UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

February 5, 2014 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled "Amended Civil Minute Order."

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.

3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.

4. If no disposition is set forth below, the matter will be heard as scheduled.

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1. 13-28020-D-7 HSM-5 — ROGER/BONNIE TURNER — MOTION TO EXTEND TIME 12-31-13 [36]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the Trustee's Motion for Order Extending Time to File Objections to Debtors' Claims of Exemptions is supported by the record. As such the court will grant the Trustee's Motion for Order Extending Time to File Objections to Debtors' Claims of Exemptions. Moving party is to submit an appropriate order. No appearance is necessary.

2. 12-33722-D-7 SLF-10 — RICHARD/ETELVINA CALDRON — MOTION FOR COMPENSATION FOR GARY FARRAR, CHAPTER 7 TRUSTEE(S), FEES: $3,500.00, EXPENSES: $260.83 1-8-14 [84]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 326(a). As such, the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.

3. 13-27725-D-7 KRISTIAN HARTMAN
DNL-5

MOTION FOR COMPENSATION BY THE LAW OFFICE OF DEMOND, NOLAN, LIVAICH & CUNNINGHAM FOR J. LUKE HENDRIX, TRUSTEE'S ATTORNEY(S), FEES: $9,593.36, EXPENSES: $540.81
1-8-14 [120]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 326(a). As such, the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.

4. 13-27725-D-7 KRISTIAN HARTMAN
DNL-7

MOTION FOR COMPENSATION FOR J. MICHAEL HOPPER, CHAPTER 7 TRUSTEE(S), FEES: $5,700.00, EXPENSES: $0.00
1-8-14 [125]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 326(a). As such, the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.

5. 13-27725-D-7 KRISTIAN HARTMAN
WAC-2

CONTINUED MOTION TO DISMISS CASE
10-1-13 [93]

6. 13-32730-D-7 ROBERT/BARBARA CUTTLE
PD-1
WELLS FARGO BANK, N.A. VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
12-18-13 [14]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The debtors received their discharge on January 14, 2014 and, as a result, the stay is no longer in effect as to the debtors (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtors as moot. The court will grant relief from stay as to the trustee and the estate, and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.

7. 13-34135-D-7 BALBIR SANDHU — CONTINUED MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE
11-1-13 [5]

Final ruling:

The debtor paid the filing fee on January 22, 2014. Accordingly, the motion will be denied as moot by minute order. No appearance is necessary.

8. 12-39339-D-7 SLF-7 MARTIN/YVETTE DOTSON — MOTION FOR COMPENSATION BY THE LAW OFFICE OF THE SUNTAG LAW FIRM FOR DANA A. SUNTAG, TRUSTEE'S ATTORNEY(S), FEES: $9,000.00, EXPENSES: $0.00
1-8-14 [68]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.

9. 13-35552-D-7 CARRIE MURPHY — MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE
12-10-13 [5]

10. 13-35552-D-7 CARRIE MURPHY — TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
1-8-14 [14]

11. 13-26559-D-7 BRIAN MCGLONE
13-2330 RK-1
MCGLONE V. IBERIA BANK

CONTINUED MOTION BY RICHARD KWUN TO WITHDRAW AS ATTORNEY
12-24-13 [7]

Final ruling:

This motion was denied as moot by minute order. No appearance is necessary. Matter removed from calendar.

12. 13-35561-D-7 RAYMUNDO/MARTHA CAMACHO
GAM-1

MOTION TO COMPEL ABANDONMENT
12-23-13 [10]

Final ruling:

This is the debtors' motion to compel the trustee to abandon the business of debtor Raymundo Camacho, a self-employed electrician. The court is not prepared to consider the motion at this time because the moving parties failed to serve the motion in accordance with Fed. R. Bankr. P. 6007.

Fed. R. Bankr. P. 6007(a) requires the trustee or debtor in possession to "give notice of a proposed abandonment or disposition of property to the United States trustee [and] all creditors . . . ." On the other hand, Fed. R. Bankr. P. 6007(b) provides that "[a] party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate." Ostensibly, the latter subparagraph does not require that notice be given to all creditors, even though the former does. A motion under subparagraph (b), however, should generally be served on the same parties who would receive notice under subparagraph (a) of Fed. R. Bankr. P. 6007. See In re Jandous Elec. Constr. Corp., 96 B.R. 462, 465 (Bankr. S.D.N.Y. 1989) (citing Sierra Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d 705, 709-10 (9th Cir. 1986)). In this instance, the moving parties served only the chapter 7 trustee and the United States Trustee, and failed to serve any of the creditors. (The proof of service refers to an attached list, but there is no list attached.)

The court will continue the hearing to February 19, 2014, at 10:00 a.m., the moving parties to file a notice of continued hearing no later than February 5, 2014, and to serve it, together with the motion and supporting exhibits, no later than February 5, 2014, on all creditors. The notice of continued hearing shall be a notice pursuant to LBR 9014-1(f)(2) (no written opposition required). The moving parties shall file a proof of service no later than February 7, 2014. The hearing will be continued by minute order. No appearance is necessary on February 5, 2014.

13. 09-29162-D-11 NMM-1 SK FOODS, L.P.

MOTION FOR COMPENSATION BY THE LAW OFFICE OF NAGELEY MEREDITH AND MILLER, INC. FOR JAMES C. KEOWEN, DEBTOR'S ATTORNEY(S), FEES: $424,194.00, EXPENSES: $30,586.15 AND FOR ADMINISTRATIVE EXPENSES AND/OR COMPENSATION, FEES: $5,077.50, EXPENSES: $0.00
1-8-14 [4623]

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the application of the Nageley Meredith and Miller, Inc. ("NMM") for an allowance of attorneys' fees and costs allegedly incurred on behalf of certain entities that have since been consolidated with the debtor in this case, SK Foods, L.P.[1] (the "Consolidated Entities"). NMM seeks approval of $424,194 in fees and $30,586.15 in reimbursement of expenses, a total of $454,780.15, for services allegedly rendered to the Consolidated Entities during the period April 21, 2010 through September 20, 2011. Of that amount, NMM seeks authorization to retain the $370,677.32 it has already been paid by one of the Consolidated Entities, SSC Farming LLC ("SSC Farming"). NMM has also been paid a total of $30,000 by Cary Collins, leaving an unpaid balance of $78,535.09; NMM asks the court to authorize payment of that amount from the debtor's bankruptcy estate.

The chapter 11 trustee and unsecured creditors committee have filed a joint statement of non-opposition upon conditions to motion of NMM (the "Conditional Non-Opposition"). The Conditional Non-Opposition indicates that the trustee and the creditors' committee have reached an agreement with NMM, whereby NMN retains the payments it has already received from both SSC Farming and Cary Collins and NMM will then have an allowed general unsecured claim against the SK Food's estate in the amount of $78,535.09. Based on the Conditional Non-Opposition the court will not issue a substantive tentative ruling on this motion, but rather will use the hearing as a status conference.

14. 14-20064-D-11 GLENN GREGO

PRELIMINARY STATUS CONFERENCE RE: VOLUNTARY PETITION
1-3-14 [1]

Tentative ruling:

This is the initial status conference in this chapter 11 case. From its initial review of the documents filed thus far in the case, the court has several concerns. First, the Order to (1) File Status Report; and (2) Attend Status Conference, issued January 7, 2014 in this case (the "Order"), expressly required that the debtor serve a copy of the Order no later than January 17, 2014 on the parties listed in the Order. As of January 28, 2014, there is no evidence the Order has been served on anyone. Second, the Order also required the debtor to file a status report and to serve it on the listed parties. The debtor filed a status report in a timely manner, but failed to serve it on all the listed parties. Specifically, listed on the debtor's Schedule E are the tax collectors for El Dorado

and San Luis Obispo Counties, listed as being owed property taxes on the debtor's various real properties. These creditors are secured creditors, inasmuch as their claims are secured by the real properties on which the taxes are owed. Thus, pursuant to the Order, the debtor was required to serve the status report (and the Order) on the tax collectors, but did not do so.

The debtor's schedules and statement of financial affairs raise additional concerns. First, the list of 20 largest unsecured creditors, although blank, was required to be signed under oath by the debtor - it was not. Second, the debtor's declaration concerning schedules states that the debtor has read the "foregoing" summary and schedules, consisting of ___ sheets, and they are true and correct. The declaration, although signed by the debtor, appears at the beginning of the schedules; thus, it does not certify the accuracy of the "foregoing" schedules; further, the number of pages is not filled in. Next, the debtor's Schedule A lists five different real properties; as to each, the "nature of the debtor's interest" is listed as "Co-Owner." Yet nowhere in the schedules or statements filed in the case does the name of the debtor's co-owner appear. The nature of the co-ownership - whether joint tenancy, community property, or something else, is not provided, and the court cannot determine what percentage interest the debtor owns in each property. Further, there are no co-debtors listed on the debtor's Schedule H; thus, if the schedules are true and correct, the debtor owns some interest in the properties, but he is solely liable on the deeds of trust against them. Next, and of concern, is the fact that for every single category of personal property listed on the debtor's Schedule B, the debtor has checked the box "None." Thus, he has sworn under oath (assuming his declaration concerning the schedules properly covers the schedules following it) that he has no money, either cash or in bank accounts or any other type of financial account, no clothing, no household goods, no interests in insurance policies, no retirement assets of any kind, no vehicles, and so on. This the court cannot accept, and the court is troubled by the debtor's and his attorney's casual approach to the completion of the schedules. It seems clear to the court that the debtor has not complied with his "duty of careful, complete, and accurate reporting in his schedules." See Hickman v. Hana (In re Hickman), 384 B.R. 832, 841 (9th Cir. BAP 2008), citing Diamond Z Trailer, Inc. v. JZ L.L.C. (In re JZ L.L.C.), 371 B.R. 412, 417 (9th Cir. BAP 2007). This does not bode well for this chapter 11 case.

The debtor's statement of financial affairs suffers from the same problem - with the exception of rental income for the debtor's four rental properties, listed in response to question 1, the debtor has answered every single question on the statement by checking the box "None." It appears highly unlikely that these answers are all true. For example, the answer to the question requiring the debtor to list all suits and administrative proceedings to which the debtor is a party is "None," yet the debtor's status report states the debtor has "launched an action in Superior Court of Eldorado [sic] County" against JPMorgan Chase Bank. Unless the state court action was filed after the debtor's petition in this case was filed, the answer in the statement of financial affairs is inaccurate. Next, the debtor's chapter 11 statement of current monthly income is not signed and the figures in it are not mathematically accurate (see, e.g., lines 4(a), (b), and (c)). The debtor's Exhibit D - statement of compliance with credit counseling requirement - states the debtor received a credit counseling briefing within the 180 days before the filing, but the debtor did not attach a copy of the certificate, as expressly required by the form, and has not otherwise filed a copy of the certificate.

The debtor's Schedules I and J show the following. The debtor supports his eight-year old daughter, who lives with him. His mortgage payment is $4,066, and

his other expenses, not including the mortgage, insurance, and maintenance expenses of his rental properties, total $4,195, bringing total living expenses for the debtor and his daughter to $8,261. (Adding in the mortgage and other expenses of the rental properties brings the grand total of the debtor's expenses to $17,511.) Yet the debtor lists his total income as $3,725 (income from rental properties). He states, again under oath (assuming the declaration regarding his schedules was properly filed), that he expects no increases or decreases in either his income or his expenses within the next year. Thus, by the debtor's own admission, he has and expects to receive insufficient income to support himself and his daughter, and has no excess income from which he might fund a chapter 11 plan.

It appears from the debtor's status report that the debtor intends to utilize this chapter 11 case to delay foreclosure on one of his properties while he pursues his predatory lending practices action in state court. "Debtor will object to any claim from JP Morgan Chase Bank and will seek to have the determination of these claims deferred until the resolution of the Superior Court action in El Dorado County." Debtor's Status Report, filed Jan. 21, 2014, at 3:5-8. Given the state of the debtor's schedules and statements filed in this case, and the apparent state of his income and expenses, the court is not likely to permit the debtor to delay the prosecution of this chapter 11 case for any significant length of time. The court notes that the status report indicates the debtor "is seeking permission to use cash collateral basically to survive on and as compensation for managing the five properties underlying this action" (id. at 3:1-3), yet as of this date, no motions have been filed to allow the debtor to use cash collateral.

The court will conduct the status conference as scheduled, on February 5, 2014, but will not conclude it at that time. The debtor will need to address the issues raised above by way of a further status report, and will also be required to serve (1) the original Order; (2) his original status report; (3) a supplemental status report; and (4) a notice of continued hearing on all required parties.

The court will hear the matter.

15.	13-28369-D-7 SAC-1 DEWALD EQUIPMENT LEASING VS.	EDWIN GERBER	CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY 12-6-13 [62]

This matter will not be called before 10:30 a.m.

16. 13-33674-D-7 CAROL BURGESS
RCO-1
CENTRAL MORTGAGE COMPANY
VS.

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION
11-25-13 [24]

Final ruling:

This motion was granted by an order entered on January 11, 2014. Matter removed from calendar. No appearance is necessary.

17. 12-40188-D-7 JOHN/ROSARIO KENERY
DNL-2

MOTION TO SELL
1-6-14 [32]

18. 12-29195-D-7 PEW FOREST PRODUCTS
TAA-7

OBJECTION TO CLAIM OF SKYLINE ALTERATIONS, LLC, CLAIM NUMBER 3
12-23-13 [156]

Final ruling:

The matter is resolved without oral argument. The court's record indicates that no timely opposition/response to the objection has been filed and the objection is supported by the record. Accordingly, the court will sustain the trustee's objection to claim and disallow the claim Skyline Alternations, LLC as a priority and allow the claim as a general unsecured claim. Moving party is to submit an appropriate order. No appearance is necessary.

19. 13-21595-D-7 PATRICIA CUNNINGHAM
PA-6

CONTINUED OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
9-27-13 [120]

Final ruling:

The hearing on this objection is continued to March 19, 2014 at 10:00 a.m. per the order entered January 30, 2014. No appearance is necessary on February 5, 2014.

20. 13-30496-D-7 JRR-2 — EDWARD/LORRAINE KURATA — MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH EMK INVESTMENTS, INC.
1-7-14 [59]

Final ruling:

The matter is resolved without oral argument. There is no timely opposition to the trustee's motion to approve compromise of controversy, and the trustee has demonstrated the compromise is in the best interest of the creditors and the estate. Specifically, the motion demonstrates that when the compromise is put up against the factors enumerated in In re Woodson, 839 F.2d 610 (9th Cir. 1988), the likelihood of success on the merits, the complexity of the litigation, the difficulty in collectability, and the paramount interests of creditors, the compromise should be approved. Accordingly, the motion is granted and the compromise approved. The moving party is to submit an appropriate order. No appearance is necessary.

21. 11-48899-D-7 SLF-3 — WILLIAM PATTISON — CONTINUED MOTION TO SELL
12-12-13 [33]

22. 11-48899-D-7 SLF-4 — WILLIAM PATTISON — CONTINUED MOTION TO ABANDON
12-12-13 [38]

23. 13-33106-D-7 — ERIC LEWIS-MARTIN — TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
12-30-13 [18]

24. 13-33219-D-7 MARIA MADRIGAL SANCHEZ
JDM-1
TRAVIS CREDIT UNION VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
1-14-14 [22]

25. 06-22532-D-7 RIO MORALES
12-2587 DNL-1
DIDRIKSEN V. LICHEN, INC.

CONTINUED MOTION FOR SUMMARY JUDGMENT
9-16-13 [25]

Final ruling:

the court finds a further hearing will not be helpful and is not necessary. This is the motion of plaintiff Susan Didriksen, the trustee in the underlying chapter 7 case in which this adversary proceeding is pending (the "trustee"), for summary judgment against defendant Lichen, Inc. ("Lichen"). Lichen filed opposition and the trustee filed a reply; the court then issued a tentative ruling, and the hearing was continued to allow for further briefing, which has now been completed. For the following reasons, the motion will be granted.

On a motion for summary judgment, the moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986). In the present case, the parties appear to concede, and the court concludes, that there are no genuine issues of material fact, and the matter is appropriate for determination as a matter of law.

The court will begin by incorporating herein its tentative ruling for the original hearing, which is included in the civil minutes for October 16, 2013, DN 57 on the court's docket. Having reached a conclusion on a number of issues, the court determined that one issue had not been sufficiently briefed by the parties – whether the definition of "proceeds" contained in the California Commercial Code governs the determination of what proceeds Lichen has a security interest in under its deed of trust. The parties having further briefed that issue, the court now concludes the Commercial Code definition does not apply to the deed of trust, and thus, Lichen does not have a security interest in the proceeds of the debtors' construction defect claims.

The definition in question is found in § 9102(a)(64). (All statutory references are to the California Commercial Code.) That is, the definition is found in Division 9 of the Commercial Code, which governs transactions that create security interests in personal property or fixtures (§ 9109(a)(1)), and which does not govern real property transactions. § 9109(d)(11).[1] What the court was looking

for, then, in inviting further briefing was authority, if any, for the proposition that, as a matter of real property law or otherwise, the definition of "proceeds" in the Commercial Code applies to Lichen's deed of trust, and in particular, to determine the extent of the collateral Lichen obtained under the deed of trust.

Lichen has done nothing more than recite certain provisions of the Commercial Code that would apply if the Commercial Code governed the deed of trust, and cite a single case, Qmect, Inc. v. Burlingame Capital Partners II, L.P., 373 B.R. 682 (N.D. Cal. 2007), that, arguably, would apply if the Commercial Code governed here. In Qmect, the district court affirmed the bankruptcy court's decision that the debtor's post-petition accounts receivable were proceeds of the secured creditors' collateral (373 B.R. at 683), as a result of a post-petition replacement lien granted by the bankruptcy court as adequate protection, a lien the bankruptcy court determined was a blanket lien on the types of assets identified in the pre-petition loan documents, which included both real and personal property. Id. at 684-87. The district court's analysis, not surprisingly, centered on the provisions of the Commercial Code. The case has no bearing here, where the question is whether the Commercial Code applies to situations involving only real property liens, and Lichen has cited no authority for the proposition that the Commercial Code applies.

The conclusion Lichen draws from the Qmect case is this: "Lichen holds a security interest in the Property. Lichen is therefore entitled as a matter of law to any identifiable proceeds of the Property. To determine what these identifiable proceeds are, the [Commercial] Code provides the expansive definition given above." Lichen's Supplemental Memorandum in Opposition, filed Dec. 6, 2013 ("Supp. Opp."), at 6:26-7:4. The problem with this conclusion is simply that the "Property" in which Lichen was granted a security interest by way of its deed of trust was the debtors' real property, not personal property such as claims or causes of action for construction defects. Thus, the Commercial Code and its definition of "proceeds" simply do not govern, and Lichen is left with only the "proceeds" it bargained for; namely, those defined in the deed of trust itself, which the court has previously determined do not include the proceeds of the construction defect claims.[2]

Lichen makes several additional points that warrant response. First, it claims the debtors have never asserted that Lichen's lien did not attach to the proceeds of settlement of the construction defect claims. Thus, Lichen concludes, "the parties intended to include the settlement proceeds as part of [Lichen's] collateral." Supp. Opp. at 10:24-25. The argument is flawed for several reasons. First, Lichen makes a general assertion that what controls in contract interpretation is the parties' intent, as evidenced by their conduct and the context of the contract, as opposed to the actual contractual language; however, the cases cited do not support that proposition. Second, Lichen has offered no evidence of what the debtors intended to convey to Lichen as collateral. In fact, in a declaration filed in support of the trustee's motion, debtor Rio Morales identifies Lichen's "predominant security" as the debtor's interest in various real properties.[3] Third, Lichen mischaracterizes the language of the deed of trust – specifically, the definition of "Miscellaneous Proceeds" as "'. . . any compensation, settlement, award of damages or proceeds paid by any third party . . . ' without limitation." Supp. Opp. at 9:25-27. It is simply inaccurate to say that the definition was without limitation. The definition encompassed four specific situations – none of them including construction defect claims – and nothing more.[4]

Second, Lichen claims "[t]he Debtor's [sic] gave the collateral to [Lichen] subject to the alleged defects and the pending litigation to recover the damage occasioned thereby." Supp. Opp. at 12:25-13:1.[5] As already indicated, the alleged

construction defects had been discovered and the litigation commenced by the time the debtors gave the deed of trust to Lichen. Thus, in some sense, the real property was, at that time, "subject to" the alleged defects and the litigation. However, as already noted, the debtors apparently did not mention any of this to Lichen; at any rate, none of it was mentioned in the deed of trust or, apparently, the other loan documents. Thus, Lichen's conclusion – that "[a]ny compensation paid as damages in compensation for the defects in the collateral was unequivocally assigned to [Lichen] at the time the deed of trust was executed"[6] is simply wrong.

Finally, Lichen quotes the trustee as quoting § 552(a), and concludes from the language of § 552(a) that "[t]his argument concedes that the lien attaches to the settlement compensation or proceeds." Supp. Opp. at 3:28.[7] In Lichen's view, apparently, the statutory language that property acquired post-petition is not subject to any "lien resulting from" any pre-petition security agreement presupposes there was a "lien resulting from" a security agreement. Thus in this case (again, in Lichen's view), the trustee's reliance on § 552(a) presupposes there was a "lien resulting from" Lichen's deed of trust. And indeed there was a lien resulting from Lichen's deed of trust; namely, a lien on the debtors' real property and the "Miscellaneous Proceeds" of the property, as defined in the deed of trust. The trustee's reliance on § 552(a) to "cut off" the lien as to property acquired post-petition does not, as Lichen contends, presuppose that Lichen's "lien resulting from" its deed of trust was a lien on the debtors' claims and causes of action against Newcastle Homes or on the proceeds of those claims and causes of action.

The deed of trust specifically defined what "proceeds" of the real property would be covered by Lichen's lien; the definition did not include the proceeds of the debtors' claims and causes of action for construction defects. Pursuant to § 552(b), if the security interest created by the deed of trust extended to property of the debtor acquired pre-petition, and to proceeds, then the security interest extends to such proceeds acquired post-petition, to the extent provided by the security agreement and applicable nonbankruptcy law. The court concludes that neither the security agreement (the deed of trust) nor applicable nonbankruptcy law (neither the Commercial Code nor anything else) provides that Lichen has a security interest in the proceeds of the construction defect claims. Accordingly, the trustee is entitled to judgment as a matter of law, and the motion will be granted by minute order and the trustee is to submit a judgement consistent with this ruling. No appearance is necessary.

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1 With exceptions not relevant here, "[t]his division does not apply to . . . [t]he creation or transfer of an interest in or lien on real property, including a lease or rents thereunder . . . ." § 9109(d)(11).

2 At the hearing, the court declined Lichen's request that it be permitted additional briefing on the question whether the proceeds of the construction defect litigation fell within the definition of "Miscellaneous Proceeds" included in the deed of trust. Nevertheless, Lichen has further addressed this issue in its supplemental opposition. First, nothing Lichen has added changes the court's view on the issue, as set forth in its October 16, 2013 ruling. Second, there was nothing in the earlier ruling that would support Lichen's present contention that the court found the deed of trust definition of "Miscellaneous Proceeds" to be "ambiguous" as to whether it included the proceeds of the construction defect claims. Supp. Opp. at 11:4.

3 R. Morales Decl., filed Oct. 2, 2013, at 2:18-19.

4 The litigation had been commenced some ten months before the debtors signed the deed of trust in favor of Lichen's predecessor in interest. Yet neither the alleged construction defects nor the litigation was mentioned in the deed of trust, or apparently, in any of the loan documents. In particular, the definition of "Miscellaneous Proceeds" in the deed of trust did not mention the litigation or its proceeds. This omission strongly suggests the parties did not contemplate the litigation proceeds as being among Lichen's collateral.

5 Phrased another way, "[t]he security interest was granted subject to the litigation against Newcastle Homes concerning the alleged defects to the property and the resulting damage." Id. at 1:23-25.

6 Supp. Opp. at 13:1-3.

7 Phrased another way, "the Trustee's claim herein concedes that the lien attaches as she seeks to defeat the attachment post petition. Her very argument assumes the attachment of [Lichen]'s lien." Supp. Opp. at 9:11-13.

26.	06-22532-D-7 12-2587 DIDRIKSEN V. LICHEN, INC.	RIO MORALES RSK-1	CONTINUED MOTION FOR SUMMARY JUDGMENT 9-18-13 [32]

Final ruling:

The court finds a further hearing will not be helpful and is not necessary. This is the motion of defendant Lichen, Inc. ("Lichen") for summary judgment against plaintiff Susan Didriksen, the trustee in the underlying chapter 7 case (the "trustee"). The trustee has filed opposition, and Lichen has filed a reply.

The court incorporates herein its rulings for the original and continued hearings on the trustee's counter-motion for summary judgment, DC No. DNL-1. The former is included in the civil minutes for October 16, 2013, DN 57 on the court's docket; the latter is included in the court's pre-hearing disposition for this date, February 5, 2014, on DC No. DNL-1, and will be included in the court's civil minutes for February 5, 2014. As discussed in those rulings, the court has determined that Lichen does not have a lien in the proceeds of the debtors' litigation against Newcastle Homes, et al. Accordingly, Lichen's motion, by which it seeks an award of the proceeds of settlement of that litigation, will be denied by minute order. No appearance is necessary.

27.	11-49741-D-7 DNL-7	WAGDI/NATALYA WAHBA	MOTION TO ABANDON 1-14-14 [264]

28. 13-29346-D-7 RYAN/LORENA O'MALLEY — MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE
1-9-14 [39]

29. 12-24155-D-7 ANDREW/RINA CARAGAN
12-2249
TABIJE V. CARAGAN ET AL — ORDER TO SHOW CAUSE WHY THE ADVERSARY PROCEEDING SHOULD NOT BE DISMISSED AS TO DEFENDANT RINA DEL ROSARIO CARAGEN
1-23-14 [49]

Final ruling:

This order to show case has been resolved by the stipulated order entered January 30, 2014. As a result the order to show cause will be removed from calendar as moot. No appearance is necessary.

30. 12-40761-D-7 MARIANNE MILLER
SLF-11 — MOTION TO EMPLOY HOMELINK REAL ESTATE AS REALTOR(S)
1-15-14 [75]

Tentative ruling:

This is the trustee's motion to employ John Altstatt, a broker at Homelink Real Estate, as his broker to assist her in finalizing the sale of certain real property of the estate. The motion was brought pursuant to LBR 9014-1(f)(2); thus, the court will entertain opposition, if any, at the hearing. However, for the guidance of the parties, the court issues this tentative ruling.

Mr. Altstatt's declaration in support of the motion is not sufficient to permit the court to conclude that he is a disinterested person and that he does not hold or represent an interest adverse to the estate. Mr. Altstatt draws his own conclusion that he does not hold or represent any interest adverse to the debtor or the estate, based on the following statements:

> **(1) [He is] not a creditor, an equity security holder, or an insider of the Debtor;**
>
> **(2) [He is] not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the Debtor;**
>
> **(3) [He does] not have an interest materially adverse to the interest of Trustee, the estate, or any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the Debtor or Trustee; and**

(4) [He does] not have any connection with the Debtor, the Trustee, the United States Trustee, or any person employed in the Office of the United States Trustee.

John Altstatt Decl., filed Jan. 15, 2014, at 3:5-15.

He adds that he does not have any connection with any creditor listed on the debtor's petition and schedules, and does not have any connection with any of the parties listed on them. These statements are not sufficient. The conclusions that a professional "does not hold or represent an interest adverse to the estate" and "does not have an interest materially adverse to the interest of Trustee, the estate, or any class of creditors or equity security holders" are not the professional's to draw, they are the court's. The professional's job is to disclose "all of [his or her] connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." Fed. R. Bankr. P. 2014(a); LBR 2014-1. Mr. Altstatt's statement (4), above, satisfies this requirement with respect to the debtor, the chapter 7 trustee, the U.S. Trustee's office, and employees of the U.S. Trustee's office, and the additional statements set forth above satisfy the requirement with respect to creditors and other parties listed on the petition and schedules, but does not satisfy the requirement that he have no connections with any of the respective attorneys and accountants of the debtor, the chapter 7 trustee, creditors, and all other parties in interest.

The court notes that because Mr. Altstatt was employed as a listing broker by the executors of the debtor's probate estate, he has a connection with parties in interest in this case. Thus, his statement regarding connections with the debtor and other parties in interest should likely be prefaced with "Except as set forth above . . . ." Finally, the declaration does not indicate whether Homelink Real Estate, with which Mr. Altstatt presumably intends to share some portion of his commission, has any connections with the relevant parties.

For the reasons stated, the court will grant the motion only upon the submission of supplemental evidence of Mr. Altstatt (assuming no opposition is presented at the hearing). The court will hear the matter.

31.	12-40761-D-7 SLF-12	MARIANNE MILLER	MOTION TO SELL 1-15-14 [81]

32. 09-29162-D-11 SK FOODS, L.P.
09-2692 RJ-5
SHARP V. SSC FARMS I, LLC ET AL

CONTINUED AMENDED MOTION FOR COMPENSATION FOR RICHARD S. E. JOHNS, DEFENDANTS ATTORNEY(S), FEES: $3,499.76, EXPENSES: $0.00
12-12-13 [1047]

This matter will not be called before 10:45 a.m.

33. 09-29162-D-11 SK FOODS, L.P.
FBM-3

CONTINUED MOTION FOR COMPENSATION BY THE LAW OFFICE OF FARELLA BRAUN + MARTEL, LLP FOR DEAN M. GLOSTER, DEBTOR'S ATTORNEY(S), FEES: $2,379,908.50, EXPENSES: $86,962.35
12-24-13 [4608]

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the application of Farella Braun + Martel, LLP ("FBM") for a first interim allowance of attorney's fees and costs allegedly incurred on behalf of certain entities that have since been consolidated with the debtor in this case, SK Foods, L.P. (the "Consolidated Entities"). The application is opposed by the chapter 11 trustee, the unsecured creditors' committee, and creditor the Bank of Montreal. FBM has filed a reply. For the following reasons, the application will be denied.

FBM seeks approval of $2,379,908.50 in fees and reimbursement of $86,962.35 in costs, a total of $2,466,870.85, for services allegedly rendered to the Consolidated Entities during the period July 1, 2011 through August 31, 2012. Of that amount, FBM seeks authorization to retain the $710,449.48 it has already been paid by one of the Consolidated Entities, SSC Farming LLC ("SSC Farming"). FBM has also been paid a total of $250,000 by Robert Pruett, Jr. and John Gallegly, leaving an unpaid balance of $1,506,421.37; FBM asks the court to authorize payment of that amount from the consolidated bankruptcy estate.

As a starting point, in general, the only professionals who are entitled to be paid out of a bankruptcy estate are those who are employed by a bankruptcy trustee, committees of creditors or equity security holders, or chapter 11 debtor-in-possession, and whose employment has been approved by the court. See §§ 327, 328, 330, 331, 1107(a). (All statutory references are to the Bankruptcy Code, Title 11 of the United States Code.) Thus, it is important to recognize that at no time was FBM employed by the trustee or the creditors' committee in this case, nor did FBM perform any services on behalf of either of them or on behalf of the bankruptcy estate, nor did the court ever approve FBM's employment on behalf of the trustee, the committee, or otherwise on behalf of the estate. In fact, it is safe to say

that a large portion of FBM's services went toward opposing the trustee and thwarting his efforts to preserve or recover assets for the estate. Thus, there is no basis on which the unpaid balance of FBM's fees and costs may be paid from the estate, although there is a basis on which FBM may be entitled to retain the payments it has already received from SSC Farming, or some portion of them. That basis is a series of rulings and preliminary injunctions the court issued in 2011 and 2012.

In January of 2010, the trustee filed an adversary complaint, commencing AP No. 10-2014, in which he sought to substantively consolidate SSC Farming and other entities related in some fashion to the debtor's principal, Scott Salyer, with the debtor. On March 20, 2010, having made the requisite findings, the court issued a preliminary injunction restraining the defendants in the adversary proceeding from transferring any assets (except for certain payments to be made in the ordinary course of business) without first applying to the court and demonstrating good cause. The defendants in the adversary proceeding appealed from the preliminary injunction. While the appeal was pending, the court, on the motion of the defendants, modified the preliminary injunction to permit SSC Farming to sell certain real property, requiring it to hold the proceeds pending further court order.

The district court affirmed this court's issuance of the preliminary injunction, but addressed one issue that had not been specifically addressed by this court – the payment by the defendants of their attorney's fees. The parties to the appeal agreed the issue could be addressed by the district court, although it had not been raised in this court; the district court ruled as follows:

> The court recognizes that the payment of attorneys' fees for the non-debtor entities [the defendants] is not permitted under the preliminary injunction issued by the Bankruptcy Court. The non-debtor entities, however, must be represented by counsel [citing local rule requiring non-individuals be represented by counsel]. The court is aware that the Bankruptcy Court has a procedure through which counsel for debtor entities may recover attorneys fees. Given that the court affirms the Bankruptcy Court's finding of a likelihood of success on the merits that the non-debtor entities should be substantively consolidated with the debtor entities, and thus be debtor entities themselves, the court finds it appropriate to amend the preliminary injunction to allow for counsel for the non-debtor entities to apply for attorneys' fees and costs in the same manner in which counsel for debtor entities may. The court instructs the Bankruptcy Court, on remand, to so amend the preliminary injunction and to issue any orders necessary to implement the amendment.

Order dated Dec. 10, 2010 in Sharp v. Salyer, Dist. Ct. Case No. 2:10-cv-00810, at 20:11-21:2 (footnote omitted).

One point bears mention here, particularly in light of FBM's reply, in which it characterizes the district court's ruling, together with Judge Karlton's remarks at the hearing, as mandating that the defendants' attorneys be paid for their services. First, the statement in the ruling quoted above, that the non-debtor entities "must be represented by counsel" was made with specific reference to, and only to, a local rule providing that "[a] corporation or other entity may appear only by an attorney." E.D. Cal. Local Rule 183(a). The court did not suggest there was anything special about the particular entities or the particular attorneys that mandated that the entities be represented or that the attorneys be paid if, for

example, the entities had no money to pay them. Further, nothing in the ruling or in Judge Karlton's comments at the hearing suggested that one entity, if it had money, must (or even should) pay the attorney's fees for services performed for other entities that did not have money. The only issue before Judge Karlton at the time with regard to the defendants' attorney's fees was, as now apparently recognized by FBM, that the attorneys were not being paid "due to the restrictions of the Injunction."1 That was the only problem being rectified by Judge Karlton, not the problem that SSC Farming had money and the other entities, apparently, did not. Finally, Judge Karlton remanded the matter to this court to implement his ruling, which this court did, with the express provision that if counsel for the defendants believed this court's proposed ruling did not properly responded to Judge Karlton's remand order, the court would continue the hearing so they could seek further clarification from Judge Karlton; counsel chose not to pursue that option.

On remand, this court issued a ruling noting, first, certain difficulties with permitting counsel for the defendants to be paid like counsel for debtor entities. Specifically, in cases like this one, where a chapter 11 trustee has been appointed, the trustee's counsel is paid from the estate, but the debtor's counsel is not. (That is, it is only where the debtor remains a "debtor-in-possession" that the debtor's counsel is paid from the estate.) Further, the defendants' counsel, inasmuch as they would likely be working against rather than on behalf of the estate, would be unable to meet the requirements that they be disinterested and not hold or represent an interest adverse to the estate (§ 327(a)), and that their services be reasonably likely to benefit the estate or necessary to the administration of the case (§ 330(a)(4)(A)(ii)).2 The court recognized, however, that the spirit and intent of the district court's order was to allow the defendants to use a portion of the funds that were blocked pursuant to the preliminary injunction to pay their attorneys for certain services. The court determined it could best comply with that spirit and intention "by amending the preliminary injunction to allow <u>each defendant</u> to pay reasonable attorney's fees and costs for services rendered to <u>that particular defendant</u> in connection with defending this particular adversary proceeding and the parent bankruptcy case."3 Further, if substantive consolidation of the defendants with the debtor were later ordered, the defendants' attorneys would be subject to the disclosure requirements of § 329(a) and possible disgorgement of fees, under § 329(b), just like any other entity that becomes a debtor in bankruptcy (that is, a debtor not in possession: a debtor in a case in which a bankruptcy trustee has been appointed).

The court indicated in its ruling that it would continue the hearing to allow the parties to seek clarification from the district court. That is, if the defendants' or the trustee's counsel believed this court had not accurately interpreted the district court's order, they were free to seek further direction from the district court. They did not so do, and this court issued an amended preliminary injunction, in which it modified the preliminary injunction "to allow <u>each defendant</u> to pay reasonable attorney's fees and costs for services rendered to <u>that particular defendant</u> in connection with this particular adversary proceeding and the bankruptcy case."4 The amended preliminary injunction also provided that "[i]f substantive consolidation of any defendant with the debtor is hereafter ordered, the attorney's fees and costs paid under this order will be subject to the court's review under 11 U.S.C. § 329 (but without the one-year limitation), and all amounts that exceed the reasonable value of the services rendered and costs paid will be subject to disgorgement under § 329(b)."5 6 The amended preliminary injunction was not appealed; it became final.

At the time the ruling and amended preliminary injunction were issued, FBM was not yet involved as attorneys for the defendants. FBM substituted in for the defendants in August of 2011. Among its earliest services was the filing of a motion to authorize the defendants to pay an expert witness from the proceeds of sale of SSC Farming's real property. In response to the motion, the court further modified the preliminary injunction "to allow each defendant to pay reasonable fees and costs for services rendered to that particular defendant by its attorneys and other litigation professionals, including expert witnesses . . . ."7 In its ruling on the motion,8 the court expressly clarified that it had not, as suggested by FBM and the defendants, recognized and endorsed the notions that (1) one of the defendants could pay attorney's fees for services provided on behalf of all of them, (2) one could pay its attorneys for services rendered for the others "toward a common purpose," and (3) the attorneys did not need to allocate the fees for their services among their multiple clients. In other words, FBM expressly raised these three arguments -- arguments upon which its present motion depends -- in August of 2011, virtually as soon as it came into the cases,9 and the court rejected those arguments.

The unambiguous language in the January 19, 2011 ruling and January 20, 2011 amended preliminary injunction was that each defendant could pay for services rendered to that particular defendant, subject to the disclosure requirements of § 329(a) and the possibility of disgorgement under § 329(b). The second amended preliminary injunction was equally clear – each defendant could only pay for services rendered to that particular defendant by its litigation professionals, including expert witnesses. There was nothing in either injunction (or in the rulings underlying them) to suggest that one of the defendants could pay for services provided to all of them, even if those services were toward a common purpose. The second amended preliminary injunction was not appealed; it became final.

Finally, obviously in recognition of the unequivocal nature of the terms of the amended and second amended preliminary injunctions, in December of 2011, SSC Farming, through FBM, filed a motion for clarification regarding the payment of attorney's fees. FBM sought clarification "regarding . . . [its] ability . . . to apply funds of SSC Farming . . . to outstanding attorneys' fees and costs owed by SSC Farming,"10 which FBM claimed would be in compliance with the earlier preliminary injunctions. In that motion, FBM characterized those injunctions as "allow[ing] each defendant, including SSC Farming, to use available funds to pay reasonable attorneys' fees and costs for defense of these adversary proceedings or the bankruptcy case."11 However, it also stated it had been made aware at the outset of its representation that the injunctions "limited payment of attorneys' fees and costs by the enjoined clients to matters on which [FBM] was providing services to that specific client."12

FBM claimed that, as a result of those limits, it had billed its services for Salyer and his various entities to three different accounts: one for services related to Salyer entities unrelated to any interests of the so-called Farming Entities; another for services involving the Farming Entities, including SSC Farming; and a third for services related primarily to Farming Entities other than SSC Farming; that is, services that, in FBM's opinion, "arguably should have been paid by SSC Farms I and II rather than SSC Farming." SSC Farming, LLC's Motion for Clarification, filed Dec. 16, 2011, at 6:1-5. Thus, FBM appeared to acknowledge that by way of the amended and second amended preliminary injunctions, the court had authorized SSC Farming to use its funds – the proceeds of sale of its real property

- to pay for services rendered to SSC Farming, although FBM included in the second category, for which it sought to be paid by SSC Farming, services that "had a direct benefit to SSC Farming and not just the other Farming Entities.13 In other words, FBM was looking for a comfort order that would authorize SSC Farming to pay for services rendered to SSC Farming and the other farming entities.

The court issued a final ruling on the motion14 in which it stated FBM could be paid from SSC Farming's funds, with the express caution that if substantive consolidation were later ordered, the court would examine FBM's fees and costs under the standards of § 330(a), with the possibility of disgorgement of fees determined to be not reasonable or necessary. The court reiterated its earlier rejection, in its ruling on the motion for authority to pay expert witness fees, of the propositions that one defendant could pay fees incurred on behalf of all of them, that one of them could pay lawyers representing others toward a common purpose, and that the attorneys did not need to segregate their time among their various clients. The court directed counsel for the moving party, SSC Farming, to prepare a proposed order, to be approved as to form by counsel for the trustee and the receiver; SCC Farming apparently never did so. However, FBM was well aware of the court's ruling, which is in the record in the adversary proceeding.

In the present application, FBM virtually ignores the language of the amended and second amended preliminary injunctions - the unambiguous statement that each defendant could pay attorney's fees and costs for services rendered to that particular defendant in the particular adversary proceeding and the parent case, subject to § 329(a) disclosure and possible § 329(b) disgorgement if substantive consolidation were later ordered, as it is has been. It appears the only entity that paid anything to FBM was SSC Farming; apparently, it was the only one of the Farming Entities or other Salyer-related entities that had the funds to pay. FBM's predecessors had attempted, in their initial motion on remand from the district court's order, to get this court to approve a procedure whereby the attorney's fees incurred by all the Salyer entities would be paid from the proceeds of sale of SSC Farming's real property.15 They were not successful. FBM then attempted twice to persuade the court to permit one entity to pay the attorney's fees of the others or, at least, to pay the attorney's fees of all of them for efforts toward a common purpose; it too was unsuccessful. It chose not to appeal from the amended preliminary injunctions, yet it now attempts, once again, to do exactly what those injunctions provided it could not.

FBM's emphasis on its "huge undertaking" and the fact that it was "required by applicable rules of professional responsibility to advocate zealously on behalf of its clients and make every effort to protect its clients' interests" (Reply at 2:15-16, 2:25-27) is simply misplaced. FBM made a voluntary business decision to undertake the representation of the defendants; it is not this court's role to protect it from the consequences of what turned out to be, apparently, an imprudent decision. And FBM voluntarily undertook the representation at a time when, it readily admits, it was fully aware of the limitations of the amended preliminary injunction on the payment of attorney's fees from the proceeds of SSC Farming's real property. "When FBM was first engaged, it was immediately made aware of the terms of the Injunction and that it limited payment of attorneys' fees and costs by the enjoined clients to matters on which [FBM] was providing services <u>to that specific client</u>." Reply at 3:17-19 (emphasis added). Thus, FBM says, it opened the three separate billing matters, choosing not to segregate its services to those undertaken for each "specific client," but to lump together what it determined to be the "Farming Entities," including SSC Farming, the "Non-Farming Entities," and SSC Farms I and II relating to the wastewater discharge agreements. Nothing in the amended

preliminary injunctions or the rulings underlying them gave FBM any reason to believe this billing method would be acceptable when the time came to defend the payment of its fees by SSC Farming.

Thus, if FBM is to retain the funds paid to it by SSC Farming, it must demonstrate that the services for which it was paid by SSC Farming were on behalf of SSC Farming specifically. As discussed, there was no provision in the preliminary injunctions for SSC Farming to "carry" the other Farming Entities or the other Salyer-related entities simply because SSC Farming had money and the others did not. FBM has made no attempt in the present application to make such a showing. The court will not parse through the 169 pages of billing statements submitted with the motion or the 161 pages submitted with FBM's reply to try to ferret out which services were for the benefit of SSC Farming and which were for the benefit of other persons or entities. In fact, based on the content of the billings, the court could not do so. FBM is in the best position to present its billing information in a manner that comports with the amended preliminary injunctions; that is, that demonstrates in readily understandable fashion which of its services were performed for the benefit of SSC Farming, and it will need to do so if it wishes to retain the funds paid by SCC Farming. For the funds paid by Robert Pruett, Jr. and John Gallegly, a total of $250,000, FBM will need to show those funds were not part of the funds that were the subject of the preliminary injunctions.

For the reasons stated, FBM's request for approval of $2,379,908.50 in fees and reimbursement of $86,962.35 in costs, a total of $2,466,870.85, for services allegedly rendered to the Consolidated Entities will be denied. As indicated, there is no basis on which this court can "approve" any portion of the fees and costs incurred, as it would if FBM had been employed on behalf of the trustee or the committee or on behalf of a debtor-in-possession. For this reason also, the request that the court authorize payment of the unpaid balance of the account will be denied.

As discussed, the only thing the preliminary injunctions provided the court would do as regards the attorney's fees incurred by the defendants was to examine the payments made by each particular defendant for services on its particular behalf to determine whether the amounts paid exceeded the reasonable value of the services rendered, pursuant to § 329(a), and to order disgorgement of the excess, if any, pursuant to § 329(b). The court made it clear that the parties were free to seek clarification from the district court if they believed this court had not correctly interpreted the remand order; they did not do so. FBM's request for authorization to retain the $710,449.48 it has been paid by SSC Farming will be denied without prejudice, as the court is unable to determine from the moving papers what services were provided to SSC Farming in particular, as distinct from services provided to other entities or to SSC Farming and other entities.

The court will hear the matter.

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1 FBM's Reply, filed Jan. 29, 2014 ("Reply"), at 1:13-14.

2 That fact did not change with the order substantively consolidating the defendants with the bankruptcy estate.

3 Civil minutes for Jan. 19, 2011, DN 196 in AP No. 10-2014, at 2 (emphasis added).

4 Amended Preliminary Injunction, filed Jan. 20, 2011, at 2:6-8 (emphasis added).

5 Id. at 2:14-19.

6 Section 329 does not require a debtor's attorney to apply for approval of his or her fees and costs, only that he or she make certain disclosures, and it allows for a challenge to those fees and costs as exceeding the reasonable value of the services rendered. Here, it appears the trustee asked the FBM to file this application, and in that manner, brought the matter to the court's attention for determination under § 329(a) and (b).

7 Second Amended Preliminary Injunction, filed Sept. 2, 2011, at 2:12-15 (emphasis added).

8 See civil minutes for Sept. 1, 2011, DN 288 in AP No. 10-2014.

9 FBM argued:

> Where . . . counsel is representing all of the Salyer Non-Debtor Entities jointly, and towards a common purpose, it would be very difficult, if not impossible, to say that one particular task only benefited one entity or to allocate benefit amongst the clients. The Trustee's over-technical interpretation of the Preliminary Injunction Orders leads to absurd results, does not accomplish what the District Court ordered and should again be rejected.

Reply, DC No. FBM-1, filed Aug. 22, 2011, at 2:23-3:2. (FBM mistakenly believed the court had previously rejected the trustee's argument, when, as discussed, the ruling and the amended preliminary injunction both explicitly limited each defendant to paying for services rendered to that particular defendant.)

10 SSC Farming's Motion for Clarification, filed Dec. 16, 2011, at 6:1-5.

11 Id. at 3:20-22.

12 Id. at 4:27-28.

13 Id. at 5:27-28.

14 See civil minutes for Jan. 25, 2012, DN 397 in AP No. 10-2014.

15 See defendants' Ex. A, filed Dec. 22, 2010 in AP No. 10-2014, Proposed Order On Remand To Amend Preliminary Injunction To Allow For Payment of Attorneys' Fees And Costs And For Approval Of Payment Of Fees.

16 Civil minutes for Jan. 25, 2012, DN 397 in AP No. 10-2014, at 2.

17 See civil minutes for Jan. 19, 2011, DN 196 in AP No. 10-2014.

34. 13-35762-D-12 JOSE DASILVA
MF-3

MOTION TO EMPLOY FRED A. SILVA AS SPECIAL COUNSEL
1-10-14 [30]

Tentative ruling:

This is the debtor's application to employ the law firm of Damrell Nelson Schrimp Pallios Pacher & Silva ("Damrell") as special litigation counsel to represent the debtor in an adversary proceeding in this court, AP No. 13-2389. The motion was brought pursuant to LBR 9014-1(f)(2); thus, the court will entertain opposition, if any, at the hearing. However, for the guidance of the parties, the court issues this tentative ruling.

The application is supported by the declaration of attorney Fred A. Silva, a shareholder of Damrell. The declaration is not sufficient to permit the court to conclude that Damrell is a disinterested person and that it does not hold or represent an interest adverse to the estate. Mr. Silva draws his own conclusions that he does not represent or hold any interest adverse to the debtor or the estate with respect to the matter on which he is to be employed. By contrast, the conclusion that a professional does not represent or hold an interest adverse to the debtor or the estate is not the professional's to draw, it is the court's.[1] The professional's job is to disclose "all of [his or her] connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." Fed. R. Bankr. P. 2014(a); LBR 2014-1. This Mr. Silva has not done.

He has disclosed the following connections: (1) His firm retained the debtor's bankruptcy counsel to represent the firm in a now-closed unrelated adversary proceeding before the bankruptcy court; and (2) members of Mr. Silva's family retained the debtor's bankruptcy counsel to represent them in a now-closed proceeding before the bankruptcy court. Mr. Silva also discloses that during the year prior to this bankruptcy filing, his firm received attorney's fees from the debtor in the amount of $7,500. Mr. Silva does not disclose the nature of the firm's pre-petition representation of the debtor, which would certainly qualify as a "connection" with the debtor, within the meaning of Rule 2014(a). Finally, Mr. Silva states that he has "no pre-petition claim other than earned but unpaid attorneys' fees and costs in the amount of $4,762.89." F. Silva Decl., filed Jan. 10, 2014, at 2:6-7.

The problems here are three-fold. First, although the declaration discloses two connections with the debtor's bankruptcy counsel, and pre-petition payments from the debtor, along with an unpaid balance due the firm, it does not disclose the nature of the firm's pre-petition representation of the debtor and does not include the statement that "Except as set forth above, I have no connection with the debtor, creditors, or any party-in-interest, their respective attorneys, accountants, or the U.S. Trustee, or any employee of the U.S. Trustee," as required by LBR 2014-1. Second, the declaration does not disclose whether other members of the firm have connections with the debtor, creditors, or other parties-in-interest, their respective attorneys or accountants, or the U.S. Trustee or any employee of the U.S. Trustee. Third, the fact that Mr. Silva (or more probably, Damrell) has a pre-petition claim against the debtor per se disqualifies him (and Damrell) from being employed as a professional in this case. Only a professional who is a "disinterested person" may be employed (§ 327(a)), and by definition, a creditor is

not a disinterested person. § 101(14)(A).[2]

For the reasons stated, the court intends to deny the motion unless the issues raised have been adequately addressed. The court will hear the matter.

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1 The duty of professionals is to disclose all connections with the debtor, debtor-in-possession, insiders, creditors, and parties in interest . . . . They cannot pick and choose which connections are irrelevant or trivial. . . . No matter how old the connection, no matter how trivial it appears, the professional seeking employment must disclose it.

Neben & Starrett, Inc. v. Chartwell Fin. Corp. (In re Park-Helena Corp.), 63 F.3d 877, 882 (9th Cir. 1995).

All facts that may be relevant to a determination of whether an attorney is disinterested or holds or represents an interest adverse to the debtor's estate must be disclosed. The purpose of such disclosure is to permit the Court and parties in interest to determine whether the connection disqualifies the applicant from the employment sought, or whether further inquiry should be made before deciding whether to approve the employment. This decision should not be left to counsel, whose judgment may be clouded by the benefits of the potential employment.

In re Lee, 94 B.R. 172, 176 (Bankr. C.D. Cal. 1988).

2 "It is black-letter law that a 'creditor' is not 'disinterested.'" In re Kobra Props., 406 B.R. 396, 403 (Bankr. E.D. Cal. 2009).

35. 13-33166-D-7 GRACIE KELLY — MOTION FOR EXEMPTION FROM FINANCIAL MANAGEMENT COURSE 1-14-14 [20]

36. 13-28369-D-7 EDWIN GERBER
FWP-1
MONTICELLO BANKING COMPANY
VS. — CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION 10-16-13 [31]

This matter will not be called before 10:30 a.m.

37. 13-28369-D-7 EDWIN GERBER
PA-5

MOTION TO SELL AND/OR MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH MONTICELLO BANKING COMPANY
1-15-14 [90]

This matter will not be called before 10:30 a.m.
Tentative ruling:

This is the trustee's motion for approval of a compromise and sale of certain personal property of the estate. The motion was brought pursuant to LBR 9014-1(f)(2); thus, the court will entertain opposition, and possibly overbidding, if any, at the hearing. However, as a preliminary matter, the court has been unable to locate a proof of service on the court docket, and thus, intends to deny the motion or, in the alternative, to continue the hearing to allow proper notice to be given.

The court will hear the matter.

38. 13-23371-D-11 JUAN/MARGARITA RAMIREZ
TCS-7

CONTINUED MOTION TO VALUE COLLATERAL OF THE BANK OF NEW YORK MELLON
11-13-13 [107]

39. 13-35671-D-11 CARLYLE STATION LLC

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
12-13-13 [1]

40. 13-30483-D-7 GARY/SHARON SPARKS
SLF-3

CONTINUED MOTION FOR CONTEMPT
11-15-13 [55]

41.	13-30483-D-7 TOG-2	GARY/SHARON SPARKS	CONTINUED MOTION TO CONVERT CASE TO CHAPTER 13 10-28-13 [41]
42.	13-31283-D-7 DN-1	ROBERT MESSNER AND KAREN LITTLE-MESSNER	MOTION TO COMPEL ABANDONMENT 1-17-14 [19]
43.	12-34285-D-7 13-2373 MURRAY V. MERRILL	JASON MURRAY RSG-1	CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING AND/OR MOTION FOR A MORE DEFINITE STATEMENT 12-17-13 [6]

Final ruling:

The court finds that a hearing will not be helpful and is not necessary. This is the motion of defendant Deborah Merrill ("Merrill") to dismiss the complaint of the plaintiff, Jason Murray ("Murray"), pursuant to Fed. R. Civ. P. 12(b)(6), incorporated herein by Fed. R. Bankr. P. 12(b), for failure to state a claim upon which relief can be granted, or in the alternative, for a more definite statement, pursuant to Fed. R. Civ. P. 12(e), incorporated herein by Fed. R. Bankr. P. 12(b). Murray has not filed opposition. However, that does not by itself entitle Merrill to the relief requested. "[I]t is black-letter law that entry of default does not entitle a plaintiff to judgment as a matter of right or as a matter of law." All Points Capital Corp. v. Meyer (In re Meyer), 373 B.R. 84, 88 (9th Cir. BAP 2007), citing Fed. R. Civ. P. 55(b)(2), incorporated herein by Fed. R. Bankr. P. 7055. "Settled precedent establishes that default judgment is a matter of discretion in which the court is entitled to consider, among other things, the merits of the substantive claim, the sufficiency of the complaint, the possibility of a dispute regarding material facts, whether the default was due to excusable neglect, and the 'strong policy' favoring decisions on the merits." Id., citing Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

Thus, the court will examine the merits of the motion. Murray filed the underlying chapter 7 case in which this adversary proceeding is pending on August 2,

2012. He was granted a discharge on November 19, 2012, and the case was closed on November 30, 2012. On March 28, 2013, Merrill sued Murray in Colusa County Superior Court for breach of contract, claiming he owed her $33,774 plus prejudgment interest on a debt Murray allegedly breached on or about August 1, 2011 (before he filed his chapter 7 petition) (the "state court action"). Attached to Merrill's complaint in the state court action was a copy of a promissory note apparently signed by Merrill and Murray, with the words "Samuel Merritt College" handwritten across the top. According to Merrill, Murray raised his bankruptcy discharge as a defense in the state court action, whereupon one of the parties filed a motion to determine dischargeability of debt. The court considered the testimony and arguments of the parties, and issued an order, a copy of which Merrill has filed as an exhibit in support of this motion, in which the court found that Merrill's loan advances were made payable to Samuel Merritt College, "were clearly educational loans for the benefit of [Murray]" (Merrill's Ex. B, filed Dec. 17, 2013, at 2:11-12), and "qualify as a 'Qualified Educational Loan'." Id. at 2:17. Thus, the court held that the loan "was not discharged in [Murray's] bankruptcy." Id. at 2:19-20. The state court then set the breach of contract action for trial.

The state court's ruling was issued November 1, 2013; on November 26, 2013, Murray filed the complaint commencing this adversary proceeding, seeking a declaration that Merrill's claim against him was discharged in his bankruptcy case. Murray also sought an award of damages for intentional infliction of emotional distress and an order enjoining Merrill from attempting to enforce her claim in state court. By this motion, Merrill seeks an order dismissing the adversary proceeding with prejudice for failure to state a claim upon which relief can be granted. Merrill notes that (1) Murray has failed to allege any facts that would support a finding of hardship, under § 523(a)(8); and (2) although Murray states in his complaint that Merrill's loan to him was not a qualified student loan, he has failed to allege facts sufficient to support such a finding.

Finally, Merrill claims these issues have been conclusively determined by the state court, and thus, by application of collateral estoppel, cannot be relitigated here. Although it appears there are cases where courts have applied collateral estoppel to decisions made on motion, rather than after a trial (see cases cited in Groves v. Peterson, 100 Cal. App. 4th 659, 668, 669 (2002)), it is not clear that the state court's ruling on the motion to determine dischargeability is a final order for purposes of collateral estoppel. Thus, this court is not prepared to give collateral estoppel effect to that ruling.

The court finds, however, that it would be appropriate for the court to abstain from determining the issues raised in the adversary proceeding. "Section 1334(c)(1) [Title 28, United States Code] provides for permissive abstention in both core and non-core proceedings." Security Farms v. International Bhd. of Teamsters, 124 F.3d 999, 1009 (9th Cir. 1997). The factors the court is to consider are:

> (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with

enforcement left to the bankruptcy court, (9) the burden of [the bankruptcy court's] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.

In re Tucson Estates, Inc., 912 F.2d 1162, 1166-67 (9th Cir. 1990).

In the present case, the fourth factor weighs heavily in favor of abstention, as there is already an action pending in the state court in which the issue of dischargeability can be and has been raised. There is no doubt the state court had jurisdiction to rule on that question. "With respect to all other subsections of § 523(a) [other than (a)(2), (4), and (6)], bankruptcy courts have concurrent rather than exclusive jurisdiction to determine whether a debt is excepted from discharge." Ackerman v. Eber (In re Eber), 687 F.3d 1123, 1128 (9th Cir. 2012). The first, second, and sixth factors also favor abstention – the main bankruptcy case has been concluded, there is no longer any bankruptcy estate being administered, and but for the single issue of dischargeability, Merrill's action against Murray does not implicate bankruptcy law.

Finally, the tenth factor, perhaps the most important in the context of these two cases – the state court action and the adversary proceeding – weighs heavily in favor of abstention. Murray had the opportunity to seek a determination of dischargeability in this court during the time his chapter 7 case was pending, or at any time thereafter. Yet he waited until after Merrill filed the state court action, and then another several months, until after the state court had heard the parties' testimony and arguments, and issued its ruling against him, before he commenced this adversary proceeding, in which he seeks, in essence, a second opinion. This conduct cannot be rewarded. In short, the court finds no reason it should not abstain from hearing this adversary proceeding, and on that basis, the adversary proceeding will be dismissed.

For the reasons stated, the adversary proceeding will be dismissed by minute order. No appearance is necessary.

44.	14-20196-D-11	LABOUR OF LOVE CHURCH OF GOD IN CHRIST	CONTINUED ORDER TO SHOW CAUSE RE DISMISSAL 1-15-14 [11]

45.	14-20196-D-11	LABOUR OF LOVE CHURCH OF GOD IN CHRIST	STATUS CONFERENCE RE: VOLUNTARY PETITION 1-9-14 [1]
46.	13-35671-D-11 TMP-2	CARLYLE STATION LLC	MOTION TO UTILIZE CASH COLLATERAL AND ADEQUATE PROTECTION PAYMENTS O.S.T. 1-27-14 [26]