the Plan the Debtor in Possession and then Plan Administrator take the monthly income and use it without disclosure or limitation. Fourth, though the Chapter 12 Trustee has the money, the Debtor in Possession does not propose to make a distribution of interest payments to the creditors with secured claims until a month after the plan is confirmed. With a March 2014 confirmation hearing date, it is likely that any such disbursement will coincide with the promised no later than June 1, 2014 disbursement of the proceeds from the sale of the Real Property. The promise to pay interest appears to be illusory.

The Debtor in Possession can rectify these problems through the confirmation process and providing for disbursement of the interest payments prior to confirmation. The court continues the hearing to February 13, 2014, at 10:30 a.m. to allow the Debtor in Possession to address these issues, file any proposed amendments, and file any necessary motions.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss filed by Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion to Dismiss is continued to 10:30 a.m. on February 13, 2014.

11. 13-91588-E-12 MARY JO MEIRINHO
SAC-2 Scott A. CoBen

CONTINUED MOTION FOR COMPENSATION FOR SCOTT A. COBEN, DEBTOR'S ATTORNEY(S), FEES: $10,000.00, EXPENSES: $0.00
10-25-13 [51]

CONT. FROM 12-19-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 25, 2013. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to grant the Application for a $10,000.00 Fixed Fee in this case. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

FEES REQUESTED

Scott A. Coben & Associates, Counsel for the Debtor, seeks compensation in this case of a fixed fee of $10,000.00 with $10,000.00 paid by the Debtor pre-petition.

Description of Services for Which Fees Are Requested

Before the Case is Filed: Counsel agreed to,

1. Meet with the Debtor to review the Debtor's debts, assets, liabilities, income, and expenses.

2. Counsel the Debtor regarding the of filing either a chapter 7, 12, 13, discuss both procedures with the Debtor, and answer the Debtor's questions.

3. Timely prepare and file the Debtor's petition, plan, lists, statements, schedules, required documents and certificates.

4. Review with the Debtor the completed petition, plan, lists, statements, schedules, required documents and certifications, as wall as all amendments thereto, whether filed with petition or later.

5. Explain which payments will be made directly to creditors by the Debtor and which payments will be made through the Debtor's chapter 12 plan.

6. Explain to the Debtor how, when, and where to make the chapter 12 plan payments.

7. Explain to the Debtor that the attorney is being engaged to represent the Debtor for all purposes in the case, except adversary proceedings.

8. Explain to the Debtor how and when the attorney's fees and chapter 12 trustee's fees are determined and paid.

9. Advise the Debtor of the necessity to maintain appropriate insurance including equipment insurance and liability, collision, and comprehensive insurance on vehicles securing loans or leases.

After the Case is Filed: Counsel agrees to,

1. Advise the Debtor of the requirement to attend the §341(a) meeting of the creditors and instruct the Debtor as to the date, time and place of the meeting. In joint cases, inform the Debtor that both spouses must appear.

2. Appear at the §341(a) meeting of creditors with the Debtor.

3. Timely serve the Debtor's plan on the chapter 12 trustee.

4. Timely provide to the chapter 12 trustee the Domestic Support Obligation Checklist (form EDC 3-088), Class 1 Checklist (form EDC 3-086), and Authorization to Release Information to Trustee Regarding Secured Claims Being Paid By the Trustee (form EDC 3-087) required by Local Bankruptcy Rule 3015-1(b)(6).

5. Timely respond to objections to plan confirmation and, where necessary, prepare, file, and serve an amended plan.

6. Prepare, file, and serve necessary modifications to the plan which may include suspending, lowering, or increasing plan payments.

7. Prepare, file and serve any necessary amended statements and schedules and any change of address, in accordance with information provided by the Debtor.

8. Object to improper or invalid claims, if necessary, based upon documentation provided by the Debtor.

9. Prepare and file a proof of claim, when appropriate, if a creditor fails to do so.

10. Prepare, file, and serve motions to modify the plan after confirmation, when necessary.

11. Prepare, file, and serve motions to buy, sell, or refinance property, when appropriate.

12. Prepare, file, and serve any other motion that may be necessary to appropriately represent the Debtor in the case.

13. Timely respond to all motions filed by the chapter 12 trustee, and represent the Debtor in response to other motions filed in the case including, but not limited to, motions for relief from stay.

14. Where appropriate, prepare, file, serve, and set for hearing motions to avoid liens on real or personal property and motions to value the collateral of secured creditors.

15. Represent the Debtor at a discharge hearing, if required.

16. Provide such other legal services as are necessary for the administration of the Debtor's case before the Bankruptcy Court.

The fixed fee will not include representation in appeals; court filing fees; court reporter fees for transcripts; or fees of expert witnesses.

Counsel argues that the Debtor agreed before this case was filed that Counsel would charge a fixed fee of $10,000.00 to be paid pre-petition. To date, a motion to confirm the Chapter 12 plan has been set for hearing and has been denied. There is also a pending motion to dismiss.

For a Chapter 12 case, a fixed fee to represent the Debtor in Possession and revested Debtor through discharge, the filing of all required pleadings upon completion of the plan, and the final closing of the case is not unreasonable. The $10,000.00 fee proposed is not unreasonable. However, in light of the significant difficulties with the Debtor prosecuting a plan in this case, the payment of $10,000.00 in fees to counsel is not warranted.

Therefore, the court approves the requested $10,000.00 fixed fee, which shall be paid from the pre-petition retained received by Counsel and held in his trust account. At this time, the court authorizes counsel to disburse $4,000.00 of the retainer which he may apply to the $10,000.00 fixes fee in this case. No further monies may be disbursed from the pre-

petition retainer or paid by the Debtor or Debtor in Possession, except upon further order of the court, for services of representing the Debtor or Debtor in Possession in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Scott A. Coben & Associates is allowed the following fees and expenses as a professional of the Estate:
>
> Scott A. Coben & Associates, Counsel for the Estate Applicant's Fees Allowed a fixed fee in the amount of $10,000.00 for services provided to the Debtor and Debtor in Possession, through the completion of the plan and closing of this case. All of the fixed fee shall be paid from the $10,000.00 pre-petition retainer received by counsel. Of the allowed fixed fee, the court authorizes Counsel to disbursed $4,000.00 from the $10,000.00 pre-petition retainer, which shall be applied to the allowed $10,000.00 fixed fee. The balance of the retainer shall be held in counsel's trust account, and no further amount distributed or any other amounts paid by the Debtor, Debtor in Possession, or Plan Administrator under a confirmed Chapter 12 Plan, or from the balance of the retainer held by Counsel except upon further order of this court.

12. 13-91990-E-7 CARA HEINER — MOTION TO COMPEL ABANDONMENT
SJS-1 Scott J. Sagaria — 12-26-13 [20]

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 26, 2013. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Abandon Personal Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006).

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

GROUNDS FOR DENYING MOTION

The court has concerns in reviewing the Motion itself in how the relief is requested. While the Motion is long in recounting the history and contentions by the Debtor, it carefully never identifies the asset being abandoned other than referencing it as the Wells Fargo bank account. The Debtor never states the amount of money in the account which the court is being asked to order abandoned.

The Motion does state that the Debtor did not originally list this on her Schedule, and explains that it was not listed because she believe that it had long ago been transferred to her ex-husband through their divorce in 2007. Interestingly, the motion only says that the Trustee agreed to release $5,725.91 if the Debtor amended her Schedule B to list the asset. The declarations filed in support of the Motion fail to state the balance in the bank account. Dckts. 22, 23, 24. Though Stanford Heiner testifies that copies of bank statements are filed as Exhibit A, no such Exhibit has been filed.

When the court reviewed Amended Schedule B, Dckt. 14, it discovered that the bank account has a balance of $50,774.06, any amount close to the $5,725.91 referenced in the Motion. Further, while copies of bank

statements is promised (actually stated under penalty of perjury as having been provided to the court), none are filed as exhibits.

While there may well be nothing amiss, Creditors have never been notified that there is $50,774.06 which the court is being asked to order abandoned. The court will not issue an order abandoning an asset that (1) is not clearly identified in the Motion and (2) for which Creditors were not provided notice that it would be abandoned.

The Motion is denied without prejudice.

REVIEW OF MOTION

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

Here, Debtor requests that the court order the Chapter 7 Trustee to release the Wells Fargo account ending in 7652 to Stanford D. Heiner ("Heiner"). The Trustee has filed a statement of non-opposition.

Background

On November 2, 2007, Debtor and Heiner filed a petition for dissolution of marriage in the Stanislaus County Superior Court. The parties ultimately entered into a marital settlement agreement on August 30, 2007, six years before the filing of this bankruptcy petition. Debtor and Heiner entered into a marital settlement agreement, which Debtor has designated as Exhibit 'A' and attaches in support of the Motion to Compel Abandonment. Exhibit A: Marital Settlement Agreement, *In re: Marriage of Heiner*, Stanislaus County Superior Court, Case No. 401815 (Dckt. No. 25).

The marital settlement agreement expressly states that the Wells Fargo and any funds contained therein belong solely to Mr. Heiner. *Id.* at 14. In addition, both parties would maintain their respective one half interest in the property located at 2520 Fiedler Way, Modesto, California. The Agreement also afforded Heiner the option to purchase Debtor's one half interest at any time. *Id.* Heiner subsequently purchased Debtor's one half interest in the family residence and then later sold the residence to a third party. Upon completion of the sale, Heiner deposited the proceeds from the sale into the Wells Fargo account. Nevertheless, Heiner did not remove Ms. Heiner's name as an authorized user from the Wells Fargo account.

Debtor states that although she is still on the Wells Fargo account, she has never deposited any money into it or withdrawn any since her divorce. ¶ 4, Declaration of Cara Elaine Heiner, Dckt. No. 24 at 2. The only funds in the Wells Fargo account are from the sale of the Heiner's previous residence, which Heiner purchased from Debtor approximately three years after their divorce. As a result, Debtor does not have any claim to the Wells Fargo account and it is not part of her bankruptcy estate, and Debtor was also not required to turn over the Wells Fargo account to Trustee.

Debtor did not list the Wells Fargo account in her schedules. After filing for bankruptcy, however, Wells Fargo placed an administrative freeze on the Wells Fargo account. When Debtor found out about the administrative freeze, she contacted Trustee. Trustee contacted Debtor's counsel to request evidence that Debtor did not have an interest in the Wells Fargo Account. Debtor provided bank statements and declarations from both herself and Heiner, attesting to the fact that Debtor does not hold an interest in the account.

Trustee agreed to release $5,725.91 if Debtor filed an amended schedule B with the Wells Fargo account, and withheld filing another amended Schedule C without first obtaining his consent. Debtor complied with Trustee's request approximately two weeks before the initial 341 meeting of creditors. At the Meeting of Creditors, Trustee did not ask Debtor any questions regarding the Wells Fargo account and concluded the meeting after a brief examination.

Debtor states that she had no interest in the Wells Fargo account when she filed her petition, and thus Trustee has no right to prevent Heiner from accessing his Wells Fargo account. Debtor then requests this Court enter an order requiring Trustee to immediately release the Wells Fargo account to Heiner.

DISCUSSION

The filing of a bankruptcy petition under 11 U.S.C. §§ 301, 302 or 303 creates a bankruptcy estate. 11 U.S.C. § 541(a). Bankruptcy Code Section 541(a)(1) defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." Characterization of property as separate or community as of date of one spouse's bankruptcy filing is determined by applicable state law. *In re McCoy*, 9th Cir. BAP (Cal.) 1990, 111 B.R. 276. If the debtor has an equitable or legal interest in property from the filing date, then that property falls within the debtor's bankruptcy estate and is subject to turnover. 11 U.S.C. § 542(a). If the debtor does not have a legal or equitable interest in property from the filing date, then that property falls outside the debtor's bankruptcy estate and is not subject to turnover. *Id.* For purposes of § 541(a)(2), all community property in California that is not yet divided by a state court at the time of the bankruptcy filing is property of the bankruptcy estate. *In re Mantle,* 153 F.3d 1082, 1085 (9th Cir. 1998).

Under California law, division of property is the event that will sever the liability of community property for community debts, and, until division, all community property of the divorcing couple is property of one spouse's bankruptcy estate. 11 U.S.C. § 541(a)(2). *Id.* at 1083. As Debtor states, under California law, there are two categories of ownership by married people: the separate property of each, and community property of both. *Riddell v. Guggenheim*, 281 F.2d 836, 841 (9th Cir. 1960). When the party's dissolve their marriage, they retain their separate property and divide their interest in community property pursuant to either a marital settlement agreement or court order. Cal. Fam. Code. § 2550 (2009).

Here, Debtor and Heiner entered into a contract to divide their community assets after filing for a divorce. It was Debtor and Heiner's division of property (framed as the "confirmation of separate property" in their marital dissolution agreement) and the dissolution of marriage, that terminated the liability of the community property for community debts, as well as debts of the other spouse and the division of the community property, Cal. Fam. Code §§ 910, 916(a)(2), 2300.

Although it may be that Debtor's assertion that the Wells Fargo account is Debtor's ex-husband's separate property is true, and therefore does not constitute property of the estate under 11 U.S.C. § 541, the court cannot order that the asset be abandoned if the asset has not been identified with specificity in Debtor's Motion. Additionally, creditors have not been notified as to the magnitude of what was being abandoned. (Though the Motion was served on creditor, neither the Motion nor the Notice of Motion stated that a " $50,774.06 bank account" was being abandoned.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon Property filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is of Wells Fargo Bank, N.A., checking account ending in #7652 is denied without prejudice.

13. 13-91990-E-7 CARA HEINER MOTION TO COMPEL ABANDONMENT
SJS-2 Scott J. Sagaria 12-26-13 [27]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 27, 2013. By the court's calculation, 34 days' notice was provided. 28 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Abandon Real Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006).

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

REVIEW OF MOTION

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000). Here, the property commonly known as 1904 East Orangeburg Avenue, Modesto, California, is impaired by one deed of trust held by Pennymac Loan Services, with a principal loan balance of $155,198.00.

Debtor asserts that the value of the property at the time of the filing of her case was $180,000.00. This is a different figure cited, however, from the value listed on Debtor's original petition (Dckt. No. 1), and her most recently revised Second Amended Schedules C and D, filed on December 9, 2013 (Dckt. No. 14). The value listed on the petition and Debtor's amended schedules is $173,923.00. Debtor offers no explanation of the discrepancy between the petition figure and her current valuation of the property of $180,000.00.

Lack of Competent Evidence Supporting Debtor's Valuation of the Property

The Debtor seeks to value the property at a fair market value of $180,000 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Debtor arrives at the $180,000.00 figure, however, by way of improper hearsay evidence. In Debtor's Memorandum of Points and Authorities (Dckt. No. 31), Debtor alleges that the fair market value of the property is $180,000.00, derived from an evaluation performed by a real estate agent that Debtor contacted one week before Debtor's Meeting of Creditors. Debtor states that she contacted Angie Japka, a local real estate agent, to perform an assessment of comparable home sales to determine an appropriate list price for the residence. Debtor states that Japka reviewed 11 different properties within the Debtor's neighborhood and with similar square footage, and informed Debtor that sales within the Debtor's neighborhood after November 6, 2013 ranged between $155,000.00 and $199,100.00.

Debtor does not, however, provide competent evidence demonstrating that Japka's did in fact analyze and conclude that the value the property to is $180,000. Debtor's Memorandum states that,

> Based on comparable home sales and the condition of the Debtor's residence, Ms. Japka strongly believes that the fair market value is $180,000.00.

Debtor's Memorandum of Points and Authorities in Support of Motion to Compel Abandonment, Dckt. No. 31 at 3.

Debtor does not offer a sworn declaration by Japka, attesting to the valuation of the residence at $180,000.00. The factual contentions in Debtor's Memorandum of Points and Authorities emanate from Debtor's understanding of the analysis that Japka conducted, and not from the personal knowledge and description of the analysis provided by Japka herself. Upon review of the 'report' relayed to Debtor by Japka, offered by the Debtor as Exhibit A in Support of the Motion to Compel Abandonment (Dckt. No. 30), the court notes that Japka states the following:

> Attached is a list of comparable properties that have recently sold in the area. After researching the similarities and conditions of these properties and comparing them to your subject property, I would safely say that I would be able to list your property between $175,000-$180,000.

Japka's letter to Debtor is far less definitive than Debtor suggests. Debtor asserts that Japka "strongly believes" that the fair market value is $180,000.00, which, upon review of Japka's actual CMA report sent to Debtor, appears to be on the high end of the range of figures cited by Japka. There is no authentication of Japka's expert appraisal as required by Federal Rule of Evidence Rule 901.

Additionally, Debtor states that she checked the real estate appraisal website Zillow.com on December 23, 2013 to obtain an approximate fair market value for her residence. Declaration of Cara Elaine Heiner, ¶ 5, Dckt. No. 29 at 2. Debtor states that according to Zillow.com, the estimate for her residence is $175,000.00, and attaches a true and correct copy of the page as Exhibit B in support of the Motion. Merely reading something on the internet, however, does (1) not make it true and (2) does not constitute an exception to the hearsay rule. Fed. R. Evid. 801-803.

The court cannot accept Debtor's opinion of the value of the property because the $180,000 figure is not, in fact, Debtor's opinion, but rather valuation founded on improper hearsay.

Trustee's Report of No Distribution

Debtor also states that based upon a liquidation analysis, the property will have no equity once sales costs and administrative fees have been paid. If the court accepted Debtor's valuation of the resident at the fair market value of $180,000.00, there would be no equity remaining in the property, and the property is not of inconsequential value and benefit to the estate. Debtor has not, however, met the evidentiary burden of establishing the fair market value of the estate under 11 U.S.C. § 554(b), in demonstrating that the court should order the abandonment of the subject property.

The court notes that Trustee filed a Report of No Distribution on January 7, 2014, showing that Trustee believes that there is no property available for distribution from the estate. It appears then, that Trustee concurs with Debtor's questionable valuation of the property. Although Debtor has not provided competent evidence of the fair market value of her residence, the court will accept the use the $180,000.00 figure in calculating the property interest held by the estate, based on Trustee's apparent agreement with Debtors' opinion of the property's value.

Liquidation Analysis

Assuming the value of the property at the date of Debtor's filing of the petition was (and is currently) $180,000.00, then the real property cannot be liquidated for value to benefit the creditors of the estate. The property secures the loan of Pennymac Loan Services in the amount of $155,198.00. Subtracting the amount owed to Pennymac Loan Services from the value of the property, there is $24,802.00 worth of equity left in the subject property. According to Debtor's Schedule C, Debtor has only claimed an exemption of $18,725.00 under California Code of Civil Procedure § 703.140(b)(5) on the property. Less Debtor's claimed exemption, $6,077.00 remains in the property.

Debtor then subtracts the 'costs of sale' of $14,400.00 from the remaining equity. Debtor then subtracts the 'costs of sale' of $14,400.00 from the remaining equity. The court will take judicial notice, under Federal Rule of Evidence 201, that costs of sale is in the customary range of 8% (after having accounting for broker's commissions, title insurance, escrow fees, etc.). Debtor's assignment of costs of sale as $14,400.00, which is appropriately 8% of the $180,000.00 valuation. The court takes

judicial notice that 8% is a percentage commonly used in the real estate business as the costs for commissions and closing costs in the sale of real property.

Subtracting $14,400.00 from the remaining $6,077.00 in equity shows that there is negative equity in the property. The court concludes that the debt secured by the property exceeds the value of the property, and that the property is of inconsequential value to the estate. There are negative financial consequences of the estate in retaining the property. The court will order grant the Motion to Abandon.

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon Property filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the real property identified as:
>
> 1. A Fee Simple Interest in Primary Residence, 3 Bedrooms, 2 Bathroom, 1904 E. Orangeburg Avenue, Modesto, CA 95355
>
> on Schedule A by the Debtor is abandoned to Cara Elaine Heiner, the Debtor, by this order, with no further act of the Trustee required.

14. 13-90795-E-7 SSA-2 JOSE IRAHETA AND ALBA MARTINEZ

MOTION FOR TURNOVER OF PROPERTY AND/OR MOTION FOR IMPOSITION OF COMPENSATORY AND/OR GENERAL DAMAGES, FEES, COSTS, AND OTHER RELIEF AGAINST DEBTORS
12-26-13 [26]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on December 26, 2013. By the court's calculation, 35 days' notice was provided. 28 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Turnover Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered.

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

The Chapter 7 Trustee seeks the turnover of Debtors' 2002 Nissan, bearing the license number 6TAY714, with the Vehicle Identification Number ending in #0012, and the amount of $1,050, which Debtors withdrew from their Checking account at Wells Fargo Bank during the post-petition period of this bankruptcy case. Trustee demands the turnover of the vehicle and funds pursuant to 11 U.S.C. § 542, which entitles the Trustee to turnover of all property of estate from Debtors.

Trustee states that the subject vehicle was not listed in Debtors' schedules, and only following post-petition investigation did the Trustee discover this vehicle. Dckt. 29, ¶ 5, Declaration of Trustee Michael D. McGranahan in Support of Motion. According to the information provided to Trustee from the Debtors' books and records, the subject vehicle was purchased for $6,000 in the pre-petition period, on or about February 27, 2013. Trustee argues that the vehicle cannot be exempted based on Debtors'

bad faith in not disclosing it on their schedules. Debtors' schedules have not been amended to reflect this asset.

Trustee also uncovered an unauthorized cash withdrawal made by Debtors after they filed their bankruptcy case. Debtors' correspondence to the Trustee and his investigation reflect that Debtors, from their checking account at Wells Fargo Bank, made an unauthorized post-petition expenditure of $1,050 cash withdrawal, that was not disclosed on their original schedules or their bankruptcy petition. Trustee asserts that the foregoing was the property of the estate and also cannot be exempted due to their bad faith in failing to disclose this asset until after discovery by the Trustee, and demand for turnover.

The court notes that the only checking account listed in Debtors' Schedule B is a Wells Fargo Account, listed as joint property with the value of $200.00 as of the petition filing date of April 25, 2013. This account is claimed as exempt under California Civil Code of Procedure § 703.140(b)(5). Debtors' false listing of their checking account is of serious concern and may serve grounds for denial of Debtor's discharge, as Debtors made knowingly and fraudulent accounts of their assets in connection with their bankruptcy case under 11 U.S.C. § 727.

Attempts to Contact Debtors' Counsel

On June 6, 2013, Trustee sent a letter to counsel for Debtors concerning the unauthorized expenditure of the purchase of the Nissan vehicle purchase. Debtor and their counsel did not "fully respond" to Trustee's initial letter. Trustee sent a second letter on July 22, 2013, but Debtor and their counsel also did not "fully respond" to that letter.

Debtor's counsel did reply to Trustee's emails on July 16, 2013. The letter does not address Trustee's concerns about the turnover, and merely states that Debtors had made withdrawals from their checking account in the pre and post-petition period, which included the purchase of a vehicle for $6,000 on February 27, 2013, and a payment of $682 to register the vehicle. Declaration of Michael D. McGranahan in Support of Motion for Turnover of Property, Dckt. No. 29. This information is not included in Debtors' Petition or Statement of Affairs, and have not been updated to reflect these transactions.

As a result, on November 13, 2013, counsel for Trustee wrote Debtors' counsel a letter demanding, among other things, the turnover of the 2002 Nissan within five days. The Trustee did not receive a response. On November 25, 2013, counsel for Trustee sent a courtesy email to counsel for Debtors, Thomas Gillis, advising him that a turnover motion would be filed if Trustee did not receive a response from him and his clients. Debtors' counsel did not respond to that correspondence.

DISCUSSION

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

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

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

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

Here, both the vehicle and the funds withdrawn by Debtors constituted property of the estate. The filing of a bankruptcy petition under 11 U.S.C. §§ 301, 302 or 303 creates a bankruptcy estate. 11 U.S.C. § 541(a). Bankruptcy Code Section 541(a)(1) defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." The vehicle was acquired on February 27, 2013, two months before the Debtors filed for bankruptcy on April 25, 2013. Debtors held an interest in the property when the case commenced upon the filing of Debtors' petition. The vehicle is currently under the possession and control of Debtors, and is the type under 11 U.S.C. § 363, that the Trustee may use, sell, or lease.

The funds undisclosed in Debtors' Wells Fargo bank account was also property of the estate under 11 U.S.C. § 541. The cash withdrawn from Debtors' account, which became part of their bankruptcy estate once Debtors filed their bankruptcy petition. 11 U.S.C. § 549 provides that the Trustee may avoid a transfer of property of the estate that occurs after the commencement of the case and is not authorized under this title or by the court. The monies spent by Debtors post-petition by cash withdrawal on May 3, 2013 (after the commencement of the bankruptcy case) is an unauthorized post-petition transfer, not approved by the court or authorized by law, that is recoverable by the estate pursuant to 11 U.S.C. § 549.

Additionally, 11 U.S.C. § 550(a) provides that the Trustee may recover, for the benefit of the estate, property transferred from the immediate transferee of the transfer. Debtors were the immediate transferees, for whose benefit the cash withdrawal from the bank account was made. Trustee is thus empowered to recover the $1,050 benefit Debtors received when withdrawing funds in the post-petition period from their checking account. 11 U.S.C. § 550(c) also permits the Trustee to avoid transfers made between 90 days and one year before the filing of the

petition. Debtors purchased their 2002 Nissan less than two months before the filing of their petition. Trustee is entitled to avoid the transaction under 11 U.S.C. § 550.

Trustee has demanded from Debtors turnover of the 2002 Nissan, and Debtors and their counsel have refused to turnover the property requested. Trustee contends that at the time of the transfer, the 2002 Nissan had a fair market value of $6,000. Trustee demands that this amount be paid to the estate, and that any registration, title, insurance contracts, or documents pertaining to the vehicle be turned over as well.

In the alternative, Trustee demands that the subject vehicle be turned over to Trustee for administration sale and disposition. If residual net funds derived from this vehicle are less than $6,000, then the Debtors should be required to reimburse the estate, due to the fact that they or their family members have had the use of the vehicle, and have allowed it to depreciate. Debtors should be required to reimburse the bankruptcy estate the sum of $6,000 not disclosed in their schedules and for which they cannot otherwise claim exempt.

Debtors also wrongfully expended the sum of $1,050 post-petition, an expenditure which was also unauthorized by this court, for their own use. The court finds that Trustee's request that Debtors be required to reimburse the bankruptcy estate the sum of $1,050 (not disclosed in their schedules and for which they cannot otherwise claim exempt) reasonable and will include this request in the order granting the Motion.

Trustee testifies that he has repeatedly attempted to obtain the property of the estate, suggesting that Debtors and Debtors' counsel have intentionally concealed their expenditures and evaded Trustee's attempts to collect information regarding the cash withdrawal and the vehicle purchase. The court finds that the funds withdrawn by Debtors from their Wells Fargo account in the post-petition period, and the purchase of their 2002 Nissan, both transfers having been undisclosed in their schedules and petition, to be property of the estate. As Debtors are statutorily required to turnover all property of the estate, the court grants the motion to compel turnover of property of the estate, and that the 2002 Nissan and $1,050 in withdrawn funds be turned over to the Chapter 7 Trustee immediately.

The Trustee also requests that if the Debtors refuse to turnover the monies and property requested, the court should impose further corrective or general compensatory damages in the amount of $100.00 per day to secure their compliance with its orders. Finally, the Trustee requests that the court order the Debtors to pay the difference of the value obtained by the Trustee from the sale of the vehicle and $6,000.00, if the sales proceeds are less than $6,000.00.

Limits to Relief Pursuant to 11 U.S.C. § 542 Relief

In his frustration with the Debtors in what has been shown to be a blatant and flagrant violation of the Bankruptcy Code and the perceived unresponsiveness of Debtors' counsel, the Trustee pushes beyond obtaining an order for turnover of the property. He requests that the court order that the Debtors pay the estate $6,000.00, the value of the vehicle. Further,

that if the Debtors fail to turnover the property, the court issue prospective $100.00 a day corrective sanctions or "compensatory damages." This latter relief is based on the powers of the court under 11 U.S.C. § 105. The Trustee does not provide legal authority for either.

With respect to the $6,000.00 monetary award requested, the Trustee is requesting a $6,000.00 judgment in lieu of turning over the property or a prospective judgment to the extent that the sales price for the vehicle is less than $6,000.00. 11 U.S.C. § 542(a) provides for the turnover of property or the value of the property. The court can, and will order that the Debtor turnover the vehicle or $6,000.00 in lieu of delivering physical possession. However, the court will not grant a judgment to the Trustee for $6,000.00.

While the court may issue corrective sanctions, the court will not presume that the Debtors, based on the advice of their experienced counsel, will ignore the turnover order.

Bankruptcy courts have jurisdiction and the authority to impose sanctions, even when the bankruptcy case itself has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384,395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548-549 (9th Cir. 2004). The bankruptcy court judge also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (in re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); see 11 U.S.C. § 105(a).

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

At this point, the court does not know that a mere $100 a day in "corrective sanctions" may be sufficient if the Debtors ignore the order or that such amount is appropriate for the damages caused by Debtors' wrongful retention of this property of the estate (or presuppose the possible tort claims which the Trustee may seek to assert).

The order of sanctions will be made pursuant to a separate motion brought by the Trustee, if on the remote chance that the Debtors do not comply with the present order. The evidence presented also raises several other issues in connection with the Debtors' conduct.

In the Trustee's June 6, 2013 letter to Counsel for Debtors, the Trustee states that the Debtors advised the Trustee that the vehicle was purchased for their daughter, and requests the name for the daughter. Exhibit 1, Dckt. 31. In his July 22, 2013 letter to Debtors' Counsel, the Trustee references the Debtors having withdrawn $8,100.00 from the bank

account on the eve of bankruptcy. Id., Exhibit 2. No response correspondence from Debtors' Counsel, if any exists, has been provided.

To the extent that the Debtors and Counsel are not only withholding assets, but information, the court could well envision 2004 examinations of the Debtors, the Debtors' Daughter, and the vehicle itself at the United States Bankruptcy Court, Modesto Division. Failure of the Debtors, Daughter, and Vehicle to appear as ordered could possibly result in the court ordering that the United States Marshall take each into custody and present them to the court. FN. 1.

FN.1. The imposition of monetary sanctions, the Debtors and their Daughter being taken into custody if they fail to appear at a 2004 examination set in court, and the Marshal taking possession of the vehicle may be the least of the Debtors' worries. Pursuant to 11 U.S.C. § 727(e) the Chapter 7 Trustee or the U.S. Trustee might decide to file a complaint to have the Debtors' discharge in this case revoked (one year statute of limitations). While the court has only heard the Trustee's side of the story, the Debtors electing to not file an opposition to this Motion, putting a $400,000+ discharge over a $6,000 vehicle and some cash appears to be an unbalanced equation.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Motion to Compel Turnover of Property filed by the Trustee having been presented to the court, and
>
> **IT IS ORDERED** that the Motion is granted and that Debtors turnover their 2002 Nissan, Vehicle Identification Number ending in #0012, to Trustee, along with any registration, title, insurance, or other documents related to the vehicle on or before noon on February 14, 2014. The vehicle shall be delivered to the Trustee at ----------.
>
> **IT IS FURTHER ORDERED THAT** if the Debtors elect to so do, they pay and deliver to the Trustee the sum of $6,000 rather than physical possession of the 2002 Nissan Vehicle. The $6,000.00, in the form of a cashier's check or other certified funds drawn on a bank with a physical location in California, shall be delivered to the Trustee at ----------, on or before noon on February 14, 2014.
>
> **IT IS FURTHER ORDERED THAT** Debtors pay the Trustee the sum of $1,050 resulting from their unauthorized post-petition transfer of monies forthwith.
>
> **IT IS FURTHER ORDERED THAT** the Trustee's request for corrective sanctions or compensatory damages are denied without prejudice as premature.

IT IS FURTHER ORDERED THAT a costs bill and motion for attorneys' fees, if any, shall be filed and served on or before February 21, 2014. The court makes no determination as to whether a basis exists for an award of attorneys; fees.

15. 13-91459-E-11 KDG-4 — **LIMA BROTHERS DAIRY** — Hagop T. Bedoyan — **MOTION TO USE CASH COLLATERAL AND/OR MOTION FOR ADEQUATE PROTECTION O.S.T. 1-17-14 [119]**

Local Rule 9014-1(f)(3) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on January 17, 2014. By the court's calculation, 13 days' notice was provided.

Tentative Ruling: The Motion to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Use Cash Collateral on an interim basis through February 18, 2014, and set the final hearing at 10:30 a.m. on February 13, 2014. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Lima Brothers Dairy, the Debtor-in-Possession seeks an order authorizing the use of cash collateral, in the form of cash on hand, money on deposit, milk and cull proceeds, and the feed, derived from its business operations to fund its ongoing operations on an emergency basis. Debtor believes the use of these funds is necessary to preserve its operations as a going concern and to insure the 2,200 animals, including milk cows, dry cows, heifers, calves and bulls, are fed. Debtor seeks the use of cash collateral through April 12, 2014.

Based on the loan and security documents, Debtor believes that AgCredit has first priority liens against the Cash Collateral. Based on loan statements and the representations of AgCredit, Debtor believes that the debt owed to AgCredit is about $1.8 million on its Cow Loan and $0.00 on its Feed Loan. On the petition date, AgCredit was owed about $2.5 million on the two loans combined, but Debtor sold some livestock and pool quota and paid AgCredit pursuant to stay-relief orders entered on October 16, 2013, and November 5, 2013, in addition to continuous monthly payments throughout the case.

Debtor states the following creditors hold security interests junior to AgCredit's interest against the Cash Collateral: (1) Stanislaus Farm Supply (UCC-1 filed August 29, 2012), and (2) Cargill, Inc. (UCC-1 filed October 15, 2012).

To date, Debtor has been using cash collateral pursuant to two very narrow cash collateral stipulations dated September 11, 2013, and December 2, 2013. However, Debtor seeks broader use of cash collateral under the motion as well as additional protections to AgCredit. Debtor has requested that AgCredit continue to consent to the use of cash collateral under a further stipulation. Debtor is hopeful that such a stipulation will be entered shortly and presented to the Court in conjunction with this motion.

Debtor states it will provide AgCredit with adequate protection, including:

a. caring for and maintaining the secured parities' collateral,

b. granting AgCredit a replacement lien on Debtor's post-petition property of the same type and nature as against Debtor's prepetition property to the extent the use of cash collateral results in a decrease in value of AgCredit's interest in its collateral,

c. making bi-weekly adequate-protection payments to AgCredit in the amount of about $35,000.00 (increasing to $55,000.00 in February 2014 and thereafter) as provided in the Budget;

d. providing monthly financial reports to AgCredit, and allowing reasonable inspection of its operations; and

f. harvesting crops in the field and converting it into usable silage, thereby substantially increasing the feed collateral value.

Debtor states it will provide junior secured creditors Stanislaus Farm Supply and Cargill, Inc. with adequate protection by granting replacement liens on milk proceeds and milk products generated by Debtor post-petition of the same type and nature as existed when Debtor filed its case to the extent the use of cash collateral results in a decrease in value of their interest in their collateral.

DISCUSSION

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

The Debtor-in-Possession proposes the following budget:

	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	
Cash Flow Week	1	2	3	4	5	6	7	8	9	10	11	12	13	
Post-Petition Accounting Week	20	21	22	23	24	25	26	27	28	29	30	31	32	
Week Beginning Monday	1/13/14	1/20/14	1/27/14	2/3/14	2/10/14	2/17/14	2/24/14	3/3/14	3/10/14	3/17/14	3/24/14	3/31/14	4/7/14	TOTAL
BEGINNING CASH BALANCE	**$58,574**	**$124,674**	**$57,574**	**$179,174**	**$104,374**	**$205,474**	**$133,374**	**$81,974**	**$191,674**	**$246,824**	**$174,724**	**$121,924**	**$187,974**	**$58,574**
ADD: Cash Receipts:														
Net Milk Check	207,000		233,000		207,000		43,500	184,500	175,050		38,900	175,050		1,264,000
Bull Calf Income	700	700	700	700	700	700	700	700	700	700	700	700	700	9100
Cow Sales		10,000		10,000		10,000		10,000		10,000			10,000	60000
TOTAL CASH RECEIPTS	**207,700**	**10,700**	**233,700**	**10,700**	**207,700**	**10,700**	**44,200**	**195,200**	**175,750**	**10,700**	**39,600**	**175,750**	**10,700**	**1,333,100**
LESS: Operating Disbursements														
Hay	10,500	10,500	10,500	10,500	10,500	10,500	10,500	10,500	10,500	10,500	10,500	10,500	10,500	136,500
Grain/Silage	35,000	55,000		60,000		60,000		60,000		60,000		60,000		390,000
Seed and Farming														0
Payroll, Taxes & Benefits	19,200		19,200		19,200		19,200		19,200			19,200		115,200
Contract Labor		2,000		2,000		2,000		2,000		2,000		2,000		12,000
Hauling	1,500				1,500				1,500				1,500	6,000
Fuel & Oil	1,000	3,500	1,000	3,500	1,000	3,500	1,000	3,500	1,000	3,500	1,000	3,500	1,000	28,000
Herd Replacement									14,000		21,000		14,000	49,000
Repairs & Maint.		2,000		2,500		2,000		2,500		2,000		2,500		13,500
Supplies	4,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000	52,000
Utilities	8,000	300			8,000	300			8,000	300			8,000	32,900
Vet & Breeding	1,500				1,500				1,500				1,500	6,000
Insurance	400		400	2,500	400		400	2,500	400		400	2,500	400	10,300
Owner's Draw	5,000		5,000		5,000		5,000		5,000			5,000		30,000
Misc	500	500	500	500	500	500	500	500	500	500	500	500	500	6,500
TOTAL OPERATING DISBURS.	**86,600**	**77,800**	**40,600**	**85,500**	**51,600**	**82,800**	**40,600**	**85,500**	**65,600**	**82,800**	**37,400**	**109,700**	**41,400**	**887,900**
Less: Non-Operating Disburs.														
Legal and Professional Fees													25,000	25,000
Property Taxes	20,000												18,000	38,000
2013 Payroll Tax Liability			30,000											30,000
US Trustee Fees			6,500											6,500
TOTAL NON-OPER. DISBURS.	**20,000**		**36,500**										**43,000**	**99,500**
Less Loan Payments														
Loan Payments	35,000		35,000		55,000		55,000		55,000		55,000		55,000	345,000
TOTAL LOAN PAYMENTS	**35,000**		**35,000**		**55,000**		**55,000**		**55,000**		**55,000**		**55,000**	**345,000**
TOTAL CASH DISBURSEMENTS	**141,600**	**77,800**	**112,100**	**85,500**	**106,600**	**82,800**	**95,600**	**85,500**	**120,600**	**82,800**	**92,400**	**109,700**	**139,400**	**1,332,400**
ENDING CASH BALANCE	**$124,674**	**$57,574**	**$179,174**	**$104,374**	**$205,474**	**$133,374**	**$81,974**	**$191,674**	**$246,824**	**$174,724**	**$121,924**	**$187,974**	**$59,274**	**$59,274**

The court authorizes the use of cash collateral on an interim basis as requested through February 18, 2014, including the adequate protection payments, with one exception. The court does not approve a budget expense for legal and professional fees (non-operating disbursements). If professionals desire to obtain a retainer or other dedicated funds to the exclusion of other administrative expenses, they must do so by a separate motion clearing requesting such preferential treatment.

No objection has been raised to the use and the payments are reasonable and necessary to maintain Debtor's operations. The court may authorize use of cash collateral so long as the creditor is adequately protected. 11 U.S.C. § 363(e). Here, the existence of a substantial equity cushion and the adequate protection payment protect the creditors interests, with the court granting creditors with liens on the cash collateral replacement liens in the same types of collateral described in their security agreements and other lien documents, to the extent that the use of cash collateral reduces the pre-petition amount of collateral which secured their respective claims.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Authorize Use of Cash Collateral filed by the Debtor-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the motion to use cash collateral for the payment of the expenses is granted on an interim basis through and including February 18, 2014, with a final hearing set for 10:30 a.m. on February 13, 2014, and the cash collateral may be used to pay the following expenses:

	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	
Cash Flow Week	1	2	3	4	5	6	7	8	9	10	11	12	13	
Post-Petition Accounting Week	20	21	22	23	24	25	26	27	28	29	30	31	32	
Week Beginning Monday	1/13/14	1/20/14	1/27/14	2/3/14	2/10/14	2/17/14	2/24/14	3/3/14	3/10/14	3/17/14	3/24/14	3/31/14	4/7/14	TOTAL
BEGINNING CASH BALANCE	**$58,574**	**$124,674**	**$57,574**	**$179,174**	**$104,374**	**$205,474**	**$133,374**	**$81,974**	**$191,674**	**$246,824**	**$174,724**	**$121,924**	**187,974**	**$58,574**
ADD: Cash Receipts:														
Net Milk Check	207,000		233,000		207,000		43,500	184,500	175,050		38,900	175,050		1,264,000
Bull Calf Income	700	700	700	700	700	700	700	700	700	700	700	700	700	9100
Cow Sales		10,000		10,000		10,000		10,000		10,000			10,000	60000
TOTAL CASH RECEIPTS	**207,700**	**10,700**	**233,700**	**10,700**	**207,700**	**10,700**	**44,200**	**195,200**	**175,750**	**10,700**	**39,600**	**175,750**	**10,700**	**1,333,100**
LESS: Operating Disbursements														
Hay	10,500	10,500	10,500	10,500	10,500	10,500	10,500	10,500	10,500	10,500	10,500	10,500	10,500	136,500
Grain/Silage	35,000	55,000		60,000		60,000		60,000		60,000		60,000		390,000
Seed and Farming														0
Payroll, Taxes & Benefits	19,200		19,200		19,200		19,200		19,200			19,200		115,200
Contract Labor		2,000		2,000		2,000		2,000		2,000		2,000		12,000
Hauling	1,500				1,500				1,500				1,500	6,000
Fuel & Oil	1,000	3,500	1,000	3,500	1,000	3,500	1,000	3,500	1,000	3,500	1,000	3,500	1,000	28,000
Herd Replacement									14,000		21,000		14,000	49,000
Repairs & Maint.		2,000		2,500		2,000		2,500		2,000		2,500		13,500
Supplies	4,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000	52,000
Utilities	8,000	300			8,000	300			8,000	300			8,000	32,900
Vet & Breeding	1,500				1,500				1,500				1,500	6,000
Insurance	400		400	2,500	400		400	2,500	400		400	2,500	400	10,300
Owner's Draw	5,000		5,000		5,000		5,000		5,000			5,000		30,000
Misc	500	500	500	500	500	500	500	500	500	500	500	500	500	6,500
TOTAL OPERATING DISBURS.	**86,600**	**77,800**	**40,600**	**85,500**	**51,600**	**82,800**	**40,600**	**85,500**	**65,600**	**82,800**	**37,400**	**109,700**	**41,400**	**887,900**
Less: Non-Operating Disburs.														
Legal and Professional Fees													25,000	25,000
Property Taxes	20,000												18,000	38,000
2013 Payroll Tax Liability			30,000											30,000
US Trustee Fees			6,500											6,500
TOTAL NON-OPER. DISBURS.	**20,000**		**36,500**										**43,000**	**99,500**
Less Loan Payments														
Loan Payments	35,000		35,000		55,000		55,000		55,000		55,000		55,000	345,000
TOTAL LOAN PAYMENTS	**35,000**		**35,000**		**55,000**		**55,000**		**55,000**		**55,000**		**55,000**	**345,000**
TOTAL CASH DISBURSEMENTS	**141,600**	**77,800**	**112,100**	**85,500**	**106,600**	**82,800**	**95,600**	**85,500**	**120,600**	**82,800**	**92,400**	**109,700**	**139,400**	**1,332,400**
ENDING CASH BALANCE	**$124,674**	**$57,574**	**$179,174**	**$104,374**	**$205,474**	**$133,374**	**$81,974**	**$191,674**	**$246,824**	**$174,724**	**$121,924**	**$187,974**	**$59,274**	**$59,274**

The amount authorized for each category may be increased by no more than 10% each month, but the total cash collateral used in a month cannot exceed the monthly total set forth in the budget above.

IT IS FURTHER ORDERED that the creditors having an interest in the cash collateral are given replacement liens in the post-petition proceeds in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim.