UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

February 13, 2014 at 10:30 a.m.

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1. 13-91601-E-7 JDP-3 | **TIMOTHY/KATHLEEN JOHNSON** | **CONTINUED MOTION TO COMPEL ABANDONMENT**
Christian Younger | **12-17-13 [44]**

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 17, 2013. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

Final 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). 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, Debtors seek to abandon the sole proprietorship business named "Johnson Landscape Company," which provides landscaping services. Debtors contend that this business has no marketable value outside Debtors own efforts. Debtors state the equity in the subject property is exempted pursuant to C.C.P. Sections 703.140(b)(5) and 703.140(b)(6) as set forth in Debtors' Amended Schedule C.

Debtors ask that the following assets be abandoned:

1. The business name, "Johnson Landscape Company;"

2. Two business checking accounts, one with Tri-Counties Bank ending in XXX7452 with an approximate balance of $148.21, and Bank of the West ending in XXX2633 an approximate balance of $3,655.56;

3. Accounts receivable owed to the business in the approximate amount of $3,200.00.

Debtors state that the following assets are all secured by a business loan with Tri-Counties Bank for approximately $67,745.00:

1. 2007 Bobcat Skiploader;
2. Toro 587L Mower;
3. Toro Lawnmower;
4. 4 tool boxes;
5. shop compactor,
6. 2003 John Deere Gator;
7. Navigator Lawnmower;
8. 1987 John Deere Tractor;
9. other miscellaneous hand and power tools all valued at $10,000.00;
10. 2007 Chevrolet Silverado 2500 Crew Cab LS with approximately 95,000 miles and in Fair/Poor Condition valued at $16,708.00;
11. 2003 Chevrolet Silverado 2500 LS with approximately 80,000 miles in Poor condition valued at $3,000.00;
12. 2005 PJ Utility Trailer in fair condition valued at $300.00;
13. 1987 FB Utility Trailer in fair condition valued at $100.00;
14. 1986 Spons Utility Trailer in fair condition valued at $400.00;
15. 1987 Carrier Trailer in fair condition valued at $100.00.

Since the subject property is fully exempted or secured by a business loan, and 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.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon Property filed by 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 property identified as:

1. the business name, "Johnson Landscape Company;"
2. Two business checking accounts, one with Tri-Counties Bank ending in XXX7452 with an approximate balance of $148.21, and Bank of the West ending in XXX2633 an approximate balance of $3,655.56;
3. accounts receivable owed to the business in the approximate amount of $3,200.00;
4. 2007 Bobcat Skiploader;
5. Toro 587L Mower;
6. Toro Lawnmower;
7. 4 tool boxes;
8. shop compactor,
9. 2003 John Deere Gator;
10. Navigator Lawnmower;
11. 1987 John Deere Tractor;
12. other miscellaneous hand and power tools all valued at $10,000.00;
13. 2007 Chevrolet Silverado 2500 Crew Cab LS with approximately 95,000 miles and in Fair/Poor Condition valued at $16,708.00;
14. 2003 Chevrolet Silverado 2500 LS with approximately 80,000 miles in Poor condition valued at $3,000.00;
15. 2005 PJ Utility Trailer in fair condition valued at $300.00;
16. 1987 FB Utility Trailer in fair condition valued at $100.00;
17. 1986 Spons Utility Trailer in fair condition valued at $400.00;
18. 1987 Carrier Trailer in fair condition valued at $100.00.

on Schedule B are abandoned to Timothy and Kathleen Johnson, the Debtors by this order, with no further act of the Trustee required.

2.	**13-91607-E-7**	**KENNETH MATTSON**	**MOTION TO AVOID LIEN OF CAPITAL**
	JDP-3	**James D. Pitner**	**ONE BANK (USA), N.A.**
			1-21-14 [45]

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 21, 2014. By the court's calculation, 23 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Avoid a Judicial 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 grant the Motion to Avoid a Judicial 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 judgment was entered against the Debtor in favor of Capital One Bank (USA), N.A. for the sum of $3,722.30. The abstract of judgment was recorded with Stanislaus County on March 14, 2013. That lien attached to the Debtor's residential real property commonly known as 3613 Davis Avenue, Modesto, California.

Pursuant to the Debtor's Schedule A, the subject real property has a value of $60,000.00 as of the date of the petition. The unavoidable senior liens total $43,494.69 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $13,955.81 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is equity (value to this judgment creditor) in excess of the senior liens and claimed exemption. Therefore, the fixing of this judicial lien does impair the Debtor's exemption of the real property and its fixing is avoided in excess of $2,549.50, subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Capital One Bank (USA), Stanislaus County Superior Court Case No. 678907, recorded on April 22, 2013, with the Stanislaus County Recorder, Document No. 2013-0034073, against the real property commonly known as 3613 Davis Avenue, Modesto, California, is avoided for all amounts in excess of $2,549.50, pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

3. 11-94410-E-11 SAWTANTRA/ARUNA CHOPRA — MOTION FOR ORDER APPROVING STIPULATION AND/OR MOTION TO EXTEND TIME
HSM-18 Robert S. Marticello — 1-9-14 [767]

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 11 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on January 9, 2014. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion for Order Approving Stipulation 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 Order Approving Stipulation is granted. No appearance required.

Gary Farrar, the Chapter 11 Trustee ("Trustee") seeks an Order Approving Stipulation and Extending Time to File Objections to the Debtors' Claims of Exemptions. The deadline to file objections to the Debtors' amended claims of exemptions is presently set for January 10, 2014. The Debtors and the Trustee have entered into a stipulation to extend the deadline for the Trustee to object to the Debtors' amended claims of exemptions until April 10, 2014. Exhibit A, Dckt. 770.

Pursuant to Federal Rule of Bankruptcy Procedure 4003(b)(1), the court may, for cause, extend the time to file an objection, if before the time to object expires, a party in interest files a request for an extension.

Here, the Trustee has filed the request before the time to file objections to exemptions has expired. Further, the Trustee provides cause exists for requesting the extension, as the Trustee is continuing to evaluate the Debtors' recently amended schedules, including newly asserted claims of exemptions. The Trustee states he and the Debtors are engaged in

negotiations concerning a potential agreement for the Debtors or their relatives to purchase and/or provide for other disposition of certain nonexempt assets. The Trustee has attached the stipulation agreeing to extend the time to file an objection to Debtors' exemptions.

Based on the foregoing, the court finds sufficient cause to grant the stipulation and extend the deadline to file objections to Debtors' amended claims of exemption to and including April 10, 2014.

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 Approve Stipulation filed by the Chapter 11 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 deadline for the Trustee to file objections to Debtors' amended claims of exemption is extended to and including April 10, 2014.

4. 11-93411-E-11 SANJIV/SHEENA CHOPRA
RMY-43

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH NAGRA, LLC AND JOGINDER NAGRA
1-8-14 [922]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, all creditors, parties requesting special notice, and Office of the United States Trustee on January 8, 2014. By the court's calculation, 36 days' notice was provided. 21 days' notice is required.

Tentative Ruling: The Motion to Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and Federal Rule of Bankruptcy Procedure 2002(a)(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 Compromise. 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:

Sanjiv Chopra and Sheena Chopra, debtors-in-possession ("Debtors-in-Possession") seek an order approving the settlement agreement with Nagra, LLC and Joginder Nagra ("Nagra Parties"). The Debtors-in-Possession seek approval of this agreement pursuant to Federal Rule of Bankruptcy Procedure 9019.

Debtors-in-Possession state that the compromise is the "follow-through" to the concessions made by both sides at the hearing on the confirmation of the plan and include the following terms:

1. GGD Oakdale, LLC ("GGD") shall redeem the interest held by Nagra, LLC for the sum of $300,000, to be paid over a one-year period. GGD shall issue a $300,000 promissory note to Nagra, LLC, which note shall be guaranteed by the Debtors-in-Possession;

2. Nagra, LLC shall transfer its interests in American Custom Homes, LLC and Roman Real Estate Development, LLC to the Debtors-in-Possession;

3. Nagra, LLC withdraws its objection to the Plan, filed October 9, 2013.

4. Nagra, LLC dismisses the adversary, filed January 7, 2013 against Nagra, LLC, Case No. 13-09003.

5. Nagra, LLC withdraws the Proof of Claim, filed June 27, 2012.

6. Each party shall bear their own attorneys fees and costs and mutual releases will be exchanged.

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). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Here, the Debtors-in-Possession argue that the factors have been met.

Probability of Success

In this case, the Debtors-in-Possession state they filed the objection because they did not feel that the proof of claim should be allowed in any amount. This objection is now being withdrawn. Furthermore, the adversary complaint was filed by the Debtors-in-Possession because they desired to retrieve back for the benefit of creditors the 50% of GGD transferred to Nagra, LLC as a part of an alleged fraudulent transfer. Debtors-in-Possession state the question of value becomes important because Nagra, LLC gave up a promissory note from a limited liability owned by the Debtor (Premier Real Estate Development) in exchange for the 50% of GGD. The litigation therefore involves the valuation of two different pieces of real estate and a promissory note. Debtors-in-Possession state the factual testimony will rely in large part upon appraisers whose testimony cannot always be predicted.

Difficulties in Collection

Debtors-in-Possession state this factor is a neutral factor.

Expense, Inconvenience and Delay of Continued Litigation

Debtors-in-Possession argue that the complexity in the case comes the factual predicate as the law to be applied is relatively well known. Debtors-in-Possession state the costs of hiring multiple appraisers compared to the amounts in dispute (about $100,000) the factor weighs in favor of approving the settlement.

Paramount Interest of Creditors

Debtors-in-Possession argue that settlement is in the paramount interests of creditors since this settlement agreement reduces a claim from in excess of $3,000,000 to "zero dollars" from the estate or the Debtors-in-Possession under the Chapter 11 plan, additional attorneys' fees will not be incurred and resolves the proof of claim issue.

Consideration of Additional Offers

At the hearing, the court shall announce the proposed settlement and request any other parties interested in making an offer to the Trustee for the claims or interests in the property to state their offers in open court.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate. 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 to Compromise 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 to Compromise Controversy against Sanjiv Chopra and Sheena Chopra, debtors-in-possession and Nagra, LLC and Joginder Nagra is granted and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed as Exhibit A in support of the motion on January 14, 2014 (Docket Number 928).

5. 11-93411-E-11 SANJIV/SHEENA CHOPRA — **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION**
Robert M. Yaspan — **9-27-11 [1]**

Debtors' Atty: Robert M. Yaspan

Notes:

Continued from 1/30/14. Continued to the date and time of the hearing on the motion to approve the Nagra Settlement. At that time counsel for the Debtors in Possession/Plan Administrators shall provide the court with a schedule for (1) obtaining a final order confirming the plan, (2) filing of all final compensation motions, (3) other post-confirmation motions, and (4) filing of a motion to administratively close the case.

6. 11-93411-E-11 SANJIV/SHEENA CHOPRA — **STATUS CONFERENCE RE: COMPLAINT**
13-9003 **Robert M. Yaspan** — **1-7-13 [1]**
CHOPRA ET AL V. NAGRA, LLC

Plaintiff's Atty: Robert M. Yaspan; Debra Brand
Defendant's Atty: Richard H. Gibson

Adv. Filed: 1/7/13
Answer: 2/8/13

Nature of Action:
Recovery of money/property - other
Declaratory judgment

Notes:

Set by order dated 1/30/14 [Dckt 27]. This adversary proceeding being set for trial commencing 2/19/14 at 9:30 a.m. The parties state that settlement has been reached.

7. 13-92013-E-7 HARI PAL **ORDER TO SHOW CAUSE**
Michael H. Luu **1-3-14 [31]**

CASE DISMISSED 11/26/13 AND CLOSED 12/16/13

Notice Provided: The Order to Show Cause was served by the Clerk of the Court through the Bankruptcy Noticing Center on Reilly Wilkinson, Chapter 7 Trustee and the Office of the U.S. Trustee, on January 3, 2014. 41 days notice of the hearing was provided.

No Tentative Ruling:

ORDER TO SHOW CAUSE

The court has issued the Order to Show Cause to address a serious issue concerning presentation of testimony under penalty of perjury which does not comply with the basic Federal Rules of Evidence. Attorneys, for some reason, appear to believe that merely because they are attorneys licensed to practice law they can execute declarations and testify under penalty of perjury concerning facts for which they have no personal knowledge. In one case several years ago, this court observed an attorney "testifying" under penalty of perjury as to facts which had occurred ten years previously – a time when the attorney was still in high school.

Though such improper practices have reduced substantially in the past several years, some attorneys have continued notwithstanding repeated rulings and warnings by this court. This judge recalls the Honorable Randall Newsome, U.S.B.C. N.D. Cal., sanctioning attorneys $500.00 for such attorney testimony in the late 1990's. Notwithstanding Judge Newsom's efforts, the practice continues.

Conduct of Counsel and Law Firm in this Case

Reilly D. Wilkinson ("Wilkinson") is an attorney with the Scheer Law Group. In this bankruptcy case, the Scheer Law Group filed a motion for confirmation that the automatic stay had terminated or had not gone into effect in the present case. Motion for Relief, DCN: RDW-1 Dckt. 13. The motion is signed by Wilkinson, as a member of the Scheer Law Group. The testimony in support of the Motion, stated under penalty of perjury to be on the personal knowledge of the declarant, was provided by Wilkinson. Declaration, Dckt. 15. Wilkinson purported to authenticate, based upon his personal knowledge, various documents and facts relating to underlying loan documents (promissory note, assignment note, assignment of deed of trust).

The court found that Wilkinson had not shown, and did not have, personal knowledge of the facts upon which he purported to testify under penalty of perjury. In an extensive ruling on the Motion for Relief From the Automatic Stay, the court addressed not only the improper "testimony" by Wilkinson, but also the conflicting "testimony" upon which the court concluded that the client of the Sheer Law Group did not have an interest sufficient to meet the minimal case or controversy Constitutional requirements.

Wilkinson has been an attorney licensed to practice law since 2007. The Scheer Law Group is a well-known law firm which specializes in representing creditors. On its website the Scheer Law Group describes its law firm as follows:

> SLG [Scheer Law Group] represents its clients in all state and federal courts throughout California. SLG has been very successful in representing its clients in the following areas of law: creditor bankruptcy litigation matters, real estate litigation and transactional matters, contract litigation and transactional matters, privacy compliance and litigation issues, title company litigation, corporate litigation and transactional matters, lender liability defense, including lender and broker fraud litigation, receiverships, collection, and eviction litigation.
>
> **OUR COMMITMENT TO PROVIDING HIGH VALUE, PERSONALIZED SERVICE**
>
> SLG is nationally recognized for providing superior knowledge, value, and personalized service to its clients. In 2006, SLG was formed in order to focus on providing quality representation to clients with business interests in California. SLG seeks to provide superior legal services in the most cost-effective manner possible. SLG concentrates on avoiding expenditure of fees for litigation tasks which do not substantially increase the prospect of litigation victory. Towards that end, SLG will often utilize flat fee billing arrangements in order to provide its clients with a specified range of services at a fair and predetermined price. This allows for predictability in the pricing of some legal services and ensures that SLG works at maximum legal efficiency.
>
> Since its formation in 2006, SLG has expanded its practice to include additional areas of real estate law, including mortgage fraud and landlord/tenant law, by welcoming to its team additional associates and staff with extensive experience in these areas. This allows SLG to better meet the ever-changing needs of its clients and helps SLG to respond quickly and efficiently to its clients' needs.

http://www.scheerlawgroup.com/about/firm-overview/.
This description as a law firm with sophisticated, creditors' rights attorneys, experienced in federal and state court practices is consistent with how the firm presents itself in the Northern California legal community.

As addressed in the findings of fact and conclusions of law, the declaration of Wilkinson contained fundamental evidentiary defects. Given the experience and reputation of the Scheer Law Group and Wilkinson having practiced law in California for almost seven years, it appears highly unlikely that the attorneys at the Scheer Law Group do not know the basic Federal Rules of Evidence concerning witness testimony or when a witness can truthfully testify under penalty of perjury. However, it is possible that

such a fundamental failure to comply with such Rules could have been a mistake or the failure to have in place simple procedures for the attorneys at this law firm to comply with the Rules. More disturbingly, there is an alternative theory that the law firm intentionally violates the rules to minimize the time expended in providing legal services to maximize profits, irrespective of whether the conduct is consistent with the legal and ethical obligations of an attorney licensed in the State of California and admitted to practice in federal court.

Sanction Power of the Bankruptcy Court

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).

Federal Rule of Bankruptcy Procedure 9011 imposes obligations on both attorneys and parties appearing before the bankruptcy court. This Rule covers pleadings filed with the court. If a party or counsel violates the obligations and duties imposes under Rule 9011, the bankruptcy court may impose sanctions, whether pursuant to a motion of another party or *sua sponte* by the court itself. These sanctions are corrective, and limited to what is required to deter repetition of conduct of the party before the court or comparable conduct by others similarly situated.

A bankruptcy court is also empowered to regulate the practice of law in the bankruptcy court. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right and power to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *see Price v. Lehitine*, 564 F. 3d at 1058.

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.

Conduct of Wilkinson and Corrective Sanctions

The court cannot in good conscious, and will not, ignore the declaration and conduct of this attorney of the Scheer Law Group. The court will address this conduct with a prospective corrective sanction order that does not immediately impose a corrective monetary sanction or refer this matter to the United State District Court for consideration of punitive sanctions. Prospective corrective sanctions will afford both Wilkinson and

the Scheer Law Group the opportunity to change their practices and put in place procedures and education for the law firm attorneys with respect to the Federal Rules of Evidence and the presentation of competent, admissible witness testimony.

The court intends, unless cause is shown by Wilkinson and the Scheer Law Group that no corrective sanctions are warranted, to impose prospective sanctions in the initial amount of $250.00, and thereafter increasing by $250.00 per further "violation" (defined below) to be paid by each of the following: (1) the individual attorney who is an associate, partner, member, of counsel, or otherwise appearing for clients of the Sheer Law Group and (2) the Sheer Law Group. The cumulatively increasing sanction for each attorney and the Sheer Law Group computed separately.

A "violation" shall be the execution of an attorney of the Scheer Law Group in which the attorney does not have personal knowledge of the facts testified to and that the testimony fails to comply with Federal Rule of Evidence 602, 603, 701, 801, 802, 901, and 902; and 28 U.S.C. § 1746.

The court ordered Reilly D. Wilkinson and the Scheer Law Group to appear to show cause as to why the court should not impose prospective sanctions in the initial amount of $250.00, and thereafter increasing by $250.00 per further "violation" for the attorney who is an associate, partner, member, of counsel, or otherwise appearing for clients of the Sheer Law Group (or successor law firm). A "violation" shall be the execution of an attorney of the Scheer Law Group in which the attorney does not have personal knowledge of the facts testified to, or the testimony fails to comply with Federal Rule of Evidence 602, 603, 701, 801, 802, 901, and 902; and 28 U.S.C. § 1746.

RESPONSE

Scheer Law Group, LLP ("SLG") submitted a Response to this Order to Show Cause on January 27, 2014. Spencer P. Scheer, managing partner of SLG, provides a declaration, stating SLG has reviewed the Order to Show Cause and understands the Court's directives and concerns specified and fully accepts the Court's admonitions. Dckt. 36. Mr. Scheer states he has investigated the facts and circumstances surrounding the filing of the Motion specified in the Order to Show cause and has provided this Court with its review procedures generally employed with filing such motions. Mr. Sheer states he has met with the responsible SLG personnel in order to deter the filing of any pleadings that are not based on firsthand knowledge of the declarant. SLG states it will continue to review this issue in training with existing and new staff in order to prevent the problem from occurring again.

Furthermore, Reilly D. Wilkinson provides his declaration, stating he understands the Court's directives and concerns and will take steps to ensure that the conduct specified does not happen in the future. Dckt. 35. He states that his prior declaration did not comply with evidentiary requirements of the Federal Rules of Civil Procedure and was not competent evidence. Mr. Wilkinson states he was busy and concerned that the application for a "comfort order" so he did not properly review the draft declaration. Mr. Wilkinson states he would not have submitted the

Declaration with language relating to the Client's loan, had he taken time to properly review it.

FEBRUARY 13, 2014 HEARING

The Scheer Law Group, LLP has provided a thoughtful, detailed response to the Order to Show Cause. While little good reason exists for counsel signing a declaration in which he testified under penalty of perjury to facts for which he had no personal knowledge, the court recognizes that mistakes occur.

At the hearing the court shall address with counsel and the senior partner from Scheer Law Group, LLC confirmation of the educational and practice changes which are stated in the declarations. Additionally, the court will address counsel's statement "I have a busy work schedule, was concerned that the application for a comfort order be transmitted promptly, and in my haste, I did not review the language in the draft declaration, and signed the Wilkinson Declaration with language related to the Client's loan, which were not of my personal knowledge." Counsel is clear that he offers this not as an excuse but the explanation as to how this occurred.

While the court appreciates the busy schedules of attorneys and the demands on their time, such billing requirements or workloads assigned by partners (or taken on by partners) cannot be so great that an attorney is put under such pressure that a declaration could be signed without reviewing it. This could well be a law firm management issue.

8. 13-91315-E-7 APPLEGATE JOHNSTON, INC.
WFH-9 George C. Hollister

CONTINUED COUNTER MOTION TO TRUSTEE'S MOTION FOR AUTHORITY TO DISTRIBUTE PROCEEDS OF COLLATERAL TO WESTAMERICA BANK 12-5-13 [350]

CONT. FROM 12-19-13

Local Rule 9014-1(i) Countermotion - Continued Hearing.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on December 5, 2013. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Countermotion to Trustee's Motion for Authority to Distribute Proceeds of Collateral to WestAmerica Bank was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(i). 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 Countermotion to Trustee's Motion for Authority to Distribute Proceeds of Collateral to WestAmerica Bank . 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:

PRIOR HEARING

Westamerica Bank ("WAB") filed this countermotion in response to the Trustee's Motion for Authority to Distribute Proceeds of Collateral. WAB is seeking an order compelling the Trustee to turnover a state tax refund received July 5, 2013 in the amount of $58,206 and miscellaneous tax refunds received June 2, 2013 in the amount of $407.19.

The Trustee stated in his motion that the tax refunds do not constitute collateral of WAB and intends to withhold those amounts. WAB contends that the tax refunds at issue are WAB's collateral and it holds a duly perfected security interest in and lien against those funds. WAB cites its Commercial Security Agreement, which includes "All inventory, Chattel

Paper, Accounts, Replacement and General Intangibles." WAB contends that general intangibles includes tax refunds.

In Trustee's Motion for Authority to Distribute Proceeds to WAB, it noted that he had viable grounds to oppose WAB's claims to the tax refunds. Memorandum of Points and Authorities, 3: 16-19, Dckt. 339. However, the Trustee does not provide those grounds.

The Court is also unaware of what year the tax refunds are from. The right to a tax refund "vests" at the end of the tax year, since by that point all events necessary to establish Debtor's tax liability have occurred and the debtor's tax liability is fixed, albeit unliquidated. *Brandt v. Fleet Capital Corp. (In re TMCI Elec.)*, 279 B.R. 552, 555 (Bankr. N.D. Cal. 2000). For a secured creditor's security interest to attach to a debtor's collateral, the debtor must have acquired rights in the collateral as of its petition date. *Id.* at 559.

The court does not have sufficient evidence to determine whether WAB has a perfected security interest in the tax refunds.

CONTINUANCE

The court continued the hearing to allow the parties to confer.

TRUSTEE'S NON-OPPOSITION

The Trustee filed a statement of non-opposition on January 30, 2014, stating that he has no opposition to the motion for turnover of the state tax refund received July 5, 2013, in the amount of $58,206 or miscellaneous tax refunds in the amount of $407.19.

DECISION

The Chapter 7 Trustee having filed a Statement of Non-Opposition, and upon review of the pleadings, the court grants the motion and authorizes the Trustee to release $58,206.00, constituting the tax refund received July 5, 2013, and $407.19, constituting miscellaneous tax refunds received, to WestAmerica Bank. The court makes no determination of any rights to or interests in the monies disbursed.

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 Countermotion to Trustee's Motion for Authority to Distribute Proceeds of Collateral to WestAmerica Bank ("WAB") filed by WAB 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 Michael D. McGranahan, the Chapter 7 Trustee, is authorized to

release $58,206.00, constituting the tax refund received July 5, 2013, and $407.19, constituting miscellaneous tax refunds received, to WestAmerica Bank. The court makes no determination of any rights to or interests in the monies disbursed.

No further or other relief is granted.

9. 13-92224-E-7 MARIA RUIZ — MOTION TO COMPEL ABANDONMENT
JAD-1 Jessica A. Dorn — 1-3-14 [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 3, 2014. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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). Therefore, the defaults of the respondent and other parties in interest are entered.

The Motion to Abandon Real Property is granted and the Trustee is ordered to abandon the 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:

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, common known as 3736 Kansas Avenue, Riverbank, California, is impaired by two trust deeds in favor of "Chase" and "City of Riverbank" securing loans with balances of $23,856 and $15,375 respectively. According to the Debtor, the value of the subject real property is

$98,513.00. Debtor asserts she has claimed $59,282.00 in exemptions under California Code of Civil Procedure § 704.730.

Since the debt secured by the property exceeds the value of the property, and 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.

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:
>
> 3736 Kansas Avenue, Riverbank, California
>
> on Schedule A is abandoned to Maria E. Ruiz, the Debtor by this order, with no further act of the Trustee required.

10. 12-92036-E-7 UST-2 — REYNOL GARCIA AND ENEDINA GARICA — Thomas O. Gillis — MOTION TO COMPEL DEBTORS TO APPEAR AT SPECIAL MEETING OF CREDITORS — 1-16-14 [132]

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, parties requesting special notice, and Office of the United States Trustee on January 16, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Compel Debtors to Appear 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 Compel Debtors to Appear is granted. No appearance required.

The United States Trustee for the Eastern District of California (the "UST") moves the Court for an order compelling the Debtors, Reynol and Enedina Garcia to appear at their special meeting of creditors on March 13, 2014 at 2:30 p.m., at the United States Trustee Meeting Room, Suite 2, 1st Floor, 1200 I Street, Modesto, California, pursuant to 11 U.S.C. §§ 105(a), 341 and 343 and Fed. R. Bankr. P. 2004(d).

The UST states that this is the Debtors' fourth bankruptcy case since 2011, with each of the prior cases was dismissed. E.D. Cal. Bankr. Case No. 11-94029-D-13, Dckt. 13; E.D. Cal. Bankr. Case No 12-90179-D-13, Dckts. 34, 35, 37; E.D. Cal. Bankr. Case No. 12-91162-D-13 Dckts. 25, 37.

This case was initially filed under Chapter 11 on July 25, 2012 but on October 9, 2012, the Court decided preliminarily to convert the case to Chapter 7, due to the Debtors' failure to file monthly operating reports, as well as apparent inconsistencies in the Debtors' Schedule J and Statement of Financial Affairs. Civil Minute Order, Dckt. 46. The court then converted the case to Chapter 7 on November 9, 2012. Dckt. 63.

It appears that the Debtors have failed to appear at the Chapter 7 meeting of creditors. UST states that specifically, the Debtors failed to attend the 341 Meetings on December 14, 2012, January 11, 2013 and February 28, 2013. On January 14, 2013, the Trustee docketed a motion to dismiss

this case due to the Debtors' failure to appear at the 341 Meetings. Dckts. 71-72. The UST also filed a motion to disgorge fees paid to the Debtors' counsel, which the court granted and ordered the Debtors' counsel to disgorge and pay $7,500 to the Chapter 7 trustee. Dckt. 92. The Chapter 7 Trustee is currently holding these funds (less bond fees).

On November 26, 2013, the UST states she set a special meeting of creditors for January 6, 2014, pursuant to 11 U.S.C. §§ 341 and 343 and Rule 2003(f) of the Federal Rules of Bankruptcy Procedure. Dckt. 126. However, the UST states that neither the Debtors nor their counsel attended the special meeting of creditors and the special meeting of creditors has been continued to March 13, 2014 at 2:30 p.m. The UST submits that it would be inequitable for the Debtors to receive a Chapter 7 discharge without appearing and submitting to an examination by the Chapter 7 trustee.

Federal Rule of Bankruptcy Procedure 2004(d) states that "[t]he court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it designates, whether within or without the district wherein the case is pending." Fed. R. Bankr. P. 2004(d). The debtor may be compelled to comply with the terms of a Rule 2004 examination under Rule 2004(d) by court order, which does not involve a subpoen; all that is necessary is the court order. 9 COLLIER ON BANKRUPTCY ¶ 2004.03 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.) Furthermore, attendance at the 341 meeting is mandatory. 11 U.S.C. §343.

Based on the foregoing, the court grants the motion to compel Debtors to appear at the meeting of creditors on March 13, 2014 at 2:30 p.m., at the United States Trustee Meeting Room, Suite 2, 1st Floor, 1200 I Street, Modesto, California, pursuant to 11 U.S.C. §§ 105(a), 341 and 343 and Fed. R. Bankr. P. 2004(d).

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 Compel Debtors to Appear filed by the U.S. Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and the Debtors, Reynol and Enedina Garcia, are ordered to appear at their special meeting of creditors on March 13, 2014 at 2:30 p.m., at the United States Trustee Meeting Room, Suite 2, 1st Floor, 1200 I Street, Modesto, California, pursuant to 11 U.S.C. §§ 105(a), 341 and 343 and Fed. R. Bankr. P. 2004(d).

11. 13-90643-E-12 GARY/CHRISTINE TAYLOR
ADJ-6 Anthony D. Johnston

MOTION FOR COMPENSATION FOR ANTHONY D. JOHNSTON, DEBTOR'S ATTORNEY(S), FEES: $14,212.50, EXPENSES: $144.95
1-16-14 [130]

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 12 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on January 16, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The First and Final 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). 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 First and Final Application for Fees is granted. No appearance required.

FEES REQUESTED

Anthony D. Johnston, Counsel for the Debtors, makes a Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period of April, 2013 through January 16, 2014 in this Chapter 12 case. The order of the court approving employment of counsel was entered on April 25, 2013. Dckt. No. 27.

Description of Services for Which Fees Are Requested

Plan: Counsel spent 19.9 hours in this category. Counsel assisted Debtors in confirming a plan of reorganization on October 22, 2013. Counsel reviewed financial documents, including proofs of claim, in order to formulate a plan. Counsel met with the Debtors to prepare projections and to discuss a feasible plan.

Financing: Counsel spent 2.5 hours on this task. Counsel negotiated adequate protection payments for OneWest Bank (Deutsche Bank is trutsee) which holds a first deed of trust secured by Debtors' residence and agricultural

land. Counsel also reviewed Wells Fargo Dealer Service's stipulation for adequate protection services and order with respect to Debtors' motorhome.

Fee/Employment Application: Counsel prepared this fee application and the supporting documents, spending 6.3 hours on this task.

Relief from Stay: Counsel reviewed BWM Bank of North America's Motion for Relief from Stay and ancillary documents, and reviewed the Wells Fargo Dealer Services stipulation for relief from stay and executed the same. Counsel spent .55 hours on this task.

Meeting of Creditors: One meeting of creditors was held in Sacramento and Counsel attended with Debtors, and Counsel attended. Only one-way travel was charged, resulting in 50% of travel time being charged. Counsel spent 3.7 hours on this item.

Case Administration: Counsel spent 4.7 hours on case administration. Counsel prepared all documents necessary for the Chapter 12 case, such as the schedules of assets and liabilities, and a statement of financial affairs. Counsel advised creditors of the automatic stay, prepared and served the preliminary status report rquired by the court, and attended the preliminary status conference and continued status conferences.

Motions to Value Secured Claims: Counsel spent 4.8 hours on Debtors' Motions to Value the Secured Claim of their real property. Counsel prepared and timely served a motion to value a second deed of trust encumbering the Debtors' real property commonly known as 4124 S. Gratton Road, Denair, California, held by One West Bank, FSB.

Additionally, Counsel prepared and timely served a motion to value a first deed of trust encumbering the Real Property at $750,000.00. The secured creditor, Deutche Bank National Trust Company, Trustee (servicer for One West Bank, FSB) filed a proof of claim on or about April 30, 2013, in the amount of $1,037,909.48. The secured creditor filed an opposition to the motion to value the first deed of trust. Ultimately, Counsel's efforts, through negotiations with the lender's attorney, Mark Estle, led to a stipulation valuing the first deed of trust at $810,000.00.

Claims: Counsel reviewed all claims filed in this case in .2 hours.

Litigation: Counsel spent 4.9 hours on litigation. On the petition date, the Debtors and Taylor Renovation, Inc. (the corporation is solely owned by the Debtors) were defendants in a lawsuit pending in the Stanislaus County Superior Court. The Plaintiff was Bank of the West. The claims arose from a breach of contract action and failure to pay money due under a promissory note. Debtors and Counsel attended a 2004 examination of Debtor Gary Taylor, in Fresno, California. Counsel also communicated with Bank of the West's attorney.

Asset Dispositions: Counsel spent 9.3 hours on this task. Debtors are lessees under a written lease agreement, with a term from August 1, 2011 through December 31, 2031, with an option to extend for five years, for 19 acres of agricultural land located at 12119 Doerksen Road,6 Denair, California (the "Lease"). Pursuant to the terms of the Lease, the Debtors, at

considerable expense, planted an almond orchard. Counsel prepared an agreement whereby the landlord under the Lease and the Debtors agreed to the Debtors' assumption of the Lease in this bankruptcy case. Counsel prepared a motion to extend the deadline for the Debtors to assume the Lease, which was granted by the Court.

Counsel also prepared a motion for the Court's approval of the Debtors' assumption of the Lease, which motion was also granted by the Court. Bank of the West was owed approximately $10,500.00 by Debtors for the lease of certain irrigation equipment used by the Debtors in their almond farming operations at the Real Property. Counsel negotiated a final payment under the lease of $3,800.00 to the bank in exchange for the bank's waiver of any interest in the farming equipment. (The equipment lease was in essence a disguised purchase and sale contract.)

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

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

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

Id. at 959.

A review of the application shows that Counsel's services rendered successful confirmation of Debtor's Chapter 12 Plan. The Plan is based upon income to be generated from: (i) the Debtors' farming operations on land they own and (ii) a limited liability company in which the Debtors hold a 50% membership interest that farms land under a lease agreement. Counsel prepared the plan and negotiated with Deutche Bank National Trust Company, Trustee (servicer for creditor One West Bank, FSB) and Wells Fargo Dealer Services, secured creditors, to obtain their respective consent to a plan after they each filed objections to the plan.

Additionally, Counsel drafted and filed motion to value a the securd claim of Deutsche Bank National Trust Company, which held the first deed of trust in the Real Property at the amount of $750,000.00. The secured creditor, which was the servicer for One West Bank, FSB, filed a proof of claim on or about April 30, 2013, in the amount of $1,037,909.48. The secured creditor filed an opposition to the motion to value the first deed of trust. Ultimately, Counsel's efforts, through negotiations with the lender's attorney, led to a stipulation valuing the first deed of trust at $810,000.00. This reduced the claim secured by the Real Property by $227,909.48. This stipulation was incorporated into Debtors' confirmed Chapter 12 Plan.

FEES ALLOWED

The hourly rates for the fees billed in this case are $250.00/hour for counsel for 58 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of $14,212.50 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 12 case.

Counsel also seeks the allowance and recovery of costs and expenses in the amount of $144.95. These costs included the costs advanced for an Amendment to Mailing Matrix filing fee, a copy charge for a Status Report, Postage for Service of a Status Report, a copy charge for this Fee Application, and postage for this application. Exhibit D, Dckt. No. 133 at 23. The total costs in the amount of $144.95 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 12 case.

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

Attorneys' Fees	$14,212.50
Costs and Expenses	$ 144.95

For a total final allowance of $14,357.45 in Attorneys' Fees and Costs 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 Anthony D. Johnston is allowed the following fees and expenses as a professional of the Estate:
>
> Anthony D. Johnston, Counsel for the Estate
> Applicant's Fees Allowed in the amount of $14,212.50
>
> Applicants Expenses Allowed in the amount of
> $144.95
>
> **IT IS FURTHER ORDERED** that this is a final award of fees pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that this is a final allowance of fees and the Plan Administrator is authorized to pay such fees from funds of the Estate as they are able to be paid as provided in the confirmed Chapter 11 Plan.

12. 14-90046-E-7 GEORGE/LEANORE HAYES — **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Pro Se — **1-21-14 [13]**

Tentative Ruling: The court issued an order to show cause based on Debtor's failure to pay the required fees in this case ($306.00 due on January 13, 2014). An Order Denying Fee Waiver was entered on January 17, 2014. Dckt. No. 11. The court docket reflects that the Debtor still has not paid the fees upon which the Order to Show Cause was based.

The court's tentative decision is to sustain the Order to Show Cause and order the case dismissed.

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

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

13. 13-91459-E-11 LIMA BROTHERS DAIRY
KDG-3 Hagop T. Bedoyan

MOTION FOR COMPENSATION BY THE LAW OFFICE OF KLEIN, DENATALE, GOLDNER, COOPER, ROSENLIEB AND KIMBALL, LLP FOR HAGOP T. BEDOYAN, DEBTOR'S ATTORNEY(S), FEES: $6,497.50, EXPENSES: $100.30
1-15-14 [107]

Local Rule 9014-1(f)(2) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, parties requesting special notice, and Office of the United States Trustee on January 15, 2014. By the court's calculation, 30 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The First Interim Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor-in-Possession, Creditors, 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 First Interim Application for Allowance of Fees and Costs 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:

FEES REQUESTED

Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, LLP, Counsel for the Debtor in Possession ("Counsel"), makes an Interim Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period of November 26, 2013 through the December 18, 2013. The court entered an order approving the Substitution of Attorney, approving the substitution as Counsel as attorney for "Debtor," was approved on December 10, 2013. Dckt. No. 80. The court entered an order granting the application to employ Counsel on December 24, 2013. Dckt. No. 89. FN.1.

FN.1. Counsel phrases the motion as being paid for as counsel for the "Debtor." If so, then in this Chapter 11 case Counsel would not be entitled to be paid professional fees.

REVIEW OF MOTION

The Application for Allowance of Attorneys' Fees and Costs states with particularity (Fed. R. Bank. P. 9013) the following grounds upon which the requested relief is based:

a. Klein, DeNatale, Goldner, Cooper, Rosenlieb, & Kimball, LLP is the Applicant.

b. Applicant is representing Debtor in Debtor's Chapter 11 case. (Presumably the Motion should states that Applicant is counsel for the Debtor in Possession, not the "Debtor." If the Motion is correct and Applicant is attempting to be counsel for the Debtor and the Debtor in Possession, there would be a disqualifying conflict arising under 11 U.S.C. § 327, thereby precluding Applicant from any compensation in this case.)

c. The bankruptcy case was filed on August 7, 2013. Debtor-in-Possession was originally represented by David C. Johnston ("Johnston"), whose employment as counsel was approved by an order by this court on October 1, 2013.

d. The partners of the Debtor-in-Possession business contacted Applicant to substitute in as the attorney for Debtor-in-Possession for the remainder of the bankruptcy proceeding. The court entered an order approving the substitution of Applicant as counsel for Debtor-in-Possession on December 10, 2013.

e. Applicant has received a $25,000.00 retainer, constituting the total fees that have been allowed or paid to the Applicant to date.

f. Applicant states that among the "major achievements" completed in the time period covered by this application were: the filing of an application to employ Applicant; the filing of an application to employ the financial advisory group, GlassRatner Advisory & Capital Group, LLC; the filing of Monthly Operating Reports; and attending a status conference hearing, which was continued.

g. Applicant submits an Exhibit "C" in support of this motion, detailing the nature of the services rendered in support of this application.

h. Applicant summarizes the "Legal Fees" which are the subject of the Application (Section IV) in the detailed Exhibit C in support of the Application.

i. A chronological list of the services is set forth in Exhibit D.

j. The time period for which fees are requested is from November 26, 2013 through December 18, 2013.

k. The Fees for this period total $6,497.50, for which the hourly rates charged range from $150.00 to $350.00. The hourly rates for the fees billed in this case are $350.00/hour for counsel Hagop T. Bedoyan for 9.20 hours; $285.00/hour for lawyer Jacob Eaton for 5.50 hours; and $150.00/hour for paralegal Karen Clemans at 11.40 hours.

l. Applicant is requesting a total of $100.30 in expenses for postage and photocopying costs incurred.

m. The statement of fees and costs have been provided to the general partners of the Debtor (but apparently not the fiduciary Debtor in Possession) for review.

Motion, Dckt. 107. Attached to the Motion is the "Debtor's Statement Regarding Receipt of Attorneys' Bill and Statement of No Objections." This is formatted as a declaration, but is not separately filed as a declaration. Local Bankruptcy Rule ("L.B.R.") 9004 and the Revised Guidelines for Preparation of Documents. This statement under penalty of perjury clearly states that the Debtor, not the Debtor in Possession, has no opposition to paying the $6,497.50 in fees and costs in the sum of $100.30.

It appears that Counsel is hoping that the declaration of Filipe C. Lima and Joe Lima, Jr., general partners of the Lima Brothers Dairy will bolster Counsel's claim for fees and costs. Debtor's Statement Regarding Receipt of Attorneys' Bill and No Objections, Dkct No. 107. No statement, however, is provided by the fiduciary to the estate of the Debtor in Possession. The statements of general partners of the "Debtor" will not stand in for testimony from parties who can testify to the best interests of the estate. Additionally, the declarants make legal conclusions like "all of the fees and expenses are reasonable and necessary for the administration of the estate," which are not substantiated and are of little use and assistance to the court. The court will accept them as statements that the lawyers have charged what the lawyers have charged. (The court considers this in light of the fee application by the accountants/business advisers filed by Counsel in this case. Based on the one month of billings, for December 2013, it appears that the principals of the Debtor in Possession have little understanding of the finances of this bankruptcy case and the people demanding money from them.)

The Motion is clearly deficient. While some courts may allow the use of summary forms and then task the judge and judicial law clerk to work as the unpaid associate attorneys for parties in assembling the grounds upon which a motion is based (which is subject to Fed. R. Bankr. P. 9011) and canvas declarations, exhibits, documents and the files in the case to guess what the movant would include in the motion if the movant had properly prepared the motion, this court does not.

Requirement to State Grounds With Particularity

The Motion to Confirm 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."

Specific Deficiencies in Motion

The present Motion fails on several grounds. First, it seeks fees for Counsel for the Debtor. Counsel may argue that there is no distinction between the terms "Debtor" and "Debtor in Possession." There is a significant difference, with the Debtor in Possession serving as the fiduciary in lieu of a trustee. While the Debtor can unabashedly advance its interests without regard to the estate and creditors, the Debtor in Possession is the fiduciary to the estate. If Counsel does not realize or understand that, terrible consequences may ensue.

The Motion also fails to provide a meaningful summary of what has been accomplished in the case. Instead, Counsel details "significant events" that have happened during the service period. Counsel then instructs the court to sift through the attached billing statements, declarations, and chronological list of tasks to discern the work that has been performed.

In his Declaration filed in support of the fee application, Counsel Hagop T. Bedoyan states that he is working as the attorney for Lima Brothers Dairy, the Debtor-in-Possession in this case, and bases the declaration on his personal knowledge as attorney for the Debtor-in-Possession and as the one of the custodian of the Applicant firm's billing records. ¶ 2, Declaration of Hagop T. Bedoyan, Dckt. No. 109. Bedoyan goes on to provide a comprehensive summary of the work performed, and attests to the accuracy of the time and cost records attached as exhibits to the motion.

Bedoyan states that as part of Counsel's work on matters involving the administration of this case, Counsel has reviewed the Schedules and Liabilities filed in the case; attended a conference regarding the status of case and devised an action plan; prepared and filed an Order Approving Substitution of Attorney; reviewed the docket, Requests for Special Notice, and Largest Unsecured Creditors; reviewed Monthly Operating Reports for August and September; performed lien search on general partners; emailed communication to accountants regarding preparation of Monthly Operating Reports, and held a telephone conference with accountant regarding cash collateral budgets and Monthly Operating Reports. *Id.* at 3-5.

Bedoyan further states that Counsel has worked on matters involving asset disposition, which have included maintaining email communications regarding a possible offer to purchase the Debtor-in-Possession dairy business. Bedoyan asserts that Counsel also worked on issues arising from relief from stay motions and adequate protection asset disposition, the employment of professionals, and matters involving the meeting of creditors. Counsel helped negotiate a stipulation to use cash collateral to continue servicing loans from American AgCredit, and maintained contact with Debtor-in-Possession's accountant regarding the combined dairy operations of Debtor and Filip's Sons Dairy, and the accounting for all cull cows. *Id.*

Based on the assertions of Bedoyan and the court's review of attached time records, Counsel has assisted Debtor-in-Possession in filing and becoming current with its Monthly Operating Reports. Counsel also assisted in obtaining an order from this court approving the employment of the GlassRatner Advisory & Capital Group, LLC. Counsel also contacted American AgCredit's to continue a hearing on the creditor's Motion for Relief from Automatic Stay, which is now scheduled for February 13, 2014. Debtor's counsel also continued Debtor's Status Conference to March 6, 2014.

The court sees no reason for Counsel not incorporating the above summary in the body of the Motion. It is not the responsibility of the court to look beyond the scope of a motion that does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013. Counsel expects that the court is willing to do its job for him, and assume the task of fishing out facts from Counsel's vague pleadings to figure out the basis for the relief sought and the work performed by Counsel in this case.

Adverse Interests and Connections

Additionally, the court is concerned that Counsel has not disclosed the full extent of Counsel's relationship with GlassRatner Advisory & Capital Group LLC ("GlassRatner"). The court approved an order employing GlassRatner as business consultants and advisors for the "Debtor" in this case. Dckt. No.

89. In the Application For Order Authorizing the Employment of GlassRatner, which Counsel prepared on GlassRatner's behalf, the Application acknowledges that,

> (b.) GlassRatner subleases and [sic] office from Klein, DeNatale in Bakersfield, California.

¶ 8, Application for Order Authorizing Employment of GlassRatner, Dckt. No. 84. Counsel and GlassRatner make no mention of this leasing arrangement in their respective applications for fees and costs. Counsel does not explain, for example, whether the firm of Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, LLP receives a percentage of GlassRatner's revenues in exchange for leasing Counsel firm's office space. The court will require that the relationship between Counsel and GlassRatner be clarified when Counsel files a revised motion for fees.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

Compensation under 11 U.S.C. § 330, or interim compensation under 11 U.S.C. § 331 may be allowed for professionals engaged 11 U.S.C. §§ 327 or 1103. 11 U.S.C. § 327 allows "the trustee" to employ professionals. 11 U.S.C. § 1103 allows for a committee of creditors in a Chapter 11 case to engage professionals. In a Chapter 11 case the "debtor in possession" is authorized to exercise the rights and powers of a trustee, which includes the hiring of professionals. 11 U.S.C. § 1107(a). The distinction between the post-petition debtor in possession and the pre-petition debtor is stated in 11 U.S.C. § 1107(b) which states, "[a] person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case."

The debtor becomes the debtor in possession upon the commencement of the case and serves in that capacity until a Chapter 11 Trustee is appointed or the case is converted to one under Chapter 7. COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 1101.01. This creates a dual identity, that being the Debtor in its individual capacity and as the debtor in possession in its fiduciary capacity.

[3] The Separate Entity Theory

> Section 1101(1) contains only a definition. It does not address any distinction between the "debtor" and the "debtor in possession." Section 1107(a) describes the powers and duties of the debtor in possession. It grants to the debtor in possession all of the rights and powers of a trustee and requires the debtor in possession to perform all of the duties and functions of a trustee. Under section 323, the trustee is the representative of the estate. In a chapter 11 case, the debtor in possession acts in that role. This suggests that **the debtor exists in a separate capacity, in much the same way that an individual serving as trustee does not lose the individual's separate identity but has rights, powers, duties and obligations as trustee that are separate from those in the individual's personal capacity**. Thus, although one could properly say that the debtor in possession is not a separate entity from the debtor, that would be incomplete. The estate created by section 541 is a separate entity. The debtor becomes the representative of the estate and, when acting in that representative capacity, is referred to as the debtor in possession.
>
> The other provisions of chapter 11 are consistent with this distinction. Except for section 1107, expressly defining the rights, powers and duties of a debtor in possession, the provisions of chapter 11 grant rights or powers to the trustee rather than to the debtor in possession. References to the debtor are to the debtor as such, rather than to the debtor acting in its capacity as debtor in possession. For example, subsections 1121(a) and (c) permit the debtor, not the trustee

or debtor in possession, to file a plan at any time during the case, even after the appointment of a trustee. Section 1121(b) grants the debtor the exclusive right to file a plan for the first 120 days after the order for relief. Section 1112(a) authorizes the debtor to convert the case to one under chapter 7, "unless the debtor is not a debtor in possession." Section 1141(b) vests the property of the estate in the debtor upon confirmation, and section 1141(d) discharges the debtor, not the trustee or debtor in possession. 7

Some have argued that the Supreme Court ruled in National Labor Relations Board v. Bildisco & Bildisco that the debtor in possession is not a new entity but is the same entity as the prebankruptcy debtor. The assertion is based on language that "it is sensible to view the debtor-in-possession as the same 'entity' which existed before the filing of the bankruptcy petition." 8 However, this language has been taken out of context. The statement was made in the context of whether, for the purposes of applying the labor laws, the debtor in possession (or, more properly, the estate, of which the debtor in possession is the representative) should be treated as a successor employer. In full, the quote reads:

> Much effort has been expended by the parties on the question of whether the debtor is more properly characterized as an "alter ego" or a "successor employer" of the prebankruptcy debtor, as those terms have been used in our labor decisions. See *Howard Johnson Co. v. Hotel Employees*, supra, at 259, n. 5; *NLRB v. Burns International Security Services, Inc.*, supra; *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). We see no profit in an exhaustive effort to identify which, if either, of these terms represents the closest analogy to the debtor-in-possession... . For our purposes, it is sensible to view the debtor-in-possession as the same "entity" which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing. 9

Footnote 7. *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513, 527-28, 104 S.Ct. 1188, 1197, 79 L. Ed. 2d 482, 496-97, 9 C.B.C.2d 1219 (1983) .

Footnote 8. 465 U.S. 513, 527-28, 104 S.Ct. 1188, 1197, 79 L. Ed. 2d 482, 496-97, 9 C.B.C.2d 1219 (1983) .

Footnote 9. 465 U.S. 513, 527-28, 104 S.Ct. 1188, 1197, 79 L. Ed. 2d 482, 496-97 (emphasis added). Pre-Code case law provides some support for distinguishing between the roles of debtor and debtor in possession. Under former Chapter X, a trustee was always appointed unless the debtor's debts were

> less than $250,000. *In re J.P. Linahan, Inc.*, 111 F.2d 590 (2d Cir. 1940), involved a debtor that remained in possession. The Second Circuit reversed the district court's decision enjoining an election of directors to the debtor's board. In doing so, the Second Circuit distinguished between the roles of the debtor and the debtor in possession in the case, recognizing that the debtor continued to exist and represent the stockholders' interest during the case.

Id. See, *Burtch et al. v. Ganz et al.* (In re Mushroom Transportation Company, 382 F.3d 325, 339 (3rd Cir. 2004),

> As we recently pointed out, HN10"in Chapter 11 cases where no trustee is appointed,§ 1107(a) provides that the debtor-in-possession, i.e., the debtor's management, enjoys the powers that would otherwise vest in the bankruptcy trustee. Along with those powers, of course, comes the trustee's fiduciary duty to maximize the value of the bankruptcy estate." *Official Committee of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003) (en banc). The debtor-in-possession's fiduciary duty to maximize includes the "'duty to protect and conserve property in its possession for the benefit of creditors.'" *In re Marvel Entertainment Grp., Inc.*, 140 F.3d 463, 474 (3d Cir. 1998) (citation omitted). Thus, there is no question that Mushroom, acting through its representatives Arnold and Cutaiar, had a fiduciary duty to protect and maximize the estate's assets.

See also, *Rushton v. America Pacific Wood Products (In re Americana Expressways)*, 133 F.3d 752, 756 (10th Cir. 1997)("Under 11 U.S.C. § 1107 and bankruptcy case law, a debtor in possession, like a bankruptcy trustee, is a fiduciary."); *Hanson v. Finn (In re Curry & Sorensen)*, 57 B.R. 824 (B.A.P. 9th Cir. 1986) (While pursuant to Section 1107(a) of the Code, a debtor in possession is not required to investigate and report under Sections 1106(a)(3) and (4), the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would a trustee for a debtor out of possession. Weintraub, supra, 105 S. Ct. at 1994-95.)

Denial of Motion Without Prejudice

In filing a revised motion, counsel can go back and provide the court with a Motion to Allow Fees which states with particularity the grounds upon which the relief is based. Counsel can describe the services rendered with specificity in the body of the Application for Fees and Costs. Counsel will be expected to provide a clear and comprehensive summary of the work performed on this case.

Additionally, the court will require that Counsel disclose all connections between Counsel and the financial consulting and advisory firm of GlassRatner. The court approved the employment of GlassRatner to business consulting services to the "Debtor" in this bankruptcy case. Dckt. No. 89. The court notes, however, that GlassRatner's Application for Authorization of Employment briefly mentions that GlassRatner is leasing office space from the firm of Counsel. The court is in the dark, however, about any arrangement that

may exist between Counsel and GlassRatner for the subleasing of office property, since Counsel and GlassRatner have failed to provide more information about such an agreement.

Counsel will be expected to provide, in his revised motion, the specifics of this arrangement, including the rate and location of the space being leased, whether there is some kind of profit sharing arrangement whereby the rental fees of $XXXX dollars for the sublease are increased when GlassRatner generates $XXX amount of money in fees for cases, whether Counsel's firm receives a cut of GlassRatner's fees on a regular basis, or whether GlassRatner is receiving a flat fee or is simply paying for overhead for subleasing Counsel firm's office space. This information is relevant to the court's determination of the particular interests and connections at stake in Counsel's representation, and GlassRatner's services to the Debtor-in-Possession in this case.

Counsel should also, prior to filing a Motion for Fees, seek to have the employment order amended so that Counsel is engaged by the Debtor in Possession, not merely the Debtor. Dckt. Nos. 80 and 82.

The Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion 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 the Motion for Allowance of fees for Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, LLP, is denied without prejudice.

14. 13-91459-E-11 LIMA BROTHERS DAIRY
KDG-5 Hagop T. Bedoyan

MOTION FOR COMPENSATION FOR GLASSRATNER ADVISORY AND CAPITAL GROUP, LLC, ACCOUNTANT(S), FEES: $21,887.50, EXPENSES: $193.23
1-23-14 [126]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on January 23, 2014. By the court's calculation, 21 days' notice was provided. 21 days' notice is required.

Tentative Ruling: The First and Final Application for Fees 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 for Allowance of fees for GlassRatner Advisory & Capital Group, LLC, 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:

FEES REQUESTED

GlassRatner Advisory & Capital Group, LLC, Accountant for the Debtor, makes a First Interim Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period of December 3, 2013 to December 31, 2013. The order of the court approving employment of counsel was entered on December 24, 2013.

REVIEW OF MOTION

The Motion for Compensation, which has been prepared by Counsel for the Debtor in Possession, states with particularity (Fed. R. Bank. P. 9013) the following grounds upon which the requested relief is based:

a. GlassRatner Advisory & Capital Group, LLC is the Applicant.

b. Applicant is the accountant for the Debtor. (Presumably the Motion should states that Applicant is the accountant for the Debtor in Possession, not the "Debtor." If the Motion is correct and Applicant is attempting to be the accountant for the Debtor and the Debtor in Possession, there would be a disqualifying conflict arising under 11 U.S.C. § 327, thereby precluding Applicant from any compensation in this case.)

c. The bankruptcy case was filed on August 7, 2013, and Applicant's employment was approved by the court on December 24, 2013.

d. Applicant has received a $20,000.00 retainer, which is held in Applicant's trust account. FN.1.

FN.1. In the Application to Employ Applicant discloses that it was paid a $20,000.00 retainer by partners of the Debtor. This Retainer is stated to represent a capital contribution by the partners, and is not a loan.

---

e. The court is instructed to read the Declaration of George J. Demos to determine what "major achievements" would be stated with particularity in the Motion and then state which of those, if any, the court believes that the Debtor in Possession would state in the application if it did state such grounds with particularity in the Motion.

f. Applicant summarizes the "Legal Fees" which are the subject of the Application (Section II) in the detailed Exhibit C in support of the Application.

g. A chronological list of the services is set forth in Exhibit A.

h. The time period for which fees are requested is from December 1, 2013 through December 31, 2013.

i. The Fees for this one month period total $21,887.50, for which the hourly rates charged range from $275.00 to $395.00.

j. Costs of $193.23 for mileage is requested.

k. The statement of fees and costs have been provided to the Debtor (but apparently not the fiduciary Debtor in Possession) for review.

Motion, Dckt. 126. Attached to the Motion is the "Debtor's Statement Regarding Receipt of Accountant's Bill and Statement of No Objections." This is formatted as a declaration, but is not separately filed as a declaration. Local Bankruptcy Rule ("L.B.R.") 9004 and the Revised Guidelines for Preparation of Documents. This statement under penalty of perjury clearly states that the Debtor, not the Debtor in Possession, has no opposition to paying the $21,000.00+ to the accountants for the Debtor. No statement is provided by the fiduciary to the estate Debtor in Possession.

The Motion is clearly deficient. While some courts may allow the use of summary forms and then task the judge and judicial law clerk to work as the unpaid associate attorneys for parties in assembling the grounds upon which a motion is based (which is subject to Fed. R. Bankr. P. 9011) and canvas declarations, exhibits, documents and the files in the case to guess what the movant would include in the motion if the movant had properly prepared the motion, this court does not.

Requirement to State Grounds With Particularity

Lastly, the Motion to Confirm 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."

Specific Deficiencies in Motion

The present Motion fails on several grounds. First, it seeks fees for the accountants for the Debtor. Counsel and Applicant may argue, "Debtor," "Debtor in Possession," what the difference. There is a significant difference, with the Debtor in Possession serving as the fiduciary in lieu of a trustee. While the Debtor can unabashedly advance its interests without regard to the estate and creditors, the Debtor in Possession is the fiduciary to the estate. If the Applicant (or counsel for the Debtor in Possession) does not realize or understand that, terrible consequences may ensue.

The Motion fails to provide any summary of what has been accomplished in the case, instead instructing the court to wade through declarations and time records to create the summary. If the summary is "simple to figure out," there is no reason for counsel and Applicant failing to so state the summary in the Motion. If it is complex, there is no reason for counsel and Applicant to assign that work to the judge and judicial law clerk.

Kerry Krisher, a "Principal" has billed 19.50 hours of work at $395.00 an hour. The Motion gives no hit as to what $400 an hour services were provided. The court is only told that the estate is to pay $7,702.50.

Brad Smith, a "Managing Director" has billed 37.10 hours of time at $275.00 an hour. It is asked that the estate pay $10,202.50 for these "Managing Director" services.

George Demos, a "Senior Managing Director" has billed $295.00 an hour for 13.50. These Senior services are to cost the estate $3,982.50.

From the Motion, the court has no idea as to what and how this Principal, Senior Managing Director, and Managing Director provided any beneficial services to the estate.

A four page declaration has been provided by George Demos, the Senior Managing Director. His testimony provided under penalty of perjury and based on his personal knowledge includes the following:

A. The Debtor filed a Voluntary Chapter 11 Petition on August 7, 2013.

B. The Debtor is a partnership which was formed in 1987 as a California General Partnership.

C. The partners of the Debtor are Felipe C. Lima and Joe Lima, Jr.

D. Debtor is engaged in a dairy business in Merced County, California.

E. Debtor currently owns 1,400 animals, including milk cows, dry cows, heifers, calves, and bulls.

F. Before filing bankruptcy, the Debtor's dairy operations were financed primarily by American AgCredit PCA and American AgCredit, FLCA. The loan are secured by a number of security instruments.

G. The dairy industry is suffering one of the worst recessions it has faced.

H. Increases in feed costs are outpacing increases in milk prices.

I. As a result, Debtor's reduced net income has caused Debtor to fall behind in payments to its creditors.

Declaration, Dckt. 128. There is no basis by which Mr. Demos has shown for having personal knowledge of these events. He does not testify to having been personally involved in the filing of this bankruptcy case. He does not testify to having personal knowledge of the formation fo this partnership in 1987. He does not testify as to how he has personal knowledge as to who the partners are of the Debtor. He does not testify as to how he has personal knowledge as to how many head of cattle are in the estate (not "currently owned by the Debtor") or the make up of the herd. (By stating that the herd is currently owned by the Debtor, Mr. Demos demonstrates a fundamental misunderstanding of Chapter 11 cases, the creation of the bankruptcy estate, and the fiduciary capacity of the Debtor in Possession, which is separate from the Debtor.)

Mr. Demos describes the services provided, not identifying any time, charges, or rate to these activities. He directs the court, creditors, U.S. Trustee, and parties in interest to review the detailed billing statements to figure out how and what was charged.

The detailed billing statement consists of 3 pages of small font type. The one month of "business analysis" for which $18,954.50 (60.70 hours) is billed covers two pages of the two and one-half page statement. All nature of activities are interspersed, challenging the court and parties in interest to try and decipher and then organize the information.

Much of the activities appear to relate to preparing and revising monthly operating reports. Many activities appear to consist of internal meetings, memos, and calls between the Principal, Senior Managing Director, and Managing Director.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the

service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A).

Compensation under 11 U.S.C. § 330, or interim compensation under 11 U.S.C. § 331 may be allowed for professionals engaged 11 U.S.C. §§ 327 or 1103. 11 U.S.C. § 327 allows "the trustee" to employ professionals. 11 U.S.C. § 1103 allows for a committee of creditors in a Chapter 11 case to engage professionals. In a Chapter 11 case the "debtor in possession" is authorized to exercise the rights and powers of a trustee, which includes the hiring of professionals. 11 U.S.C. § 1107(a). The distinction between the post-petition debtor in possession and the pre-petition debtor is stated in 11 U.S.C. § 1107(b) which states, "[a] person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case."

The debtor becomes the debtor in possession upon the commencement of the case and serves in that capacity until a Chapter 11 Trustee is appointed or the case is converted to one under Chapter 7. COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 1101.01. This creates a dual identity, that being the Debtor in its individual capacity and as the debtor in possession in its fiduciary capacity.

[3] The Separate Entity Theory

Section 1101(1) contains only a definition. It does not address any distinction between the "debtor" and the "debtor in possession." Section 1107(a) describes the powers and duties of the debtor in possession. It grants to the debtor in possession all of the rights and powers of a trustee and requires the debtor in possession to perform all of the duties and functions of a trustee. Under section 323, the trustee is

the representative of the estate. In a chapter 11 case, the debtor in possession acts in that role. This suggests that **the debtor exists in a separate capacity, in much the same way that an individual serving as trustee does not lose the individual's separate identity but has rights, powers, duties and obligations as trustee that are separate from those in the individual's personal capacity**. Thus, although one could properly say that the debtor in possession is not a separate entity from the debtor, that would be incomplete. The estate created by section 541 is a separate entity. The debtor becomes the representative of the estate and, when acting in that representative capacity, is referred to as the debtor in possession.

The other provisions of chapter 11 are consistent with this distinction. Except for section 1107, expressly defining the rights, powers and duties of a debtor in possession, the provisions of chapter 11 grant rights or powers to the trustee rather than to the debtor in possession. References to the debtor are to the debtor as such, rather than to the debtor acting in its capacity as debtor in possession. For example, subsections 1121(a) and (c) permit the debtor, not the trustee or debtor in possession, to file a plan at any time during the case, even after the appointment of a trustee. Section 1121(b) grants the debtor the exclusive right to file a plan for the first 120 days after the order for relief. Section 1112(a) authorizes the debtor to convert the case to one under chapter 7, "unless the debtor is not a debtor in possession." Section 1141(b) vests the property of the estate in the debtor upon confirmation, and section 1141(d) discharges the debtor, not the trustee or debtor in possession. 7

Some have argued that the Supreme Court ruled in National Labor Relations Board v. Bildisco & Bildisco that the debtor in possession is not a new entity but is the same entity as the prebankruptcy debtor. The assertion is based on language that "it is sensible to view the debtor-in-possession as the same 'entity' which existed before the filing of the bankruptcy petition." 8 However, this language has been taken out of context. The statement was made in the context of whether, for the purposes of applying the labor laws, the debtor in possession (or, more properly, the estate, of which the debtor in possession is the representative) should be treated as a successor employer. In full, the quote reads:

> Much effort has been expended by the parties on the question of whether the debtor is more properly characterized as an "alter ego" or a "successor employer" of the prebankruptcy debtor, as those terms have been used in our labor decisions. See *Howard Johnson Co. v. Hotel Employees*, supra, at 259, n. 5; *NLRB v. Burns International Security Services, Inc.*, supra; *Southport Petroleum Co. v. NLRB*, 315 U.S. 100,

> 106 (1942). We see no profit in an exhaustive effort to identify which, if either, of these terms represents the closest analogy to the debtor-in-possession... . For our purposes, it is sensible to view the debtor-in-possession as the same "entity" which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing. 9
>
> Footnote 7. *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513, 527-28, 104 S.Ct. 1188, 1197, 79 L. Ed. 2d 482, 496-97, 9 C.B.C.2d 1219 (1983) .
>
> Footnote 8. 465 U.S. 513, 527-28, 104 S.Ct. 1188, 1197, 79 L. Ed. 2d 482, 496-97, 9 C.B.C.2d 1219 (1983) .
>
> Footnote 9. 465 U.S. 513, 527-28, 104 S.Ct. 1188, 1197, 79 L. Ed. 2d 482, 496-97 (emphasis added). Pre-Code case law provides some support for distinguishing between the roles of debtor and debtor in possession. Under former Chapter X, a trustee was always appointed unless the debtor's debts were less than $250,000. *In re J.P. Linahan, Inc.*, 111 F.2d 590 (2d Cir. 1940), involved a debtor that remained in possession. The Second Circuit reversed the district court's decision enjoining an election of directors to the debtor's board. In doing so, the Second Circuit distinguished between the roles of the debtor and the debtor in possession in the case, recognizing that the debtor continued to exist and represent the stockholders' interest during the case.

Id. See, *Burtch et al. v. Ganz et al.* (In re Mushroom Transportation Company, 382 F.3d 325, 339 (3rd Cir. 2004),

> As we recently pointed out, HN10"in Chapter 11 cases where no trustee is appointed,§ 1107(a) provides that the debtor-in-possession, i.e., the debtor's management, enjoys the powers that would otherwise vest in the bankruptcy trustee. Along with those powers, of course, comes the trustee's fiduciary duty to maximize the value of the bankruptcy estate." *Official Committee of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003) (en banc). The debtor-in-possession's fiduciary duty to maximize includes the "'duty to protect and conserve property in its possession for the benefit of creditors.'" *In re Marvel Entertainment Grp., Inc.*, 140 F.3d 463, 474 (3d Cir. 1998) (citation omitted). Thus, there is no question that Mushroom, acting through its representatives Arnold and Cutaiar, had a fiduciary duty to protect and maximize the estate's assets.

See also, *Rushton v. America Pacific Wood Products (In re Americana Expressways)*, 133 F.3d 752, 756 (10th Cir. 1997)("Under 11 U.S.C. § 1107 and bankruptcy case law, a debtor in possession, like a bankruptcy trustee, is a fiduciary."); *Hanson v. Finn (In re Curry & Sorensen)*, 57 B.R. 824 (B.A.P. 9th

Cir. 1986) (While pursuant to Section 1107(a) of the Code, a debtor in possession is not required to investigate and report under Sections 1106(a)(3) and (4), the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would a trustee for a debtor out of possession. Weintraub, supra, 105 S. Ct. at 1994-95.)

Denial of Motion Without Prejudice

The Applicant can go back and provide the court with a Motion to Allow Fees which states with particularity the grounds upon which the relief is based. The Motion can provide a billing summary, breaking up the task billing in a meaningful and clear way.

The declarant can provide testimony to substantiate the billing summary and providing a discussion of the actual services provided within each task area. The declaration can explain why and how the services were staff and why the billing rates for the services were appropriate. The staffing for these services, which include what appears to be basic work, is all performed by professionals with 25+ years of experience and billing $275 to $395.00 an hour. No explanation is provided as to why and how all of the services provided are no less than $275.00 an hour services. These appear to include some basic bookkeeping services.

The Applicant and Counsel should, prior to filing a Motion for Fees, seek to have the employment order amended so that Applicant is engaged by the Debtor in Possession, not merely the Debtor.

The Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Accountant 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 Allowance of fees for GlassRatner Advisory & Capital Group, LLC, is denied without prejudice.

15. 13-91459-E-11 LIMA BROTHERS DAIRY
KDG-4 Hagop T. Bedoyan

CONTINUED MOTION TO USE CASH COLLATERAL AND/OR MOTION FOR ADEQUATE PROTECTION
1-17-14 [119]

CONT. FROM 1-30-14

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

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.

The court's decision is to grant the Motion to Use Cash Collateral and to set a date for further hearing on a supplemental motion, if any, for further used of cash collateral.

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).

At the hearing, the Debtor in Possession and creditors advised the court of one amendment to the budget. For the week of February 3, 2014, the Debtor-in-Possession shall made a $48,000.00 payment to American AgCredit. The monies will be paid from a suspense account which the Debtor-in-Possession is holding.

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**	**$56,147**	**$157,474**	**$86,374**	**$33,974**	**$143,674**	**$198,824**	**$126,724**	**$73,924**	**$139,974**	
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	$9,100
Cow Sales		$10,000		$10,000		$10,000		$10,000		$10,000			$10,000	$60,000
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	$48,000	$55,000		$55,000		$55,000		$55,000		$55,000	$393,000
TOTAL LOAN PAYMENTS	**$35,000**		**$35,000**	**$48,000**	**$55,000**		**$55,000**		**$55,000**		**$55,000**		**$55,000**	**$393,000**
TOTAL CASH DISBURSEMENTS	**$141,600**	**$77,800**	**$112,100**	**$129,500**	**$106,600**	**$82,800**	**$95,600**	**$85,500**	**$120,600**	**$82,800**	**$92,400**	**$109,700**	**$139,400**	
ENDING CASH BALANCE	**$124,674**	**$57,574**	**$179,174**	**$56,374**	**$157,474**	**$85,374**	**$33,974**	**$143,674**	**$198,824**	**$126,724**	**$73,924**	**$139,974**	**$11,274**	

The court issued an emergency order authorizing the used of cash collateral on an interim basis 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.

The court set the matter for final hearing. 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 authorizes the use of cash collateral, as set forth above, through and including April 14, 2014. To provide for the orderly administration of this case, the court continues the hearing on this Motion to Use Cash Collateral to 10:30 a.m. on March 27, 2014. On or before March 10, 2014, the Debtor in Possession shall file a Supplemental Motion for Further Use of Cash Collateral, and Oppositions, if any, to the Supplemental Motion shall be filed and served on or before March 21, 2014.
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, and the Debtor in Possession is authorized through and including April 13, 2014, to use cash collateral may be used to pay the following expenses:

	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	Projected	
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	
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	$48,000	$55,000		$55,000		$55,000		$55,000		$55,000	$393,000
TOTAL LOAN PAYMENTS	**$35,000**		**$35,000**	**$48,000**	**$55,000**		**$55,000**		**$55,000**		**$55,000**		**$55,000**	**$393,000**
TOTAL CASH DISBURSEMENTS	**$141,600**	**$77,800**	**$112,100**	**$129,500**	**$106,600**	**$82,800**	**$95,600**	**$85,500**	**$120,600**	**$82,800**	**$92,400**	**$109,700**	**$139,400**	
ENDING CASH BALANCE	**$124,674**	**$57,574**	**$179,174**	**$56,374**	**$157,474**	**$85,374**	**$33,974**	**$143,674**	**$198,824**	**$126,724**	**$73,924**	**$139,974**	**$11,274**	

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 hearing on this Motion to Use Cash Collateral to 10:30 a.m. on March 27, 2014. On or before March 10, 2014, the Debtor in Possession shall file a Supplemental Motion for Further Use of Cash Collateral, and Oppositions, if any, to the Supplemental Motion shall be filed and served on or before March 21, 2014.

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.

No attorneys' fees or other professional fees are approved by this order or inclusion of such expense item in the budget. Such professional fees may be paid only as allowed and authorized to be paid by separate order of the court.

16. 10-91965-E-7 CRAIG WILSON — MOTION TO AVOID LIEN OF PERSOLVE, LLC
SDM-2 Scott D. Mitchell — 1-7-14 [25]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on January 7, 2014. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Avoid a Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Creditor having filed an opposition, the court will address the merits of the motion. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court's tentative decision is to deny the Motion to Avoid Lien 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.

A judgment was entered against the Debtor in favor of Persolve, LLC, for the sum of $12,802.58. There is no evidence filed showing that the abstract of judgment was recorded. Debtor states that the lien attached to the Debtor's residential real property commonly known as 1221 College Avenue, Modesto, California.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $136,500.00 as of the date of the petition. The unavoidable consensual liens total $159,279.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $1.00 in Schedule C. The respondent purportedly holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien.

Opposition by Creditor Persolve, LLC

Judgment Creditor Persolve, LLC, alleges that Debtor has failed to attach any evidence that the property in question is exempt, and that the property is of the value and is encumbered in the amounts stated by Debtor in Debtor's Motion to Avoid Lien.

Creditor also opposes Debtor's Motion to Avoid the Lien, on the basis that Debtor has misrepresented or is incorrect in their valuation of the property at $136,500.00, as the property was last sold in 2003 for

$172,500, and is currently believed to be valued at approximately $177,668.00. The court rejects this contention, however, for Creditor's failure to attach competent evidence supporting its opinion of value of the property.

Evidence of Value of Property and Lien

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). The Motion to Avoid Lien is accompanied by the sworn declaration of Debtor Craig D. Wilson. Debtor states in his declaration that in his "considered opinion," the value of the real property commonly known as 1221 College Avenue, Modesto, California, is $136,500.00. ¶ 3, Declaration in Support of Motion to Avoid Judicial Lien, Dckt. No. 27.

Creditor attaches an estimate from the website Zillow.com, which is not admissible evidence and cannot be relied upon by the court. Fed. R. Evid. 801, 802. There is no exception to the hearsay rule under which a Zillow report can come into evidence; the person who generated the values for a Zillow report is not available to be cross-examined as to either the underlying facts in the document, and the source for such facts. Thus, a Zillow estimate is merely hearsay and cannot be accepted by the court as a proper valuation of the property.

The court recognizes that some confusion has been created by Movant failing to comply with Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents which require that the motion, points and authorities, each declaration, and the exhibits document to be filed as separate electronic documents. The document prepared includes the motion and exhibits in this matter as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Revised Guidelines for the Preparation of Documents, ¶(3)(a).

Here, Debtor provides copies of his Schedules A, C, and D, and an abstract of judgment that was supposedly recorded by Persolve, LLC. In violation of the local rules governing the presentation of evidence and pleadings, however, Debtor attaches these documents to his Motion to Avoid Judicial Lien. Dckt. No. 25. Debtor lists the value of the property at $136,500.00 on his Schedule A, and exempts the property pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $1.00 in Schedule C. Debtor lists the Deed of Trust and debt owed to Wells Fargo Home Mortgage on his Schedule D, in the amount of $159,279.00. Exhibit 1, Copies of Schedule A-D, Abstract of Judgment, Dckt. No. 25.

The court's expectation is that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). This failure is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l). Although the fixing of this judicial lien may very well impair the Debtor's exemption of the real property under 11 U.S.C.

§ 349(b)(1)(B), the court cannot grant a Motion that does not conform to the requirements of Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents in this district.

Review of Motion and Evidence Properly Presented

Ignoring the documents Debtor attempted to file but failing to comply with the basic pleading and document rules in this District, the court would consider the following. The value of the property is stated in the Motion is the Debtor's Opinion. The Debtor's declaration states "In my considered opinion, the value of this property is $136,500.00." While the most ephemeral of evidence, an owners opinion of value is evidence of value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004). This value is stated with particularity in the Motion.

The Motion asserts that a lien was recorded pre-petition. The Motion does not identify any recording information relating to the lien. Reference is made to a copy of the abstract of judgment being included somewhere in the exhibits filed in this Contested Matter (not being identified by number or letter exhibit designation). Included in the stack of exhibits is an unrecorded California Abstract of Judgment Form. Even if the court were to consider this document, there is no recording information with which the court could identify this abstract of judgment, if it is of record, in any order.

The court, having been left casting about in a desert of admissible, competent, credible evidence, is unable to finally grant or deny the motion. The motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to 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 to Avoid Judicial Lien is denied without prejudice.

17. 10-91965-E-7 CRAIG WILSON
SDM-3 Scott D. Mitchell

MOTION TO AVOID LIEN OF HILCO RECEIVABLES
1-7-14 [21]

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 Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on January 7, 2014. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

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

No opposition was presented at the hearing. The Defaults of the non-responding parties are entered by the court.

The court's decision is to grant the Motion to Avoid Lien. No appearance at the February 13, 2014 hearing is required.

A judgment was entered against the Debtor in favor of Hilco Receivables, LLC, for the sum of $2,293.83. The abstract of judgment was recorded with the Stanislaus County Recorder on February 2, 2010. Debtor states that the lien attached to the Debtor's residential real property commonly known as 1221 College Avenue, Modesto, California.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $136,500.00 as of the date of the petition. The unavoidable consensual liens total $159,279.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $1.00 in Schedule C. The respondent purportedly holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien.

As stated in the court's ruling on Debtor's Motion to Avoid the Judicial Lien of Persolve, LLC, Debtor failed to comply with Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents which require that the motion, points and authorities, each declaration, and the exhibits document to be filed as separate electronic documents.

Debtor has provided copies of his Schedules A, C, and D, and an abstract of judgment recorded by creditor Hilco Receivables, LLC. In violation of the Revised Guidelines for the Preparation of Documents, however, Debtor attaches these documents to his Motion to Avoid Judicial

Lien. Dckt. No. 25. Debtor lists the value of the property at $136,500.00 on his Schedule A, and exempts the property pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $1.00 in Schedule C. Debtor lists the Deed of Trust and debt owed to Wells Fargo Home Mortgage on his Schedule D, in the amount of $159,279.00. Exhibit 1, Copies of Schedule A-D, Abstract of Judgment, Dckt. No. 25.

The court's expectation is that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). This failure is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l). However, the court will rule on the merits of the motion, reminding counsel that he should not rely on the court doing so in the future. The fixing of this judicial lien impairing the Debtor's exemption of the real property under 11 U.S.C. § 349(b)(1)(B), the court grants the Motion.

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Hilco Receivables, LLC, Stanislaus County Superior Court Case No. 634198, recorded on February 2, 2010, Document No. 2010-0010094, with the Stanislaus County Recorder, against the real property commonly known as 1221 College Avenue, Modesto, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

18. 13-92166-E-7 ANTERO/JODY ACIERTO MOTION TO COMPEL ABANDONMENT
PLG-1 Chelsea A. Ryan 1-3-14 [9]

Local Rule 9014-1(f)(2) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on January 3, 2014. By the court's calculation, 41 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Abandon Real Property has been properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and Federal Rule of Bankruptcy Procedure 6007(b). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. 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 Abandon Real Property 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:

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, Debtors are in the business of furniture reupholstery. Debtors' business includes certain assets which were listed in Debtors' schedules, and exempted under applicable bankruptcy and California law. Among the assets listed were "various tools and equipment used," valued at approximately $1,743.00. Debtors assert that the business and its related assets have no value or benefit to the bankruptcy estate, and is burdensome thereto.

Debtors do not, however, identify the business and assets with much specificity in the body of their motion. The Motion merely states that Debtors' business is a furniture reupholstery business, and that it includes "certain assets which were listed in the Debtors schedules and exempted" under applicable laws. ¶ 3, Motion to Compel Abandonment, Dckt. No. 9. This does not state with particularity pursuant to Federal Rule of Bankruptcy

Procedure 9013, what relief is being sought by Debtors. It does not plead with particularity, what items of property Debtors are requesting be abandoned by Trustee. Describing the assets as "various tools and equipment' fails to describe the personal property sought to be abandoned. The court does not have sufficient information regarding the property to be abandoned.

For the court to grant this motion, Debtor need to specify what business assets are being abandoned. For instance, the business name, specific business accounts, office supplies, office hardware (laptop, computer, printer), and office furniture (chairs, tables, industrial lights) can be properly described to inform the court what exact assets still exist and are considered part of the business's assets. This court will not issue vague orders and grant Motions that do not meet the basic requirements of Federal Rule of Bankruptcy Procedure 9013.

Debtors list on their Schedule B, a sole proprietorship, Four Acres. Debtors identify the business as a furniture reupholstery business, and specifically state that inventory supplies include "tacks, thread, decking, and glue." In the "Machinery, fixtures, equipment, and supplies used in business" category of type of property in Schedule B, Debtors further list individual items like a sweing machine, air compressor, staple gun, mallets, a steamer, an iron, scissors, thread, etc. Exhibit 1, Dckt. No. 12. Debtors meticulously catalogue all of their business-related personal property on their Schedule B, but do not incorporate such extensive descriptions in their Motion to Compel Abandonment. It behooves Debtors to describe their business and business assets with the same degree of observed in their schedules with their Motion as well. The court will not speculate as to what assets Debtors are referring to, and requesting to be abandoned.

The Motion to Compel Abandonment is denied.

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 denied.

19. 12-92570-E-12 COELHO DAIRY
TOG-36 Thomas O. Gillis

MOTION FOR COMPENSATION FOR THOMAS O. GILLIS, DEBTOR'S ATTORNEY(S), FEES: $91,565.00, EXPENSES: $1,725.25
1-15-14 [377]

Final Ruling: Due to the complexity of the issues arising in the Motion for Compensation for Thomas O. Gillis and at the request of the court, the hearing on this matter is continued to **10:30 a.m.** on **March 6, 2014.** No appearance required at the February 13, 2014 hearing.

20. 13-90382-E-7 MICHAEL CARSON
13-9016
TAIPE V. CARSON

MOTION FOR COMPENSATION FOR THOMAS P. HOGAN, PLAINTIFFS ATTORNEY(S), FEES: $10,562.00, EXPENSES: $363.46
1-8-14 [79]

Local Rule 9014-1(f)(1) Motion -Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on January 8, 2014. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion for Attorney's Fees and Costs has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Defendant Michael R. Carson having filed an opposition, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court's decision is to continue the Motion for Attorney's Fees and Costs to March 6 at 10:30 a.m. No appearance at the February 13, 2014 hearing is required.

FEES REQUESTED

Plaintiff Graciela Carson makes a Motion for an Award of Attorney Fees and Costs for $10,562.00 in fees and expenses of $363.46 in this adversary proceeding. The period for which the fees are requested is for the period of May 24, 2013 through December 31, 2013.

Description of Services for Which Fees Are Requested

Although this motion was framed broadly as a motion for compensation for Plaintiff's counsel's services, this is in actuality, a Motion for prevailing party's attorney's fees. Plaintiff actually seeks the

reimbursement of the attorneys' fees and costs that Plaintiff incurred, in order to obtain an order determining that an attorney's fee award issued in state court is nondischargeable. On April 10, 2013, Plaintiff filed an adversary proceeding to determine whether a state court judgement, which ordered that the child support funds that Plaintiff was to pay Defendant be offset by the attorney's fees owed by Defendant. Plaintiff filed a non-dischargeability complaint, requesting that the court determine that this set-off be deemed nondischargeable under 11 U.S.C. § 523(a)(5).

The debt in question arises from a state court judgment by the Contra Costa Superior Court, rendered in a child custody, visitation, and support case litigated by the Plaintiff and Defendant. On January 24, 2013, the Contra Costa Superior Court found that although Defendant was entitled to a child support order of $452.00 per month, Defendant had also engaged in excessive litigation. The court then ordered Defendant to pay $15,000 in attorneys' fees to Plaintiff. The child support award of $452 owed to Defendant was to be "offset" by Defendant's payment of attorneys' fees, which were to be paid over a time frame of approximately 27 months.

Plaintiff sought a judgment in the amount of $12,480.00, plus interest at the rate of 10% per annum from February 3, 2013, be deeemed a non-dischargeable pursuant to 11 U.S.C. § 523(a)(5) as a domestic support obligation. Plaintiff characterizes the judgment as sanctions that was issued by the family law court against the Defendant-Debtor,awarded to Plaintiff to punish the Defendant-Debtor's excessive prosecution of a child support claim against the Plaintiff. Plaintiff in her Complaint asserted that the state court judge had found that the Defendant-Debtor litigated the child support claim in bad faith.

With respect to the Instant Motion for Compensation, the court instructed both Plaintiff's Counsel and Defendant's counsel at a recent status conference on January 30, 2014. The court instructed Plaintiff's counsel to clarify the relief sought in his Motion pursuant to Federal Rule of Bankruptcy Procedure 9013 and to furnish admissible, adequate evidence in support of the requested fees and costs. Defendant's counsel was also advised to provide clear responses opposing Plaintiff counsel's Motion, and to provide any evidence supporting Defendant's contentions.

Defendant's Opposition to Motion for Compensation, filed January 30, 2014

Defendant argues that because the litigation underlying this motion implicated questions of federal bankruptcy law, rather than child support enforcement questions, Plaintiff's counsel cannot rely on provisions of the Family Code to recover an award of attorney's fees. The gravamen of the litigation rests on defendant's bankruptcy and his pursuit of bankruptcy protections and relief, and not from a state court family law proceeding. Whether the Defendant's debt could be discharged did not turn on whether the disputed claims were enforceable under applicable state law.

Rather, Plaintiff's complaint hinged on the question of whether an award of attorney's fees stemming from a state court matter is dischargeable. Defendant states that because this is not a case of child custody and visitation, division of community property, or a party seeking child support

and an award of attorney's fees under the California Family Code, there is no contract involved.

Here, Defendant relies primarily on the California Family Code, § 2030 et seq. California Family Code § 2030 states,

> (a) (1) In a proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties, and in any proceeding subsequent to entry of a related judgment, the court shall ensure that each party has access to legal representation, including access early in the proceedings, to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party, except a governmental entity, to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding.
>
> (2) When a request for attorney's fees and costs is made, the court shall make findings on whether an award of attorney's fees and costs under this section is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties. If the findings demonstrate disparity in access and ability to pay, the court shall make an order awarding attorney's fees and costs. A party who lacks the financial ability to hire an attorney may request, as an in pro per litigant, that the court order the other party, if that other party has the financial ability, to pay a reasonable amount to allow the unrepresented party to retain an attorney in a timely manner before proceedings in the matter go forward.
>
> (b) Attorney's fees and costs within this section may be awarded for legal services rendered or costs incurred before or after the commencement of the proceeding.
>
> (c) The court shall augment or modify the original award for attorney's fees and costs as may be reasonably necessary for the prosecution or defense of the proceeding, or any proceeding related thereto, including after any appeal has been concluded.
>
> (d) Any order requiring a party who is not the spouse of another party to the proceeding to pay attorney's fees or costs shall be limited to an amount reasonably necessary to maintain or defend the action on the issues relating to that party.
>
> (e) The Judicial Council shall, by January 1, 2012, adopt a statewide rule of court to implement this section and develop a form for the information that shall be submitted to the court to obtain an award of attorney's fees under this section.
>
> Cal. Family Code § 2030 et seq.

An application of the statute requires an analysis of the respective needs of the parties, as well as the ability to pay on the part of the party from whom fees have been requested. *Marriage of Rosen* (2002) 105

Cal.App.4th 808, 829, 130 Cal.Rptr.2d 1; *Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1166, 62 Cal.Rptr.2d 466. Defendant states that the record of cases involving California Family Code § 2030 et seq. must reflect an actual exercise of discretion and a consideration of the statutory factors in the exercise of that discretion. *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 315.

Defendant complains that the Plaintiff is attempting to ask that this court act as the family court, and make an award determination based on the "relative need and ability" of the parties under the California Family Code. Plaintiff has not complied with the procedures established by California Family Code § 2030(e). The California Judicial Council has promulgated statewide rules of court implementing Section 2030(e).

California Rule of Court 5.427, on attorney's fees and costs, states the following:

(a) Application. This rule applies to attorney's fees and costs based on financial need, as described in Family Code sections 2030, 2032, 3121, 3557, and 7605.

(b) Request

(1) Except as provided in Family Code section 2031(b), to request attorney's fees and costs, a party must complete, file and serve the following documents:

(A) Request for Order (form FL-300);

(B) Request for Attorney's Fees and Costs Attachment (form FL-319) or a comparable declaration that addresses the factors covered in form FL-319;

(C) A current Income and Expense Declaration (form FL-150);

(D) A personal declaration in support of the request for attorney's fees and costs, either using Supporting Declaration for Attorney's Fees and Costs Attachment (form FL-158) or a comparable declaration that addresses the factors covered in form FL-158; and

(E) Any other papers relevant to the relief requested.

(2) The party requesting attorney's fees and costs must provide the court with sufficient information about the attorney's hourly billing rate; the nature of the litigation; the attorney's experience in the particular type of work demanded; the fees and costs incurred or anticipated; and why the requested fees and costs are just, necessary, and reasonable.

(c) Response to request. To respond to the request for attorney's fees and costs, a party must complete, file, and serve the following documents:

(1) Responsive Declaration to Request for Order (form FL-320);

(2) A current Income and Expense Declaration (form FL-150);

(3) A personal declaration responding to the request for attorney's fees and costs, either using Supporting Declaration for Attorney's Fees and Costs Attachment (form FL-158) or a comparable declaration that addresses the factors covered in form FL-158; and

(4) Any other papers relevant to the relief requested.

(d) Income and expense declaration. Both parties must complete, file, and serve a current Income and Expense Declaration (form FL-150). A Financial Statement (Simplified) (form FL-155) is not appropriate for use in proceedings to determine or modify attorney's fees and costs.

(1) "Current" is defined as being completed within the past three months, provided that no facts have changed. The form must be sufficiently completed to allow determination of the issues.

(2) When attorney's fees are requested by either party, the section on the Income and Expense Declaration (form FL-150) related to the amount in savings, credit union, certificates of deposit, and money market accounts must be fully completed, as well as the section related to the amount of attorney's fees incurred, currently owed, and the source of money used to pay such fees.

(e) Court findings and order. The court may make findings and orders regarding attorney's fees and costs by using Attorney's Fees and Costs Order Attachment (form FL-346). This form is an attachment to Findings and Order After Hearing (form FL-340), Judgment (form FL-180), and Judgment (Uniform Parentage--Custody and Support) (form FL-250).

California Rule of Court 5.427.

In summary, California Rule of Court 5.427 and Family Code Section 2030(e) requires that a party requesting attorney fees and costs in accordance with California Family Code § 2030, file the following forms:

1) A Request for Order (Judicial Council Form FL-300);

2) Current Income and Expense Declaration (Judicial Council Form FL-150);

3) Any other papers relevant to the relief requested.

Defendant argues that Plaintiff’s Motion for fees and evidence offered in support of the motion are inadequate, and do not support the granting of attorneys’ fees under the cited California Rule of Court and Family Code sections. Plaintiff does not file a request for order, a current income and expense declaration, and other papers detailing Plaintiff’s financial circumstances. Plaintiff’s motion does not include the above-listed documents, thereby preventing the court from considering the finances, income, and expenses of Plaintiff in determining whether Plaintiff is in need of an award, and whether or not she can pay her own fees. Defendant contends that because this court is not a family law court, and the court

cannot issue an award of attorney's fees based on California Family Code § 2030 et seq.

Furthermore, a party does not necessarily need to be the winning party in order to be awarded attorney's fees or costs under the California Family Code. As such, Defendant asserts that Plaintiff makes more income than Defendant, and that Plaintiff can pay her own fees under the California Family Code. Defendant cites to an order by the Contra Costa County Superior Court, entered on January 28, 2013, where the court found Plaintiff made $9,197.00 monthly in comparison to Defendant's $7,333.00, to highlight the parties' income disparity. Plaintiff's Exhibit A, Findings and Order After Hearing Filed January 24, 2013, Dckt. No. 83 at 2-6, 19.

Defendant also asserts that Plaintiff's pleadings are defective, in that the request for attorney's fees was only included in the Plaintiff's prayer for relief, rather than the body of the complaint. Federal Rule of Bankruptcy Procedure 7008(b) requires that a request for an award of attorney's fees be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply. Plaintiff's request for attorney fees is not included in the body of Plaintiff's Motion. Defendant additionally contends that Plaintiff's Motion does not state with particularity the grounds upon which the relief sought is based pursuant to Federal Rule of Bankruptcy Procedure 9013.

Lastly, Defendant states that Plaintiff's submission of evidence related to the parties' settlement negotiations in their marital dissolution proceedings violates Federal Rule of Evidence § 408. Federal Rule of Evidence § 408 bars the admission of conduct or statements made in the course of negotiations, to prove liability for any alleged losses or damages, in open court. Defendant submits that the state court findings offered by Plaintiff in support of the motion to be inadmissible and should not be considered by this court.

JANUARY 30, 2014 STATUS CONFERENCE

On January 30, 2014, the court held a status conference on Plaintiff's Amended Complaint. In Plaintiff's Status Conference Statement, filed on January 23, 2014, Plaintiff advised the court that the parties previously stipulated that the right of offset pursuant to 11 U.S.C. § 553 would not be dischargeable. The court issued an order on November 30, 2013, stating the rights of the parties had been determined by their stipulation, resolving the non-dischargeability portion of this adversary proceeding. Order, Dckt. No. 78.

At the status conference, Plaintiff asserted the right to attorneys' fees in connection with this Adversary Proceeding pursuant to California Family Code §§ 2030, 2032, 3557. Defendant indicated in his Status Conference Statement, Dckt. 87, that the nondischargeability issues have been resolved, but that the matter of Plaintiff's request for attorneys' fees had not been resolved. At the status conference, Defendant contended that the request was without merit, and was being asserted to harass the Defendant. Defendant directed the court to review the the California Judicial Council Statewide Rule for fees issues pursuant to Family Code § 2030, asserting

that this Rule provides for an award of fees as rooted in the need as between the parties, not as a matter of right.

The court agreed with Defendant's assessment that Plaintiff's Counsel did not properly present his motion, and attach and file sufficient evidence, in his motion to recover prevailing party's fees and costs. The court instructed Plaintiff's counsel to file further pleadings and evidence to address the court's concerns regarding defects in Plaintiff's pleadings and exhibits.

Plaintiff's Reply to Defendant's Opposition, filed February 6, 2014

Plaintiff asserts that Defendant was adequately notified of Plaintiff's request for attorney's fees from the outset of the adversary proceeding. Plaintiff cites to the case of *In re Carey,* 446 N.R. 384 (B.A.P. 9th Cir. 2011), a matter in which an attorney's fees motion was initially denied to the appellant's failure to request attorney's fees specifically as a claim in the Complaint. The court in *In Re Carey* explained that the pleading provisions in the Civil and Bankruptcy Rules of Civil Procedure were intended to provide the parties with adequate notice of the opposing party's claims or defenses. *Id.* Plaintiff states that Defendant was continuously aware of Plaintiff's request for attorney fees, even filing a Motion to Strike Plaintiff's Request on September 12, 2013, thus acknowledging Plaintiff's request.

Plaintiff also maintains that a request for attorney's fees is permitted under the Bankruptcy Code because this request was asserted in the Complaint. Including this request in the Complaint is sufficient to award a prevailing claimant to reasonable fees generated in the prosecution of a complaint under Federal Rule of Bankruptcy Procedure 7009, and the court's ruling in *In re Carey*. *Id.* at 394.

Plaintiff's Counsel reviews the history and procedural posture of the case, imputing onto Defendant's attorney knowledge of this court's acknowledgment that the state court attorney's fee award is an set-off that included a mutuality of debts that would be treated as a secured claim, and that this court had instructed the parties' attorneys to craft a stipulation agreeing that the offset would not be violation of the discharge injunction against the domestic support obligation. Exhibit 3, Excerpts from Transcript from Hearing Held on June 27, 2013, Dckt. No. 93.

In Plaintiff's reply, Defendant-Debtor's counsel is portrayed as uncooperative, and unwilling to work with Plaintiff's counsel to fashion an order. Plaintiff expresses frustration at Defendant's counsel's perceived lack of cooperation in drafting an order that would allow Plaintiff continue to offset her child support obligation, and to determine the offset to be nondischargeable under 11 U.S.C. § 553. Exhibit 4, Dckt. No. 93. Plaintiff argues that against the advice of the court, Defendant's counsel persisted in moving forward with litigation, and refused to work with Plaintiff's counsel to craft an order memorializing the court's assessment that the attorney's fees offset from the state court is nondichargeable.

In his Reply to Defendant's Opposition to the Motion for Award of Attorney's Fees and Costs, Plaintiff advances two novel arguments in favor

of recovering attorney's fees connected to the adversary proceeding. The arguments consist of the following:

A. Plaintiff can recover attorney's fees under California Family Code Section 271, due to Defendant's refusal to cooperate and frustration of the settlement process.

B. Plaintiff is entitled to Attorney Fees and Costs, pursuant to California Family Code Section 2032, based on Plaintiff's financial circumstances and Defendant's ability to pay.

Firstly, on the basis of what Plaintiff's counsel terms as Defendant's "complete failure to cooperate and frustration of the settlement process," Plaintiff argues that the court should award of attorney's fees and costs to Plaintiff's counsel as a sanction under California Family Code § 271. Plaintiff asserts that the sanction should be imposed to excoriate Defendant's violation of the family law courts' "public policy" of promoting settlement and reducing the costs of litigation in family law cases. Pursuant to Family Code Section 271, the court has the authority to base an award of attorney's fees and costs to the extent to which the conduct of a party or attorney "furthers or frustrates the policy of the law to promote settlement of litigation, and where possible, to reduce the cost of litigation by encouraging cooperation between the attorneys. California Family Code Section 271(a).

Plaintiff's counsel states that Plaintiff has been forced to engage in unnecessary litigation, and incur "higher costs than necessary" given Defendant's refusal to enter into an order determining the state court's judgment of attorney's fees as a setoff under 11 U.S.C. § 553. Plaintiff claims that it has performed substantial work to oppose Defendant's opposition and continued pursuit of litigation.

Secondly, Plaintiff alleges that under California Family Code § 2032, Defendant has the superior ability to pay the attorney fees incurred. California Family Code § 2032 provides that,

(a) The court may make an award of attorney's fees and costs under Section 2030 or 2031 where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties.

(b) In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320. The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances.

(c) The court may order payment of an award of attorney's fees and costs from any type of property, whether community or separate, principal or income.

(d) Either party may, at any time before the hearing of the cause on the merits, on noticed motion, request the court to make a finding that the case involves complex or substantial issues of fact or law related to property rights, visitation, custody, or support. Upon that finding, the court may in its discretion determine the appropriate, equitable allocation of attorney's fees, court costs, expert fees, and consultant fees between the parties. The court order may provide for the allocation of separate or community assets, security against these assets, and for payments from income or anticipated income of either party for the purpose described in this subdivision and for the benefit of one or both parties. Payments shall be authorized only on agreement of the parties or, in the absence thereof, by court order. The court may order that a referee be appointed pursuant to Section 639 of the Code of Civil Procedure to oversee the allocation of fees and costs.

California Family Code Sections 2030 and 2032 provides that each party's needs and ability to pay should be considered. Plaintiff offers the Income and Expense Declaration of Michael Carson, the Defendant in this adversary proceeding, which shows that Defendant's monthly average salary as of the time of filing in November 2013 was $7,400.00. Exhibit 8, Dckt. No. 93 at 44. This is offered in contrast to Plaintiff's most recent Income and Expenses Declaration, filed on February 4, 2014, in which Plaintiff declares a gross monthly income of $2,667.00.

Plaintiff's Counsel further argues that Defendant's "dilatory and uncooperative conduct" justifies what might otherwise be an "excessive need based fees and costs award," where attorney's fees are incurred because of another party's refusal to cooperate. *Marriage of Kozen*, 185 CA3d 1258 (1986). Plaintiff points to Defendant's refusal to resolve the matter in late June of 2013,when the court first suggested that the parties stipulate to an order determine the offset as nondischageable.

SETTING OF BRIEFING SCHEDULE

At the continued status conference on Plaintiff's Amended Complaint on January 30, 2014, the court had instructed Plaintiff's counsel to revise or add to his initial motion for prevailing party fees, and to file additional evidence to support the original motion.

Plaintiff's counsel did file a reply to Defendant's Opposition to the Motion for Attorney's Fees and Costs. In that reply, Plaintiff's counsel raised new arguments to which Defendant's counsel has not yet been given the opportunity to respond. Plaintiff also filed two new exhibits, namely the Income and Expense Declarations of Michael Carson and Graciela Taipe (formerly Graciela Taipe Carson), labeled as Exhibits "7" and "8" on the Exhibit Cover Sheet, that Defendant has not yet had the chance to review. Dckt. No. 93.

The court's decision is to set the matter for a further briefing schedule, to allow Defendant to file Supplemental Opposition to the arguments and evidence that Plaintiff has presented in the "Reply" documents. Then, Plaintiff will be afforded the opportunity to Reply to the Supplemental Opposition. This will allow the court to accurately and fairly rule on the request for attorneys' fees in connection with the Adversary Proceeding. The court sets the following briefing Schedule:

A. Supplemental Opposition to Plaintiff's Reply to Defendant's Opposition to the Motion for Attorney's Fees and Costs, if any, shall be filed on or before February 20, 2014.

B. A Reply to Defendant's Supplemental Opposition, if any, shall be filed by Plaintiff on or before February 27, 2014.

C. The hearing on the Motion for Attorney's Fees and Costs for Plaintiff is continued to March 6, 2014 at 10:30 am.

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 Attorneys' Fees and Costs filed by 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 is set for final hearing at 10:30 a.m. on March 6, 2014. On or before February 20, 2014, the Defendant shall file and serve the Supplemental Opposition, if any, to the grounds and evidence presented by Plaintiff in the "Reply" filed on February 6, 2014, Dckts. 92, 93, 94, 95, and 96. On or before February 27, 2014, Plaintiff shall file a Supplemental Reply, if any, to any Supplemental Opposition filed by Defendant.

21. 13-91189-E-11 MICHAEL/JUDY HOUSE
RMY-2 Robert M. Yaspan

CONTINUED MOTION TO USE CASH COLLATERAL AND/OR MOTION FOR ADEQUATE PROTECTION
7-23-13 [23]

Final Ruling: The motion appearing to duplicate the Motion to Use Cash Collateral filed January 13, 2014, DCN RMY-5, **this matter is removed from calendar.**

22. 13-91189-E-11 MICHAEL/JUDY HOUSE
RMY-5 Robert M. Yaspan

MOTION TO USE CASH COLLATERAL; MOTION FOR ADEQUATE PROTECTION AND MOTION TO SCHEDULE FURTHER HEARINGS
1-13-14 [81]

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, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on January 13, 2014. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Use Cash Collateral 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 Authorization for Debtors-in-Possession to Use Cash Collateral. 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:

Debtors-in-Possession Michael and Judy House ("Debtors-in-Possession") move the court for entry of an interim order and final order (a) authorizing Debtors-in-Possession to use cash collateral, (b) granting

adequate protection to certain pre-petition secured parties for the use of their cash collateral and (c) prescribing the form and manner of notice and setting the time for the final hearing on the Motion.

Debtors-in-Possession state that the approval of Debtors'-in-Possession use of cash collateral, on an interim and final basis, will enable Debtors-in-Possession to pay their personal and business-related expenses. Without the use of cash collateral, Debtors-in-Possession assert estate properties may be lost, utilities can be discontinued, and Debtors will not be able to pay for certain personal expenses.

Debtors-in-Possession state the rental income has been pledged as collateral for the farm-rental properties located at 6231 Smith Road, Oakdale, California and 2107 South Stearns Road, Oakdale, California. The primary income for the bankruptcy estate is the rent received from Petaluma Acquisition which is not only a lender, but a tenant for the estate properties, the Smith Ranch and Triumph Ranch. The rental income for both properties is paid as one payment, and is the primary income for the estate. Debtors-in-Possession need the income to continue operating the properties and for personal expenses.

Prior Hearings

Through the Amended Order entered on September 9, 2014, the court authorized the use of cash collateral through February 28, 2014, including the required adequate protection payments. The court granted the payment of expenses, and provided that the cash collateral may be used monthly, commencing July 1, 2013, through and including February 28, 2014.

The court set a further hearing on the Motion for 10:30 a.m. on February 13, 2014. The Debtors in Possession were ordered to file and serve any new proposed budget and supplemental pleadings for any further use of cash collateral on or before January 13, 2014. Any oppositions to the further use of cash collateral were ordered to be filed and served on or before January 31, 2014. Debtors-in-Possession filed this motion on January 13, 2014.

Debtor-in-Possession Accounts

Debtors-in-Possession assert they will be setting up cash collateral accounts for each of the properties and the income for each property will be allocated to the cash collateral account. Motion, Dckt. 81 at 2. Debtors-in-Possession declaration states that Mr. House and his wife "are setting up cash collateral accounts for each of the Properties, and the income for each property will be allocated to the cash collateral account." Declaration, Dckt. 84 at 5. The court is concerned that eight months after filing the petition, Debtors-in-Possession have not set up Debtor-in-Possession accounts. If these accounts have not been obtained at this time of the case, it appears the immediate appointment of a Chapter 11 Trustee may be appropriate. The Debtors-in-Possession should be prepared to address this at the hearing.

Amended Budget

Debtors-in-Possession state they anticipate all secured parties will consent to the use of cash collateral subject to Debtors continuing to pay all of the contractually due payments and subject to the following monthly budget (with a 20% line by line potential variance):

Income	Expense	Amount
Rental income from Smith and Triumph Properties		26,210.00
Other Income (no subject to cash collateral) including, but not limited to real estate commissions, Valk Care, pasture rent, Disney Store income and School Board stipend		4,300.00
	Payment to Petaluma	(6,275.72)
	Payment to AG Credit	(4,223.98)
	Payment to Oak Vally Community Bank	(1,692.88)
	Payment to Arthur and Karen House Trust (Triumph Ranch)	(5,516.74)
	Payment to Arthur and Karen House Trust (Smith Ranch)	(1,200.00)
	Expenses for Ranches	(1,370.00)
	Rent	(1,500.00)
	Utilities	(500.00)
	Home Maintenance	(25.00)
	Food	(500.00)
	Clothing	(100.00)
	Medical and Dental	(50.00)
	Transportation	(250.00)
	Recreation	(50.00)
	Charitable Contributions	(30.00)
	Life Insurance	(920.00)
	Health Insurance	(1,100.00)
	Insurance for Ranch, Auto and House	(2,500.00)
	Income Tax	(500.00)
	Photography Expenses	(200.00)
	Trustee's Fees	(325.00)
	Payments for Additional Dependents not living at home	(200.00)

	Attorneys' Fees Carve Out (to be paid only after court approval)	(1,000.00)
	Monthly Cash Flow Profit	**480.68**

Debtors-in-Possession seek authorization to use cash collateral to pay personal expenses post-petition taxes, utilities, insurance and maintenance on the rental property pursuant to the above-referenced monthly budget. Debtors argue that the lender is adequately protected by the continued operations of the businesses and are also protected by a replacement lien against the estate's. Debtors-in-Possession state that they will pay the contractual amounts due on the secured loans for the institutional lenders, and payments to the Arthur and Karen House Trust, as set forth in the Budget.

DISCUSSION

The court may authorize use of cash collateral so long as the creditor is adequately protected. 11 U.S.C. § 363(e). The Debtors-in-Possession have 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).

Debtors-in-Possession are current on the payments under the current order authorizing their use of cash collateral, and are current on their compliance obligations with the U.S. Trustee. They are currently in the process of appraising the properties, which should be completed in the next 3 weeks. The values of the properties will be a key factor in formulating Debtors' Plan. Once the appraisals are finished, Debtors anticipate that they will be able to file a plan in 60 days. In the interim, they need to continue to use cash collateral to protect the value of properties and keep them operating.

The court authorizes the use of cash collateral through **August 31, 2014**, including the required adequate protection payments. Only expenses relating to the property from which the cash collateral is generated may be paid with cash collateral for that property. The court does not pre-judge and authorize the use of any monies for "plan payments" or use of any "profit" by the Debtor in Possession. All surplus Cash Collateral from each property shall be held in a cash collateral account and separately accounted for by the Debtor in Possession. 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' (namely the Arthur and Karen House Trust by virtue of their first position deed of trust on the Smith Ranch, the Oak Valley Community Bank, American AG Credit, and Petaluma Acquisition) interests.

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 Debtors-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the motion to use cash collateral is granted and the cash collateral may be used, through an including August 31, 2014, to pay the following monthly expenses:

Expense	Amount
Payment to Petaluma	(6,275.72)
Payment to AG Credit	(4,223.98)
Payment to Oak Vally Community Bank	(1,692.88)
Payment to Arthur and Karen House Trust (Triumph Ranch)	(5,516.74)
Payment to Arthur and Karen House Trust (Smith Ranch)	(1,200.00)
Expenses for Ranches	(1,370.00)
Rent	(1,500.00)
Utilities	(500.00)
Home Maintenance	(25.00)
Food	(500.00)
Clothing	(100.00)
Medical and Dental	(50.00)
Transportation	(250.00)
Recreation	(50.00)
Charitable Contributions	(30.00)
Life Insurance	(920.00)
Health Insurance	(1,100.00)
Insurance for Ranch, Auto and House	(2,500.00)
Income Tax	(500.00)
Photography Expenses	(200.00)
Trustee's Fees	(325.00)
Payments for Additional Dependents not living at home	(200.00)

Attorneys' Fees Carve Out (to be paid only after court approval)	(1,000.00)

IT IS FURTHER ORDERED that only expenses relating to the property from which the cash collateral is generated may be paid with cash collateral for that property. No use of cash collateral is authorized for any other purposes, including plan payments or use of any "profit" by the Debtors in Possession. All surplus Cash Collateral from each property shall be held in a cash collateral account and accounted for by the Debtors in Possession.

23. 14-90155-E-11 NORTH AMERICAN DIESEL INDUSTRIES, INC. **ORDER SETTING STATUS CONFERENCE RE: DEBTOR IN POSSESSION COUNSEL**
2-10-14 [16]

Debtor's Atty: Brian S. Haddix

Notes:

FEBRUARY 13, 2014 HEARING

Identification of Potential Disqualifying Conflict

North American Diesel Industries, Inc. ("Debtor") filed its Chapter 11 Petition on February 6, 2014. The only address listed on the petition under "Street Address of Debtor" is 916 W. Glenwood Avenue, Turlock, California. Further, the "Signature of the Debtor" lists Director, Wilson Khedry. Almost simultaneously with the filing of this petition, Diesel Engine Industries, Inc., Case No. 14-90156-E-11, filed its Chapter 11 Petition on February 6, 2014. The address listed under "Mailing Address of Debtor" and the "Location of Principal Assets of Business Debtor" in Diesel Engine Industries, Inc.'s Chapter 11 Petition is 916 W. Glenwood Avenue, Turlock, California. Furthermore, the "Signature of the Debtor" lists Director, Wilson Khedry. Both petitions were filed by Counsel Brian S. Haddix, Haddix Law Firm.

Section 327(a) authorizes the employment of professional persons, only if such persons do not hold or represent an interest adverse to the estate and are "disinterested persons," as that term is defined in section 101(14) of the Code. Section 101(14) defines "disinterested person" as a person that

> (A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and

(C) does not have an interest materially adverse to the interest of the estate or of 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 for any other reason.

When determining whether a professional holds a disqualifying "interest materially adverse" under the definition of disinterested, courts have generally applied a factual analysis to determine whether an actual conflict of interest exists. 3 COLLIER ON BANKRUPTCY ¶ 327.04[2][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). Some courts have been willing to go further and find a potential conflict or appearance of impropriety as disqualifying. *See Dye v. Brown*, 530 F.3d 832, 838 (9th Cir. 2008) (in context of section 324, examining totality of circumstances, trustee's past relationship with insider created potential for materially adverse effect on estate and appearance of conflict of interest).

Although the language of section 327(a) refers only to professionals employed by a trustee, the section also applies to professionals employed by a chapter 11 debtor in possession pursuant to 11 U.S.C. § 1107(a), which provides in relevant part, "a debtor in possession shall have all the rights … and powers, and shall perform all the functions and duties … of a trustee serving in a case under this chapter." *DeRonde v. Shirley (In re Shirley)*, 134 B.R. 940, 943 (BAP 9th Cir. 1992); 11 U.S.C. § 1107(a).

Under 11 U.S.C. § 541 of the Bankruptcy Code, each estate is a separate and distinct entity. In chapter 11 cases, the debtors in possession act as "trustees" of the estates in bankruptcy and accordingly they may hire professionals, with court approval, pursuant to 327. 11 U.S.C. § 1107. Thus, a debtor in possession is a statutory fiduciary of its own estate. 11 U.S.C. §§ 1106, 1107(a). The fiduciary of a bankruptcy estate must receive independent counsel, regardless of the estate's relationship to other entities prior to filing. *In re Amdura Corp.*, 121 Bankr. 862, 868-69 (Bankr. D. Colo. 1990). The inability to fulfill the role of independent professional on behalf of the fiduciary of the estate constitutes an impermissible conflict. *See In re Adam Furniture Indus., Inc.*, 158 Bankr. 291, 302 (Bankr. S.D. Ga. 1993).

The appointment of the same counsel in related chapter 11 cases is presumptively improper. *In re Lee*, 94 B.R. 172 (Bankr. C.D. Cal. 1988); *In re Wheatfield Bus. Park LLC*, 286 B.R. 412, 418 (Bankr. C.D. Cal. 2002). Further, the same counsel should not be appointed for related chapter 11 debtors where creditors have dealt with the debtors as an economic unit. *In re Parkway Calabasas, Ltd.*, 89 B.R. 832, 835 (Bankr. C.D. Cal. 1988).

Creditors Listed in the Bankruptcy Cases

North American Diesel Industries, Inc. 14-90155, Dckt. 1 at 4.	**Diesel Engine Industries, Inc.** 14-90156, Dckt. 1 at 4.
First Data Merchant Service Corp. c/o Allan Herzlich Herzlich & Blum, LLP 191 N. First Str. Encino, CA 91436	First Data Merchant Service Corp. c/o Allan Herzlich Herzlich & Blum, LLP 191 N. First Str. Encino, CA 91436
First Data Merchant Services Corp. c/o Corp. Service Co. dba CSC 2710 Gateway Oaks Drv., Ste 150N Sacramento, CA 95833	First Data Merchant Services Corp. c/o Corp. Service Co. dba CSC 2710 Gateway Oaks Drv., Ste 150N Sacramento, CA 95833
Kenworth Northwest, Inc. 20220 International Blvd. S Seattle, WA 98198-0967	Kenworth Northwest, Inc. 20220 International Blvd. S Seattle, WA 98198-0967
Kenworth Northwest, Inc., a WA Corp. c/o Matthew R. Eason Eason & Tambornini 1819 K Street, Suite 200 Sacramento, CA 95811	Kenworth Northwest, Inc., a WA Corp. c/o Matthew R. Eason Eason & Tambornini 1819 K Street, Suite 200 Sacramento, CA 95811
MTY Heavy Equipment, Inc., a Texas Corp. 8717 S Cage Blvd Pharr, TX 78577-9799	MTY Heavy Equipment, Inc., a Texas Corp. 8717 S Cage Blvd Pharr, TX 78577-9799
MTY Heavy Equipment, Inc., a Texas Corp. c/o John K. Peltier Law Offices of Brunn & Flynn 928 12th Str., Ste. 200 Modesto, CA 95354	MTY Heavy Equipment, Inc., a Texas Corp. c/o John K. Peltier Law Offices of Brunn & Flynn 928 12th Str., Ste. 200 Modesto, CA 95354
Tom's Backhoe Service, Inc. c/o National Registered Agents, Inc. 314 E Thayer Ave. Bismarck, ND 58501-4018	Tom's Backhoe Service, Inc. c/o National Registered Agents, Inc. 314 E Thayer Ave. Bismarck, ND 58501-4018
Tom's Backhoe Service, Inc. c/o Joel M. Fremstad Fremstad Law Firm PO Box 3143 Fargo, ND 58108-3143	Tom's Backhoe Service, Inc. c/o Joel M. Fremstad Fremstad Law Firm PO Box 3143 Fargo, ND 58108-3143

State Court Receiver

On February 7, 2014, Patrick Bulmer, in his asserted capacity as a state court receiver, filed an ex parte motion for order shortening time for a hearing on a motion to either allow him to state in possession of property of the bankruptcy estate, the appointment of a Chapter 11 Trustee, or

conversion of the case to one under Chapter 7. Motion, Dckt. 4. The underlying motion has not yet been filed and the information concerning the asserted appointment of a receiver is limited to the motion for order shortening time.

The ex parte motion asserts the following.

A. On January 16, 2014, the California Superior Court appointed a receiver in an action against North American Diesel Industries, Inc., Diesel Engine Industries, Inc., and others.

B. On February 6, 2014, North American Diesel Industries, Inc. and Diesel Engine Industries, Inc. filed voluntary Chapter 11 bankruptcy cases.

C. The "judgment creditor" and the receiver are preparing motions to allow the receiver to stay in possession of property of the estate, or in the alternative appoint a Chapter 11 Trustee or convert the case to one under Chapter 7.

D. The motion alleges that the Debtor concealed assets from the receiver and diverted accounts receivable from the receiver.

Motion, Dckt. 4.

In addition, Patrick Bulmer provides his declaration in support of the motion for order shortening time. Dckt. 5. His testimony includes a statement that he questioned Wilson Khedry, principal of the Debtor, about the assets of the Debtor, including a "second warehouse." Mr. Bulmer testifies that Mr. Khedry stated that no "second warehouse" existed. However, Mr. Bulmer further testifies that he discovered a "second warehouse" in which there "were many diesel engines and parts."

Opposition to Ex Parte Motion to Shorten Time

The Debtor in Possession opposes the request that the court allow the receiver to stay in possession of property of the estate. Opposition, Dckt. 10. It points out that the receiver is appointed to serve only the interests of one creditor, not the estate or the creditor body as a whole.

The Debtor in Possession raises the issue that the order purporting to appoint Mr. Bulmer as receiver may be invalid as to Diesel Engine Industries, Inc. It is asserted that Diesel Engine Industries, Inc. was never a party to the action in which the order for appointment of receiver was entered.

The Debtor in Possession asserts that it intends to seek to "consolidate" this case with the Diesel Engine Industries, Inc. case (though not stating whether it is a procedural or substantive consolidation which will be sought).

24. 14-90155-E-11 SMO-1 NORTH AMERICAN DIESEL INDUSTRIES, INC.

STATUS CONFERENCE RE: MOTION TO EXCUSE COMPLIANCE WITH TURNOVER DUTIES OR TO APPOINT CHAPTER 11 TRUSTEE OR CONVERT CASE TO CHAPTER 7
2-7-14 [4]

Debtor's Atty: Brian S. Haddix

Notes:

FEBRUARY 13, 2014 HEARING

State Court Receiver

On February 7, 2014, Patrick Bulmer, in his asserted capacity as a state court receiver, filed an ex parte motion for order shortening time for a hearing on a motion to either allow him to state in possession of property of the bankruptcy estate, the appointment of a Chapter 11 Trustee, or conversion of the case to one under Chapter 7. Motion, Dckt. 5. The underlying motion has not yet been filed and the information concerning the asserted appointment of a receiver is limited to the motion for order shortening time.

The ex parte motion asserts the following.

A. On January 16, 2014, the California Superior Court appointed a receiver in an action against North American Diesel Industries, Inc., Diesel Engine Industries, Inc., and others.

B. On February 6, 2014, North American Diesel Industries, Inc. and Diesel Engine Industries, Inc. filed voluntary Chapter 11 bankruptcy cases.

C. The "judgment creditor" and the receiver are preparing motions to allow the receiver to stay in possession of property of the estate, or in the alternative appoint a Chapter 11 Trustee or convert the case to one under Chapter 7.

D. The motion alleges that the Debtor concealed assets from the receiver and diverted accounts receivable from the receiver.

Motion, Dckt. 5.

In addition, Patrick Bulmer provides his declaration in support of the motion for order shortening time. Dckt. 6. His testimony includes a statement that he questioned Wilson Khedry, principal of the Debtor, about the assets of the Debtor, including a "second warehouse." Mr. Bulmer

testifies that Mr. Khedry stated that no "second warehouse" existed. However, Mr. Bulmer further testifies that he discovered a "second warehouse" in which there "were many diesel engines and parts."

Opposition to Ex Parte Motion to Shorten Time

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The Debtor in Possession raises the issue that the order purporting to appoint Mr. Bulmer as receiver may be invalid as to Diesel Engine Industries, Inc. It is asserted that Diesel Engine Industries, Inc. was never a party to the action in which the order for appointment of receiver was entered.

The Debtor in Possession asserts that it intends to seek to "consolidate" this case with the Diesel Engine Industries, Inc. case (though not stating whether it is a procedural or substantive consolidation which will be sought).

25. 14-90156-E-11 DIESEL ENGINE INDUSTRIES, INC.

ORDER SETTING STATUS CONFERENCE RE: DEBTOR IN POSSESSION COUNSEL
2-10-14 [16]

Debtor's Atty: Brian S. Haddix

Notes:

FEBRUARY 13, 2014 HEARING

Diesel Engine Industries, Inc. ("Debtor") filed its Chapter 11 Petition on February 6, 2014. The only address listed on the petition under "Street Address of Debtor" is 916 W. Glenwood Avenue, Turlock, California. Further, the "Signature of the Debtor" lists Director, Wilson Khedry. Almost simultaneously with the filing of this petition, North American Diesel Industries, Inc., Case No. 14-90155-E-11, filed its Chapter 11 Petition on February 6, 2014. The address listed under "Mailing Address of Debtor" and the "Location of Principal Assets of Business Debtor" in North American Diesel Industries, Inc.'s Chapter 11 Petition is 916 W. Glenwood Avenue, Turlock, California. Furthermore, the "Signature of the Debtor" lists Director, Wilson Khedry. Both petitions were filed by Counsel Brian S. Haddix, Haddix Law Firm.

Section 327(a) authorizes the employment of professional persons, only if such persons do not hold or represent an interest adverse to the estate and are "disinterested persons," as that term is defined in section 101(14) of the Code. Section 101(14) defines "disinterested person" as a person that

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and

(C) does not have an interest materially adverse to the interest of the estate or of 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 for any other reason.

When determining whether a professional holds a disqualifying "interest materially adverse" under the definition of disinterested, courts have generally applied a factual analysis to determine whether an actual conflict of interest exists. 3 COLLIER ON BANKRUPTCY ¶ 327.04[2][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). Some courts have been willing to go further and find a potential conflict or appearance of impropriety as disqualifying. *See Dye v. Brown*, 530 F.3d 832, 838 (9th Cir. 2008) (in context of section 324, examining totality of circumstances, trustee's past relationship with insider created potential for materially adverse effect on estate and appearance of conflict of interest).

Although the language of section 327(a) refers only to professionals employed by a trustee, the section also applies to professionals employed by a chapter 11 debtor in possession pursuant to 11 U.S.C. § 1107(a), which provides in relevant part, "a debtor in possession shall have all the rights … and powers, and shall perform all the functions and duties … of a trustee serving in a case under this chapter." *DeRonde v. Shirley (In re Shirley)*, 134 B.R. 940, 943 (BAP 9th Cir. 1992); 11 U.S.C. § 1107(a).

Under 11 U.S.C. § 541 of the Bankruptcy Code, each estate is a separate and distinct entity. In chapter 11 cases, the debtors in possession act as "trustees" of the estates in bankruptcy and accordingly they may hire professionals, with court approval, pursuant to 327. 11 U.S.C. § 1107. Thus, a debtor in possession is a statutory fiduciary of its own estate. 11 U.S.C. §§ 1106, 1107(a). The fiduciary of a bankruptcy estate must receive independent counsel, regardless of the estate's relationship to other entities prior to filing. *In re Amdura Corp.*, 121 Bankr. 862, 868-69 (Bankr. D. Colo. 1990). The inability to fulfill the role of independent professional on behalf of the fiduciary of the estate constitutes an impermissible conflict. *See In re Adam Furniture Indus., Inc.*, 158 Bankr. 291, 302 (Bankr. S.D. Ga. 1993).

The appointment of the same counsel in related chapter 11 cases is presumptively improper. *In re Lee*, 94 B.R. 172 (Bankr. C.D. Cal. 1988); *In re Wheatfield Bus. Park LLC*, 286 B.R. 412, 418 (Bankr. C.D. Cal. 2002). Further, the same counsel should not be appointed for related chapter 11 debtors where creditors have dealt with the debtors as an economic unit. *In re Parkway Calabasas, Ltd.*, 89 B.R. 832, 835 (Bankr. C.D. Cal. 1988).

Creditors Listed in the Bankruptcy Cases

North American Diesel Industries, Inc. 14-90155, Dckt. 1 at 4.	**Diesel Engine Industries, Inc.** 14-90156, Dckt. 1 at 4.
First Data Merchant Service Corp. c/o Allan Herzlich Herzlich & Blum, LLP 191 N. First Str. Encino, CA 91436	First Data Merchant Service Corp. c/o Allan Herzlich Herzlich & Blum, LLP 191 N. First Str. Encino, CA 91436
First Data Merchant Services Corp. c/o Corp. Service Co. dba CSC 2710 Gateway Oaks Drv., Ste 150N Sacramento, CA 95833	First Data Merchant Services Corp. c/o Corp. Service Co. dba CSC 2710 Gateway Oaks Drv., Ste 150N Sacramento, CA 95833
Kenworth Northwest, Inc. 20220 International Blvd. S Seattle, WA 98198-0967	Kenworth Northwest, Inc. 20220 International Blvd. S Seattle, WA 98198-0967
Kenworth Northwest, Inc., a WA Corp. c/o Matthew R. Eason Eason & Tambornini 1819 K Street, Suite 200 Sacramento, CA 95811	Kenworth Northwest, Inc., a WA Corp. c/o Matthew R. Eason Eason & Tambornini 1819 K Street, Suite 200 Sacramento, CA 95811
MTY Heavy Equipment, Inc., a Texas Corp. 8717 S Cage Blvd Pharr, TX 78577-9799	MTY Heavy Equipment, Inc., a Texas Corp. 8717 S Cage Blvd Pharr, TX 78577-9799
MTY Heavy Equipment, Inc., a Texas Corp. c/o John K. Peltier Law Offices of Brunn & Flynn 928 12th Str., Ste. 200 Modesto, CA 95354	MTY Heavy Equipment, Inc., a Texas Corp. c/o John K. Peltier Law Offices of Brunn & Flynn 928 12th Str., Ste. 200 Modesto, CA 95354
Tom's Backhoe Service, Inc. c/o National Registered Agents, Inc. 314 E Thayer Ave. Bismarck, ND 58501-4018	Tom's Backhoe Service, Inc. c/o National Registered Agents, Inc. 314 E Thayer Ave. Bismarck, ND 58501-4018
Tom's Backhoe Service, Inc. c/o Joel M. Fremstad Fremstad Law Firm PO Box 3143 Fargo, ND 58108-3143	Tom's Backhoe Service, Inc. c/o Joel M. Fremstad Fremstad Law Firm PO Box 3143 Fargo, ND 58108-3143

State Court Receiver

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The Debtor in Possession asserts that it intends to seek to "consolidate" this case with the Diesel Engine Industries, Inc. case (though

not stating whether it is a procedural or substantive consolidation which will be sought).

26. 14-90156-E-11 SMO-1 DIESEL ENGINE INDUSTRIES, INC.

STATUS CONFERENCE RE: MOTION TO EXCUSE COMPLIANCE WITH TURNOVER DUTIES OR TO APPOINT CHAPTER 11 TRUSTEE OR CONVERT CASE TO CHAPTER 7
2-7-14 [5]

Debtor's Atty: Brian S. Haddix

Notes:

FEBRUARY 13, 2014 HEARING

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