UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

March 6, 2014 at 10:30 a.m.

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1. 13-91601-E-7 TIMOTHY/KATHLEEN JOHNSON — MOTION TO EMPLOY FIRST CAPITOL AUCTION, INC. AS AUCTIONEER(S)
HCS-2 Christian J. Younger — 2-6-14 [80]

DISCHARGED 2-5-14

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, all creditors, parties requesting special notice, and Office of the United States Trustee on February 6, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Employ is granted. No appearance required.

Chapter 7 Trustee, Gary R. Farrar, seeks to employ First Capitol Auction, Inc., 50 Solano Avenue, Vallejo California as the Trustee's auctioneer. The Trustee states that the Debtors disclosed an interest in the a vehicle identified as a 2007 Chevrolet Silverado 2500 Crew Cab LS, valued at $16,708.00. No exemption was claimed in the subject vehicle. Furthermore, the Debtors did not schedule any liens or encumbrances against the subject vehicle and the Trustee states that he is unaware that any liens or encumbrances exist. The Trustee believes employing First Capital to sell the vehicle and obtain the equity for the estate is in the best interests of creditors.

The Declaration of Eric V. Smith, President of First Capitol Auction, Inc., testifies that he has been an auctioneer since 1987. Smith testifies he does not represent or hold any interest adverse to the Debtor

or to the estate and that he has no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys and Realtors, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate, and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. The court approves the fees computed as a commission equal to five percent (5%) of the gross sales priced of the property, subject to further review pursuant to 11 U.S.C. § 328(a). Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Taking into account all of the relevant factors in connection with the employment and compensation of the realtor, considering the declaration demonstrating that Smith does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ First Capitol Auction, Inc. as auctioneer for the Chapter 7 Trustee.

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.
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> The Motion to Employ filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted and the Chapter 7 Trustee is authorized to employ First Capitol Auction, Inc. as auctioneer for the Chapter 7 Trustee to sell a as a 2007 Chevrolet Silverado 2500 Crew Cab LS.
>
> **IT IS FURTHER ORDERED** that compensation computed as a commission equal to five percent (5%) of the sales price sold at auction, plus reasonable expenses not to exceed $500.00 (absent further order of the court), is approved, subject to the provisions of 11 U.S.C. § 328(a). No compensation is permitted except upon court order following an application pursuant to 11 U.S.C. §§ 330-331, which may

be made as part of the motion to approve the sale of the property.

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

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

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

2. 13-91601-E-7 TIMOTHY/KATHLEEN JOHNSON MOTION TO SELL
HCS-3 Christian J. Younger 2-6-14 [85]

DISCHARGED 2-5-14

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, all creditors, parties requesting special notice, and Office of the United States Trustee on February 6, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(2). 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). Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's decision is to grant the Motion to Sell Property. No appearance at the March 6, 2014 hearing is required.

The Bankruptcy Code permits the Trustee to sell property of the estate after a noticed hearing. 11 U.S.C. § 363(b).

Here, the Chapter 7 Trustee (hereinafter "Trustee") proposes to sell the 2007 Chevrolet Silverado 2500 Crew Cab LS (hereinafter "Vehicle"). The Trustee intends to sell the Vehicle at an online/live auction to be conducted at First Capitol's website, www. 1stcapitolauction.com. The Trustee states that the Debtors disclosed an interest in the a vehicle identified as a 2007 Chevrolet Silverado 2500 Crew Cab LS, valued at $16,708.00. No exemption was claimed in the subject vehicle. Furthermore, the Debtors did not schedule any liens or encumbrances against the subject vehicle and the Trustee states that he is unaware that any liens or encumbrances exist. The Trustee believes employing First Capital to sell the vehicle and obtain the equity for the estate is in the best interests of creditors. The Trustee intends to accept the highest reasonable bid. And if no reasonable bids are received, the Trustee may organize subsequent auction or private sale without additional notice.

As noted in the Application to Employ First Capitol, the Trustee requests authorization to pay First Capitol a 5% commission and to reimburse First Capitol for reasonable expenses up to $500.00 incurred in preparing the Vehicle for sale, including out of pocket expenses for transportation and storage of the Vehicle.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate. The Motion to Sell Property is granted, subject to the court considering any additional offers from other potential purchasers at the time set for the hearing for the sale of the property.

ISSUANCE OF A COURT DRAFTED ORDER

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 sell property 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 Gary R. Farrar, the Chapter 7 Trustee ("Trustee"), is authorized to sell pursuant to 11 U.S.C. §363 (b) at an online auction, the 2007 Chevrolet Silverado 2500 Crew Cab LS (the "Vehicle"), on the following terms:
>
> 1. The Property shall be sold to the highest reasonable bidder at the online auction at www.1stcapitolauction.com.

2. The Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.

3. The Trustee be and hereby is authorized to pay an auctioneer commission in an amount no more than six percent (5%) of the actual purchase price upon consummation of the sale.

4. First Capitol Auction Inc. shall also be reimbursed for reasonable expenses not to exceed $500.00 (absent further order of the court) up to $500.00 incurred in preparing the Vehicle for sale, including out of pocket expenses for transportation and storage of the Vehicle.

5. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Debtors. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 7 Trustee directly from escrow.

3. 13-91214-E-7 SSA-2 — IVAN GUTIERREZ AND MARIBEL CHAVEZ — Jessica A. Dorn — MOTION TO SELL — 1-14-14 [38]

DISCHARGED 10-15-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on January 14, 2014. By the court's calculation, 51 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(2). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

ruling, the court will make the following findings of fact and conclusions of law:

The Bankruptcy Code permits the Trustee to sell property of the estate after a noticed hearing. 11 U.S.C. § 363(b).

Here, the Trustee proposes to sell the estate's residual interest in the following property:

1. Residence commonly known as 4837 Faith Home Road, Sp. 140, Ceres, California, valued at $185,000.00;

2. West America Bank Account valued at $2,752.79;

3. Citi Bank Account valued at $267.69;

4. 1995 Nissan valued at $1,410.00;

5. 2003 Maxima valued at $2,945.00.

From the gross sum of $192,375 of the assets listed above, the Trustee has listed the following as current liens, encumbrances and claims of exemptions by the Debtors:

1. Deed of Trust against residence: $138,000.00;

2. Exemption of residence: $23,575.00;

3. 2003 Maxima exemption: $2,945.00;

4. 1995 Nissan exemption: $1,410.00;

5. West America Bank Account exemption: $3,020.48;

6. Citi Bank: $213.97.

The net residual equity in these estate assets is $23,211.03. The Trustee has agreed to accept from Debtors as full an complete satisfaction, the sum of $23,300 to purchase the estate's residual interest in the property listed above.

The Trustee states the sale will be subject to overbids as determined by the court, in increments of $250.00.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate. The Motion to Sell Property is granted, subject to the court considering any additional offers from other potential purchasers at the time set for the hearing for the sale of the property. **At the hearing, xxxx.**

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 sell property 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 Michael D. McGranahan, the Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b)to Ivan Gutierrez and Maribel Chavez, the estate's residual interest in the following property:

1. Residence commonly known as 4837 Faith Home Road, Sp. 140, Ceres, California, valued at $185,000.00;
2. West America Bank Account valued at $2,752.79;
3. Citi Bank Account valued at $267.69;
4. 1995 Nissan valued at $1,410.00;
5. 2003 Maxima valued at $2,945.00.

For $23,000.00, on or before xxxx, 2014.

IT IS FURTHER ORDERED that the Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.

4. 13-91620-E-7 JEROLD/RACHEL IVERSEN MOTION TO COMPEL ABANDONMENT
BSH-1 Brian S. Haddix 2-20-14 [16]

DISCHARGED 12-16-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 7 Trustee, all creditors, and Office of the United States Trustee on February 20, 2014. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Compel Abandonment 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 to Compel Abandonment. 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 commonly known as 3892 Podocarpus Drive, Ceres, California, is impaired by a trust deed in favor of Golden 1 Credit Union securing a loan with a balance of $137,336.45. The Debtors also claim a $49,917.55 exemption in the real property as their primary residence. The Debtors' Schedules A and D list the property as having a value of $187,254.

Since the debt secured by the property, together with the Debtors exemption, 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.

In addition to the real property, discussed above, the Debtors seek to abandon the follow items of personal property:

1. 75% of the funds in Golden 1 Checking Account ending in 7301-9, with a total value of $528.39;

2. 75% of the funds in AG Financial Solutions Personal Savings ending in 0716, with a total value of $399.98;

3. 75% of the funds in Oak Valley Community Bank Checking ending in 0376 with a total value of $22.27;

4. 100% of the funds which are Social Security funds in Golden 1 Account ending in 7301-0 with a value of $553.79.

5. All of the Debtors' household goods & furnishings as described in "Exhibit A to Schedule B" filed with the Debtors' petition, Dckt. 1, incorporated by reference;

6. The Debtors' books, pictures, and other art objects as listed in the Debtors' Schedule B, including painting worth $200 and Hummel Statute worth $150;

7. The Debtors' wearing apparel as listed in the Debtors' Schedule B;

8. The Debtors' jewelry as listed in the Debtors' Schedule B, including engagement and wedding rings worth $1,000, costume jewelry worth $180, watches worth $40, necklaces worth $100, and earrings worth $20;

9. The Debtors' interest in a Term Life Insurance Policy held through New York Life Ins. Co. with a face value of $10,000 with the husband debtor as insured;

10. The Debtors' interest in a Term Life Insurance Policy held through New York Life Ins. Co. with a face value of $10,000 with the wife Debtor as insured;

11. The Debtors' interest in a $2,000 accidental death and dismemberment policy held through Cuna Mutual Group;

12. The Debtors' interest in a retirement plan held through AG Financial Solutions worth approximately $2,021.91;

13. A 2001 Honda Accord EX V6 Sedan; and

14. One mixed breed dog named Milo.

The Debtors claim all of the above items as fully exempt on their Schedule C, accordingly, 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 Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the personal and real property identified in Schedule B and "Exhibit A to Schedule B" filed September 5, 2013, Dckt. 1, as:
>
> 1. Real property commonly known as 3892 Podocarpus Drive, Ceres, California;
>
> 2. 75% of the funds in Golden 1 Checking Account ending in 7301-9, with a total value of $528.39;
>
> 3. 75% of the funds in AG Financial Solutions Personal Savings ending in 0716, with a total value of $399.98;
>
> 4. 75% of the funds in Oak Valley Community Bank Checking ending in 0376 with a total value of $22.27;
>
> 5. 100% of the funds which are Social Security funds in Golden 1 Account ending in 7301-0 with a value of $553.79.
>
> 6. All of the Debtors' household goods & furnishings as described in "Exhibit A to Schedule B" filed with the Debtors' petition, Dckt. 1;
>
> 7. The Debtors' books, pictures, and other art objects as listed in the Debtors' Schedule B, including painting worth $200 and Hummel Statute worth $150;
>
> 8. The Debtors' wearing apparel as listed in the Debtors' Schedule B;
>
> 9. The Debtors' jewelry as listed in the Debtors' Schedule B, including engagement and wedding rings worth $1,000, costume jewelry worth $180, watches worth $40, necklaces worth $100, and earrings worth $20;
>
> 10. The Debtors' interest in a Term Life Insurance Policy held through New York Life Ins. Co. with a face value of $10,000 with the husband debtor as insured;

11. The Debtors' interest in a Term Life Insurance Policy held through New York Life Ins. Co. with a face value of $10,000 with the wife Debtor as insured;

12. The Debtors' interest in a $2,000 accidental death and dismemberment policy held through Cuna Mutual Group;

13. The Debtors' interest in a retirement plan held through AG Financial Solutions worth approximately $2,021.91;

14. A 2001 Honda Accord EX V6 Sedan; and

15. One mixed breed dog named Milo.

on Schedules A and B are abandoned to Jerold and Rachel Iversen, the Debtors by this order, with no further act of the Trustee required.

5. 13-92120-E-7 DAT-1 — LELAND/VIENG BEECHER, Anh V. Trinh — MOTION TO AVOID LIEN OF INCENTIVE FINANCIAL SERVICES, LLC, 2-5-14 [13]

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on respondent creditors on February 5, 2014. By the court's calculation, 29 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 failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's tentative decision is to deny 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 Incentive Financial Services, LLC for the sum of $15,412.43. The abstract of judgment was recorded with Stanislaus County on Aug 27, 2007. That lien attached to the Debtor's residential real property commonly known as 4016 Godfrey Drive, Salida, California. FN.1.

FN.1. The moving party filed the declaration 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). Counsel is reminded of the court's expectation 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).

SERVICE

A review of the proof of service filed in support of this motion indicates that the Chapter 7 Trustee was not served with the motion. This is sufficient to deny the motion.

NO EXEMPTION CLAIMED

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $198,343.00 as of the date of the petition. The unavoidable consensual liens total $251,433.00 on that same date according to Debtor's Schedule D. However, the Debtor has not claimed an exemption in Schedule C. Schedule C, Dckt. 1. Therefore, the fixing of this judicial lien does not impair the Debtor's exemption, since none exists. The motion is denied.

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 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 is denied.

6. 14-90133-E-7 JAMES/APRIL ROMERO — MOTION TO COMPEL ABANDONMENT
JAD-1 Jessica A. Dorn — 2-6-14 [11]

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 the Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on February 6, 2014. By the court's calculation, 28 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, the property commonly known as 4248 Lon Dale Road, Oakdale, California, is impaired by a trust deed in favor of Bank of America securing a loan with a balance of $260,620. The Debtors assert that the value of said real property is $290,000, as stated on their Schedule A. The Debtors also seek to introduce evidence of the value (at the same value) of the property through an appraisal; however, the evidence is not properly authenticated. The Debtors claim an exemption of $29,380 in the property.

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 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 real property identified as:

4248 Lon Dale Road, Oakdale, California

on Schedule A by the Debtors is abandoned to James and April Romero, the Debtors by this order, with no further act of the Trustee required.

7. 12-93238-E-7 BRIAN/HEATHER BRITT
SLF-6 Shane Reich

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH BRIAN MICHAEL BRITT AND HEATHER RENEE BRITT
1-30-14 [46]

DISCHARGED 4-15-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on January 30, 2014. By the court's calculation, 35 days' notice was provided. 28 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)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(3). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's tentative decision is to deny 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:

Chapter 7 Trustee Gary R. Farrar ("Trustee") moves for authorization to compromise a controversy with the Debtors regarding their claimed

exemption of the settlement of an employment-related class action lawsuit ("Class Action Settlement").

The Trustee states the Debtors reopened their bankruptcy case to disclose the Class Action Settlement received upon the settlement of the class action lawsuit against Debtor Brian Britt's employer. The Debtors filed amended schedules which purported to exempt 75 percent of the Class Action Settlement under 15 U.S.C. § 1673, which limits the garnishment of disposable earnings to 25 percent for any one workweek. The Trustee states the controversy is whether the Debtors are entitled to exempt the Class Action Settlement under 15 U.S.C. § 1673.

The Trustee believes that the Debtors are not entitled to use 15 U.S.C. § 1673 to exempt the Class Action Settlement, and therefore it belongs to the bankruptcy estate. Debtors argue that by using California Code of Civil Procedure § 703.140(b)(5) and Section 1673 the Class Action Settlement is entirely exempt.

Under the proposed compromise, the Debtors shall pay Trustee, on behalf of the bankruptcy estate, $7,000 (the "Settlement Payment"). In exchange for the Settlement Payment, the Trustee shall not challenge the Debtors' exemption of the Class Action Settlement. Trustee argues that the compromise is in the best interests of the estate and should be approved under Federal Rule of Bankruptcy Procedure 9019(a).

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 Motion is thin on facts and argument, with the Trustee informing the court that the compromise is a good deal, so judge, close your eyes and sign the order. Dckt. 46. However, the Trustee argues that the four factors have been met in his Memorandum of Points and Authorities. Dckt. 49.

Probability of Success

The Trustee argues that the probability of success is uncertain because there are disputed legal issues regarding the application of 15 U.S.C. § 1673. The Trustee states that the case law is split in this area and that it is possible a court could rule in favor of Debtors.

Difficulties in Collection

The Trustee states that if he was successful in an objection to exemption and he had to pursue the Debtors for collection, there could be difficulties in collection. The Debtors already have received their discharge and may be less inclined to cooperate than they would if they had not received their discharge. On the other hand, the Debtors have agreed to pay the Settlement Amount in full at the signing of the Agreement and they already have paid it.

This statement ignores the substantial legal consequences of a debtor who converts assets of the estate. The grounds for revocation of discharge under section 727(d) include: (I) the debtor acquired property that is property of the estate, or (ii) became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to the property, or to deliver or surrender the property to the trustee. 6 COLLIER ON BANKRUPTCY ¶ 727.17 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.) As a general rule, a plaintiff must prove that the debtor acquired or became entitled to acquire property of the estate and knowingly and fraudulently failed to report or deliver the property to the trustee, in order to obtain relief under § 727(d)(2). *Bowman v. Belt Valley Bank (In re Bowman)*, 173 B.R. 922, 925 (B.A.P. 9th Cir. 1994). This provision imposes a duty upon the debtor to report to the trustee any acquisitions of property after the filing of the petition. *Id.*

California Civil Code § 3294(a) states that "[in] an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Therefore, by committing a tort by converting an estate asset, large punitive damages could be awarded against the Debtors.

Furthermore, concealment of assets, post-petition concealment of property and embezzlement against the estate are all bankruptcy crimes. *See* 18 U.S.C. 151-155; *United States v. Ladum*, 141 F.3d 1328 (9th Cir. 1998). Federal prosecutors can bring charges for suspected bankruptcy fraud, which can carry a sentence of up to five years in prison, or a fine of up to $250,000, or both. *See* 18 U.S.C. § 152.

Merely having a "discharge in the pocket" is not a "free license to steal" property of the bankruptcy estate.

Expense, Inconvenience and Delay of Continued Litigation

The Trustee argues that litigation on the issue could be expensive and would take time. The Trustee states that he would have to file and litigate an objection to the exemption. Based on the disputed legal issues, it is conceivable that the matter would have to be resolved through extensive research and multiple court filings, and would consume significant court time. Further, the Trustee states that if he were successful on the objection, he might have to file a motion to compel turnover and that the litigation expenses could be large compared to the amount at issue. The litigation expenses easily could consume a significant portion (or all) of any potential benefit to the estate.

Paramount Interest of Creditors

The Trustee argues that settlement is in the paramount interests of creditors since as the compromise provides prompt payment to creditors which could be consumed by the additional costs and administrative expenses created by further litigation.

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.

ANALYSIS

The filing of a bankruptcy petition under 11 U.S.C. §§ 301, 302 or 303 creates a bankruptcy estate. 11 U.S.C. § 541(a). Bankruptcy Code Section 541(a)(1) defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." Exemptions represent the debtor's attempt to reclaim those assets or, more often, certain interests in those assets, to the creditors' detriment. *Schwab v. Reilly*, 560 U.S. 770, 785 (2010). The Bankruptcy Code specifies the types of property debtors may exempt, as well as the maximum value of the exemptions a debtor may claim in certain assets. *Id.*; *see* 11 U.S.C. § 522 (b), (d). Property a debtor claims as exempt will be excluded from the bankruptcy estate unless a party in interest objects. *Id.*; 11 U.S.C. § 522(l).

A review of the Settlement Agreement (as the information is not provided in the Motion or Memorandum of Points and Authorities) shows that the Debtors received a settlement of $18,564.72, plus interest of $6,939.87. Exhibit B, Dckt. 50. The Debtors claimed exemptions in the total amount of $13,923.54. However, to avoid uncertainty, delay and expense in litigation regarding the claimed exemptions, the parties agreed to settle, with Debtors paying the bankruptcy estate $7,000.00 (or approximately 27.4% of the total settlement received, or 50.2% of the total exemptions in the settlement).

Here, Debtors acquired settlement proceeds that were clearly property of the estate and failed to report the acquisition or deliver the property to the estate. This may be sufficient to revoke their discharge. Furthermore, it appears they have converted property of the estate, a tort that could result in punitive damages and a bankruptcy crime pursuant to 11

U.S.C. § 158. Based on the foregoing, the court is not convinced that the compromise is in the best interest of the creditors and the Estate.

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 is denied without prejudice.

8. 12-93041-E-7 JAD-3 — RAMON/ADELIA GOMEZ — Jessica A. Dorn — MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA), N.A. — 1-14-14 [48]

DISCHARGED 3-18-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, respondent creditors, and Office of the United States Trustee on January 14, 2014. By the court's calculation, 51 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). 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 Avoid a Judicial Lien is granted. No appearance required.

A judgment was entered against the Debtor in favor of Capital One Bank (USA) N.A. for the sum of $3,896.46. The abstract of judgment was recorded with Contra Costa County on September 12, 2011. That lien attached

to the Debtor's residential real property commonly known as 1511 Folsom Avenue, San Pablo, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $125,000.00 as of the date of the petition. The unavoidable consensual liens total $115,500.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $9,500.00 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 no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided 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(s) 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 One Capital Bank (USA), N.A., Contra Costa County Superior Court Case No. L10-08467, recorded on September 12, 2011, Document No. 2011-0186830-00, with the Contra Costa County Recorder, against the real property commonly known as 1511 Folsom Avenue, San Pablo, 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.

9. 12-93041-E-7 JAD-4 — RAMON/ADELIA GOMEZ — Jessica A. Dorn — MOTION TO AVOID LIEN OF CITIBANK (SOUTH DAKOTA), N.A. 1-14-14 [53]

DISCHARGED 3-18-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, respondent creditors, and Office of the United States Trustee on January 14, 2014. By the court's calculation, 51 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). 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 Avoid a Judicial Lien is granted. No appearance required.

A judgment was entered against the Debtor in favor of Citibank (South Dakota) N.A. for the sum of $5,801.13. The abstract of judgment was recorded with Contra Costa County on October 25, 2010. That lien attached to the Debtor's residential real property commonly known as 1511 Folsom Avenue, San Pablo, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $125,000.00 as of the date of the petition. The unavoidable consensual liens total $115,500.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $9,500.00 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 no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided 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(s) 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 Citibank (South Dakota) N.A., Contra Costa County Superior Court Case No. L09-09171, recorded on October 25, 2010, Document No. 2010-0236734-00, with the Contra Costa County Recorder, against the real property commonly known as 1511 Folsom Avenue, San Pablo, 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.

10. 12-92645-E-7 JOHN/JAN PIEL
SSA-5 Cheryl L. Sommers

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH CAPITAL ONE
1-31-14 [140]

DISCHARGED 3-12-13

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, Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on January 31, 2014. By the court's calculation, 34 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:

Michael D. McGranahan, Chapter 7 Trustee ("Trustee") seeks an order approving a compromise with Capital One Bank (USA), N.A. ("Creditor") concerning Debtor's credit card account ending in 0094. The Trustee has identified the following three transactions:

1. 8/23/12 (pre-bankruptcy) $6,980.18;

2. 9/27/12 (pre-bankruptcy) $5,047.16; and

3. 10/5/12 (date of bankruptcy) $4,986.25.

The Trustee initiated discussions with Creditor concerning the transfers and Creditor asserted it had advanced "new value" in the form of money or services to the Debtors during the subject period in the amount of $9,982.75, leaving a potential preference claim in the amount of $7,030.84. Creditor tendered to the Trustee the sum of $7,030.84, which is the preference amount owed to the estate.

The Trustee argues that the foregoing compromise is in the best interests of the estate and otherwise meets the standard for this court's approval.

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 Trustee argues that the four factors have been met.

Probability of Success

The Trustee believes the result achieved by consensual agreement is the same which would occur if this matter were litigated. Creditor has advanced a "new value" defense which is supported by the credit card statements and consistent with existing case law.

Difficulties in Collection

Trustee states litigation would entail at least fifteen hours of legal time. It is estimated at the very least litigation would cost between $3,500 to $5,000 in litigation expenses. By settlement, the fees and costs are saved, which inures to the benefit of the bankruptcy estate and creditors.

Expense, Inconvenience and Delay of Continued Litigation

The Trustee states that while the litigation is not overly complex, there are still issues that would have to be addressed in litigation that would cause substantial expense in relation to recovery. The Trustee is receiving the sum of$7,030.84, which he and his counsel calculate is the best they can establish if Creditor's new value defense prevails.

Paramount Interest of Creditors

The Trustee argues that settlement is in the paramount interests of creditors since as the compromise provides prompt payment to creditors which could be consumed by the additional costs and administrative expenses created by further litigation.

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.

However, a review of the docket shows that Trustee has not provided the Settlement Agreement with Creditor setting forth the respective rights and interests of the parties (or any other indication that Creditor has agreed to the allegations set forth in the other supporting documents).

The failure to provide the court with a settlement agreement is taken as a statement that no written agreement is to be prepared and the court are relying (and their respective interests living and dying) on the court's order.

Because this is a fairly simple situation, the court will issue an order which will constitute the entirety of the Compromise as approved by the court.

The Motion is granted and the following Settlement is Approved:

A. Michael D. McGranahan, the Chapter 7 Trustee, has asserted claims arising under 11 U.S.C. § 547 (preferences) for the following payments received by Capital One Bank, USA from the Debtor in the 90-day period prior to the commencement of the bankruptcy case:

1. 08/23/12.....$6,980.18
2. 09/27/12.....$5,047.16
3. 10/05/12.....$4,986.25

B. With respect to these payments, Capital One, USA asserts as a defense that it advanced new value in the amount of $9,982.75, resulting in there being $7,030.84 which could be at issue with the Trustee for claims arising under 11 U.S.C. § 547.

C. The Trustee and Capital One, USA have agreed to settle all claims arising under 11 U.S.C. § 547 which could be asserted by the Trustee in this case with respect to the above identified transfers by the payment of $7,030.84 from Capital One, USA to the Trustee.

D. Capital One USA has tendered the $7,030.84 to the Trustee.

E. The payment in full of the $7,030.84 to the Trustee on or before March 21, 2014 (to the extent that the "tender" has not resulted in the Trustee having the funds in the Trustee's account before that time), fully resolves any and all claims of the Chapter 7 Trustee against Capital One, USA relating to the above identified three transfers.

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 is granted and the following Settlement is Approved:

A. Michael D. McGranahan, the Chapter 7 Trustee, has asserted claims arising under 11 U.S.C. § 547 (preferences) for the following payments received by Capital One Bank, USA from the Debtor in the 90-day period prior to the commencement of the bankruptcy case:

1. 08/23/12.....$6,980.18
2. 09/27/12.....$5,047.16
3. 10/05/12.....$4,986.25

B. With respect to these payments, Capital One, USA asserts as a defense that it advanced new value in the amount of $9,982.75, resulting in there being $7,030.84 which could be at issue with the Trustee for claims arising under 11 U.S.C. § 547.

C. The Trustee and Capital One, USA have agreed to settle all claims arising under 11 U.S.C. § 547 which could be asserted by the Trustee in this case with respect to the above identified transfers by the payment of $7,030.84 from Capital One, USA to the Trustee.

D. Capital One USA has tendered the $7,030.84 to the Trustee.

E. The payment in full of the $7,030.84 to the Trustee on or before March 21, 2014 (to the extent that the "tender" has not resulted in the Trustee having the funds in the Trustee's

account before that time), fully resolves any and all claims of the Chapter 7 Trustee against Capital One, USA relating to the above identified three transfers.

11. 12-93049-E-11 MLM-3 — MARK/ANGELA GARCIA — Mark J. Hannon — MOTION TO EMPLOY KATZAKIAN REAL ESTATE AS REALTOR(S) — 2-5-14 [300]

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, all creditors, parties requesting special notice, and Office of the United States Trustee on February 5, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion to Employ is granted. No appearance required.

Chapter 11 Trustee, John E. Bell, seeks to employ real estate agent Christine Katzakian of Katzakian Real Estate, pursuant to Bankruptcy Code Section 327. Trustee seeks the employment of a real estate agent to assist the Trustee in valuing, marketing, and possibly listing for sale property commonly known as 821 Inyo Avenue, Modesto, California. Ms. Katzakian has conducted an analysis of the fair market value of the property and determined that the property is worth approximately $55,000.00 and recommends listing the property for sale at that amount. Accordingly, the Trustee wishes to employ Ms. Katzakian to assist him in the marketing and sale of the Property.

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including real estate agents, to represent or assist the trustee in carrying out the trustee's duties under Title 11. *See In re Avon Townhomes Venture*, 433 B.R. 269, 313 (Bankr. N.D. Cal. 2010) aff'd, BAP NC-11-1068-HDOD, 2012

WL 1068770 (B.A.P. 9th Cir. Mar. 29, 2012) ("a real estate broker is a "professional person" as contemplated by § 327."). To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate, and be a disinterested person.

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

Taking into account all of the relevant factors in connection with the employment and compensation of Ms. Katzakian, considering the declaration demonstrating that Ms. Katzakian does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Christine Katzakian of Katzakian Real Estate as real estate agent for the Chapter 11 estate for the purpose of valuing, marketing, and possibly listing for sale the subject real property. Ms. Katzakian's employment by the estate shall be on the terms and conditions set forth in Ms. Katzakian's Declaration filed in support of the motion (Docket No. 302), specifically, that Ms. Katzakian may apply for an order authorizing his compensation pursuant to § 330(a) at a reasonable hourly billing rate for his consulting services on properties that the Trustee decides not to list for sale, and for a sales commission of six percent (6%) of the gross sales price upon the closing of a court approved sale of the property. The approval of the fee is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by the Chapter 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 to Employ is granted and the Chapter 11 Trustee is authorized to employ real estate agent Christine Katzakian of Katzakian Real Estate on the terms and conditions set forth in Ms. Katzakian's Declaration filed in support of the motion (Docket No. 302).
>
> **IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.

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

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

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

12. 12-92856-E-7 JOE/ELIZABETH FABELA MOTION TO COMPEL ABANDONMENT
BSH-2 Brian S. Haddix 2-20-14 [25]

DISCHARGED 2-11-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 7 Trustee, all creditors, and Office of the United States Trustee on February 20, 2014. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Compel Abandonment 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 to Compel Abandonment. 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 commonly known as 5020 Rosso Court, Salida, California, is impaired by a trust deed in favor of Wells Fargo Home Mortgage securing a loan with a balance of $121,267.04. The Debtors' assert that the property has a value of $111,000, as stated on the Debtors' Schedules A and D.

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.

In addition to the real property, discussed above, the Debtors seek to abandon the follow items of personal property:

1. A Bank of America Account ending in 8609

2. A Bank of America Account ending in 3882

3. All of the Debtors' household goods & furnishings as described Schedule B filed with the Debtors' petition

4. The Debtors' wearing apparel as listed in the Debtors' Schedule B

5. The Debtors' jewelry as listed in the Debtors' Schedule B

6. The Debtors' interest in a Term Life Insurance Policy held through employer with a face value of $27,000

7. The Debtors' interest in a Whole Life Insurance Policy held through American General Life with a face value of $100,000

8. The Debtors' interest in a Whole Life Insurance Policy held through Massachusetts General Life with a face value of $110,000 and a cash surrender value of $4,373

9. The Debtors' interest in a retirement plan held through Prudential worth approximately $90.87

10. The Debtors' interest in a loan made to Juanita Fabela

11. The Debtors' interest in a loan made to Juanita Rinaldi

12. The Debtors' interest in a loan made to Dave Wiese

13. The Debtors' interest in a loan made to Robert Rinaldi

14. A 2002 Chevrolet Silverado 1500

15. A 2003 GMC Sierra 1500

16. A 1998 Dodge Neon Sedan

The Debtors claim all of the above items as fully exempt on Schedule C, accordingly, 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 Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is granted and that the personal and real property identified on Schedule B filed December 6, 2012, Dckt. 17, as:

1. 5020 Rosso Court, Salida, California

2. A Bank of America Account ending in 8609

3. A Bank of America Account ending in 3882

4. All of the Debtors' household goods & furnishings as described Schedule B filed with the Debtors' petition

5. The Debtors' wearing apparel as listed in the Debtors' Schedule B

6. The Debtors' jewelry as listed in the Debtors' Schedule B

7. The Debtors' interest in a Term Life Insurance Policy held through employer with a face value of $27,000

8. The Debtors' interest in a Whole Life Insurance Policy held through American General Life with a face value of $100,000

9. The Debtors' interest in a Whole Life Insurance Policy held through Massachusetts General Life with a face value of $110,000 and a cash surrender value of $4,373

10. The Debtors' interest in a retirement plan held through Prudential worth approximately $90.87

11. The Debtors' interest in a loan made to Juanita Fabela

12. The Debtors' interest in a loan made to Juanita Rinaldi

13. The Debtors' interest in a loan made to Dave Wiese

14. The Debtors' interest in a loan made to Robert Rinaldi

15. A 2002 Chevrolet Silverado 1500

16. A 2003 GMC Sierra 1500

17. A 1998 Dodge Neon Sedan

on Schedule A and B are abandoned to Joe and Elizabeth Fabela, the Debtors by this order, with no further act of the Trustee required.

13. 13-92064-E-7 LORENA OLIVARES — **TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS 1-16-14 [15]**

Pro Se

Final Ruling: The case having previously been dismissed, the Motion is denied as moot.

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

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

The Motion to Dismiss having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied as moot, the case having already been dismissed.

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

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

Final Ruling: The Motion to Abandon 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. The court set the matter for final hearing, with no opposition having been filed. Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's Final Decision is to grant the Motion to Abandon Property. No appearance at the March 6, 2014 hearing is 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 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.

FEBRUARY 13, 2014 HEARING

The court continued the hearing on this Motion to this hearing date to permit Debtors to file supplemental pleadings, stating with particularity the additional grounds and relief sought.

In their Motion, Debtors initially did not describe the business and assets to be abandoned with much specificity. The Motion merely stated 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; the Motion did 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 stated that it did not have sufficient information regarding the property to be abandoned.

The court advised the Debtors that it is necessary for Debtors 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 informed Debtors that it will not issue vague orders and grant Motions that do not meet the basic requirements of Federal Rule of Bankruptcy Procedure 9013.

Debtors listed on their Schedule B, a sole proprietorship, Four Acres. On their schedules, Debtors identified 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 sewing machine, air compressor, staple gun, mallets, a steamer, an iron, scissors, thread, etc. Exhibit 1, Dckt. No. 12. Debtors meticulously catalogued all of their business-related personal property on their Schedule B, but did not incorporate such extensive descriptions in their Motion to Compel Abandonment.

Supplemental Pleading in Support of Motion to Compel

Debtors filed a supplemental pleading in support of the Motion to Compel, listing the following items as as Debtor's sole proprietorship business assets, with the following values, lien amounts, and exemptions claimed:

A. Sewing machine, $250.00
B. Compressor, $75.00
C. Staple gun, $60.00
D. Staples, $20.00
E. Cotton, $20.00
F. Snaps, $20.00
G. Rulers, $10.00
H. Mallet, $15.00
I. Iron, $5.00
J. Steamer, $10.00
K. Chalk, $8.00
L. Scissors, $30.00
M. Thread, $50.00
N. Staple puller, $10.00
O. Tack Stripes $15.00
P. Dacron, $20.00
Q. Decking, $20.00
R. Cambrick, $15.00
S. Tacks, $25.00
T. Buttons, $15.00
U. Tack hammer, $15.00;

V. Cording, $35.00; and
W. Goodwill, $1,000.00

Debtors state that the above listed assets comprise the entirety of Debtors' business assets, as listed on Debtors' Schedule B. Debtors request that the court compel the abandonment of the itemized assets of Debtors' business, as detailed above.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to 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 personal property identified as:
>
> 1. Sewing machine, in a value not to exceed $250.00
> 2. Compressor, in a value not to exceed $75.00
> 3. Staple gun, in a value not to exceed $60.00
> 4. Staples, in a value not to exceed $20.00
> 5. Cotton, in a value not to exceed $20.00
> 6. Snaps, in a value not to exceed $20.00
> 7. Rulers, in a value not to exceed $10.00
> 8. Mallet, in a value not to exceed $15.00
> 9. Iron, in a value not to exceed $5.00
> 10. Steamer, in a value not to exceed $10.00
> 11. Chalk, in a value not to exceed $8.00

12. Scissors, in a value not to exceed $30.00

13. Thread, in a value not to exceed $50.00

14. Staple puller, in a value not to exceed, $10.00

15. Tack Stripes, in a value not to exceed $15.00

16. Dacron, in a value not to exceed $20.00

17. Decking, in a value not to exceed $20.00

18. Cambrick, in a value not to exceed $15.00

19. Tacks, in a value not to exceed $25.00

20. Buttons, in a value not to exceed $15.00

21. Tack hammer, in a value not to exceed $15.00

22. Cording, in a value not to exceed $35.00

23. Goodwill value of Debtors' sole proprietorship, Four Acres, valued at $1,000

are abandoned as to Antero Acierto and Judy Acierto, the Debtor by this order, with no further act of the Trustee required.

15. 12-92570-E-12 COELHO DAIRY
Thomas O. Gillis

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
9-28-12 [1]

Debtor's Atty: Thomas O. Gillis

Notes:

Continued from 2/13/14 to be heard in conjunction with other matters on calendar.

Withdrawal of Motion to Confirm Chapter 12 Plan Filed on February 10, 2014 as TOG-25, Set for Hearing on March 27, 2014, In Its Entirety filed 2/20/14 [Dckt 422]

16. 12-92570-E-12 COELHO DAIRY MOTION TO DISMISS CASE
DJD-5 Thomas O. Gillis 2-12-14 [403]

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors' Attorney, Chapter 12 Trustee, and Office of the United States Trustee on February 12, 2014. By the court's calculation, 22 days' notice was provided. 28 days' notice is required. That requirement was not met.

Tentative Ruling: This Motion to Dismiss Case was not properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Notice of Hearing indicates that this Motion was served pursuant to Local Bankruptcy Rule 9014(f)(1), and advises potential respondents to serve and file with the court opposition at least fourteen (14) days preceding the date of the hearing. Dckt. No. 404.

Local Bankruptcy Rule 9014-1(f)(1), however, requires that the moving party file and serve the motion at least twenty-eight (28) days prior to the hearing date. This Motion was served on February 12, 2014, 22 days before the hearing date. Thus, proper notice was not provided.

The Motion to Dismiss Case is continued to 10:30 a.m. on March 27, 2014. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Although the Motion will not be heard on this hearing date for Movant's lack of compliance to proper noticing procedures as set forth by the Local Bankruptcy Rules of this district, the court recognizes that serious concerns have been raised by Creditor in requesting that Debtor's case be dismissed.

OVERVIEW OF MATTER BEFORE THE COURT

As summarized below, Creditor alleges malfeasance on the Debtor in Possession and Debtor in Possession counsel's part on several grounds. First, in misrepresenting the state of Debtor's finances in its requests to obtain post-petition financing. Second, the Debtor in Possession has routinely flaunted and violated court orders in obtaining cash collateral and in attempting to draft a confirmable plan in their case. Third, that Debtor in Possession counsel has not fulfilled his responsibilities to dutifully represent the Debtor in Possession and has overstated his services provided to Debtor in Possession (as listed in his billing records). Fourth, that confirmation of a feasible plan simply cannot be expected of the Debtor in Possession, and that Debtor's in Possession inability to effectuate a plan warrants dismissal of this bankruptcy case. These are

serious allegations that the court does not treat lightly, and for which all parties will be provided sufficient time to review, brief, present evidence to the court, and argue.

Debtor in Possession has filed an *Ex-Parte* Application for an Order Shortening Time to File Opposition to Motion for Dismissal, Dckt. No. 441, Debtor in Possession counsel states that he was not served the Motion to Dismiss, nor did he receive the notice of the motion in the mail. The Proof of Service shows that the Debtor in Possession was not served (the court notes however, that the Certificate reflects that Debtor in Possession counsel was served). Dckt. No. 406. Debtor in Possession counsel maintains that he is careful in handling and calendering Motions to Dismiss. Further, that he did not discover the Motion to Dismiss until March 2, 2014, when Debtor in Possession counsel checked PACER to prepare a response to an attack on his fees by Black Rock Milling. Counsel further states that he has suffered from a recent bout of cold that turned into an attack of bronchitis, and required emergency medical care for his condition and infection. Dckt. No. 441. Debtor in Possession requests additional time to respond to the Motion to Dismiss.

As provided for below, the court continues the hearing to 10:30 am at March 27, 2014, and sets a briefing schedule to permit Debtor in Possession and other parties in interest to adequately review the motion, and file opposition to the motion, if any. The court is also setting a deadline for Creditor to file and serve any supplemental reply to Debtor's opposition.

REVIEW OF MOTION

Creditor Black Rock Milling Co. ("Creditor") moves the court to dismiss this case. Creditor alleges that Debtor's failure to confirm a plan, inability to propose a confirmable plan, numerous unauthorized payments and violations of court orders, and draining of Debtor's assets by Debtor's counsel justify dismissal under 11 U.S.C. § 1208.

Creditor points out that almost a year and a half has passed from Debtor's Chapter 12 bankruptcy, and Debtor is no closer to a successful reorganization than it was when it first filed its petition. Debtor has received refinancing on their cows, which enabled Bank of the West to exit this bankruptcy; however, Debtors did so at the expense of the Debtor owner's real property, which were further encumbered in order to acquire the loan. Creditor also argues that Debtor has failed to file a plan that is feasible, filing a first plan that was implausible, and a second plan that included the same deficiencies as the first plan. Cause exists for dismissal where Chapter 12 debtors have had ample opportunity to propose a confirmable plan and have failed to do so. *In re Weber* 297 BR 567, 572.

Creditor also states that Debtor has failed to abide by its agreements with Black Rock and an additional creditor, Bank of the West. Creditor opposes Debtor's counsel's fee application, describing Counsel's motion as an attempt to drain Debtor's estate by billing for time no worked, and for work not benefitting the Debtor.

BACKGROUND

On August 8, 2012, Creditor sued Debtor for breach of contract and common counts causes of action in the Stanislaus County Superior Court. This lawsuit additionally identified the principals of the Debtor, Frank Coelho, Bernadette Coelho, and Mary Coelho individually as Defendants. On September 28, 2012, allegedly in response to Black Rock's lawsuit and pending writ of attachment motions, Debtor filed for bankruptcy. Throughout the bankruptcy, the Debtor in Possession counsel inaccurately stated and represented that not only was Debtor part of the bankruptcy, but so were the individuals Frank and Bernadette Coelho individually. Creditor asserts that this tactic was knowingly done to simply delay the civil lawsuit from proceeding against the individuals.

On December 27, Debtor in Possession filed a motion to confirm the Chapter 12 Plan, which Creditor opposed, as well as an additional creditor, Bank of the West, and Trustee Jan Johnson. The court denied Debtor's in Possession plan. On January 29, 2013, Black Rock filed a claim in bankruptcy against Debtor in Possession for its breach of contract and failure to pay monies owed. At that time, Debtor in Possession claimed it needed to do an accounting to determine the actual amount owed on the claim. Black Rock and Debtor in Possession appeared in March at a mediation in an attempt to resolve the claim. During the mediation, the parties agreed on a payment structure and payments were to commence on May 10, 2013. Debtor failed to make any payments to Black Rock, and disregarded the mediation settlement that was entered into.

On June 21, 2013, Debtor in Possession filed a motion for confirmation of a modified plan, which was again, denied by the court for some of the same reasons raised by creditors and the Chapter 12 Trustee in the first Motion to Confirm. On August 8, 2013, Debtor in Possession filed an objection to Black Rock's claim, and a motion to enforce the March 22, 2013 settlement between Creditor, Debtor in Possession and Debtor. Debtor in Possession claimed that the alleged amount owed by Debtor to Black Rock was incorrect, and that an accounting would have to be performed to determine the amount owed. Both of these motions were denied/overruled; the motion to approve the compromise, in particular, was denied partly due the fact that Debtor had already breached the settlement agreement, which rendered the agreement void.

On September of 2013, Black Rock sought writ of attachment on Mary Coelho's property in civil court. The day prior to the write hearing, Debtor’s in Possession counsel filed a Chapter 12 bankruptcy on behalf of Mary Coelho. This bankruptcy was dismissed after claims of improper filings and conflicts of interest arose against Thomas Gillis, Debtor in Possession counsel.

On October 11, 2013, the court heard and granted Creditor Bank of the West's Motion for Relief from the stay. Creditor Black Rock Milling alleges that it was apparent that Debtor in Possession counsel had not reviewed all of the moving papers, and was ill prepared to oppose the motion. The court noted in this hearing that Debtor in Possession had not yet filed a confirmable plan in the span of the year between that date and the filing of the bankruptcy petition, and had not even attempted to file a plan in several months.

Debtor in Possession obtained financing from the Bank of Nebraska to pay their outstanding debt to Bank of the West. In order to obtain financing, however, Debtor in Possession incurred additional debt, and required Frank, Bernadette, and Mary Coelho to incur additional debt on their property. Creditor states that the Bank of Nebraska has simply stepped into the shoes of the Bank of the West, and further encumbered Debtor's assets. In January 2014, Debtor in Possession counsel requested to meet with Creditor to discuss the outstanding balance for the claim.

Debtor in Possession counsel requested that the meeting take place on the Martin Luther King holiday, on January 20, 2014. Creditor and counsel agreed to the meeting and made special arrangements to be present for the holiday meeting. Fifteen minutes prior to the meeting, however, Debtor in Possession counsel informed Creditor that he would not be attending the meeting because he needed to figure out the accounting on the amount owed by Debtor (which Creditor asserts Debtor has been stating for over 15 months). On January 15, 2014, Debtor filed a motion seeking over $93,000 in fees and costs, which Creditor states was not properly served.

DISCUSSION

Under 11 U.S.C. § 1208(c), on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including--

> (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors;
>
> (5) denial of confirmation of a plan under section 1225 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;
>
> (9) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation; and(10) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition. 11 U.S.C. § 1208.

Creditor argues that the Debtor's bankruptcy case has been unreasonably delayed and grossly mismanaged. Debtor has attempted to file attempted plans in the last year and a half, but both have been denied. Creditor points out the second proposed plan contained many of the same deficiencies as the first plan, and that Debtor in Possession has bungled its opportunities to propose confirmable plans. Creditor argues that the continual denial of confirmation of Chapter 12 plans merits dismissal of the case under 11 U.S.C. § 1208.

In addition to the delay, it is asserted that Debtor in Possession counsel is "draining the assets of the bankruptcy," as Creditor puts it, by bringing a motion for fees in excess of $93,000.00. Creditor alleges that Debtor in Possession has grossly exaggerated his work on the case, and that counsel’s bills were not necessary and beneficial to the estate, as Debtor in Possession has failed to get a plan confirmed for an almost 18-month period. Creditor also states that Debtor in Possession has grossly

mismanaged its business, as Debtor in Possession has routinely provided inaccurate and misleading financial data regarding its financial condition. Creditor states that "it has become apparent" that Debtor in Possession has made unauthorized payments and draws in the excess of $80,000 (but does not cite to a source or evidence filed to substantiate this allegation). Creditor also maintains that Debtor in Possession has achieved financing by further encumbering Debtor in Possession property, as well as the property which Debtor's owners have outside of the bankruptcy, creating an even larger burden on Debtor in Possession.

In arguing that the failure to propose a confirmable plan creates an unreasonable delay, and is grounds for dismissal under 11 U.S.C. §§ 1208(c)(1) and 1208(c)(5), Creditor sheds light on the troubled history of Debtor's in Possession failure to achieve confirmation of a Chapter 12 Plan.

First Proposed Plan

Debtor in Possession filed its first motion to confirm its Chapter 12 Plan on December 27, 2012. As the court notes in its ruling on Thomas Gillis's Motion for Compensation (also scheduled for a hearing on this day and docketed on this calendar), with respect to the first proposed plan, the Trustee and responding Creditors made a variety of arguments that overlapped with one another. Trustee and Creditors alternately asserted that although Debtor in Possession proposed to pay all of the unsecured creditors 100% of its claims by paying a lump sum into the plan on or before month 60 from a refinance of real property, there was no evidence before the court as to what real property will be refinanced in order to obtain the funds, when such loan will be taken out, or if the Debtor Plan Administrator would be able to qualify for that large of a loan. The Trustee also asserted that the claim of Blackrock Milling was estimated at $120,000.00 in the plan, but the Creditor filed a proof of claim in excess of $340,000.00. The plan stated that if any claim is more than the estimated amount, the re-finance loan will be increased to cover the excess amount. The Trustee expressed serious concerns as to whether the Debtor Plan Administrator would be able to comply with the plan terms if the creditors claim is in fact $340,000.00. The Motion to Confirm Plan was denied, and the Chapter 12 Plan was not confirmed. Civil Minutes, Dckt. No. 105.

In this second instance of attempted confirmation, Debtor's in Possession Chapter 12 Plan was again opposed by several parties in interest, and the Motion was Confirm was denied on multiple grounds. Civil Minutes, Dckt. No. 247. Creditor Black Rock Milling Co., LLC ("Black Rock") objected to the motion to confirm on the grounds that Debtor in Possession breached a Settlement Agreement, and that because of the breach, Black Rock was now entitled to full repayment of its outstanding debt. Dckt. No. 187. Black Rock also asserted that the Amended Plan contained minimal changes from the original plan which was denied. Black Rock argued that Debtor in Possession intended to continue to operate the business without any significant changes to the dairy operation and without refinancing, and that Debtor in Possession has not shown evidence that it will be profitable in future years. Lastly, Black Rock made the serious allegation that Debtor in Possession failed to identify all of its assets in the bankruptcy schedules, including the 32.89 acre parcel on Claribel Road, Modesto, California, owned

by Frank and Bernadette Coelho. Black Rock asserted that this shows bad faith on the part of the Debtor.

Creditor Westamerica Bank ("Westamerica") also opposed the plan on the grounds that it suffers from the same objectionable infirmities and the original plan, which was denied. Westamerica argued that the plan was not feasible as Debtor in Possession business operations do not generate sufficient income to fund the proposed payments to its creditors under the amended plan. Creditor Bank of the West ("BOTW") opposed the plan on the grounds that the plan was not feasible as Debtor in Possession had not provided any sufficient evidence to support its overly optimistic budget projections, and that Debtor in Possession had incurred significant liabilities that could affect its cash collateral. BOTW stated that it has become aware that Debtor's in Possession accountants had not been paid an were owed $8,800 for the preparation of records up to December 31, 2012, a past due silage bill of $11,000, breach of settlement agreement with Black Rock, and that Debtor had only paid $2,208 in total administrative expenses. BOTW also stated that the plan included an unnecessary and uncertain balloon payment that was contingent on future financing.

Similar to the arguments submitted by Black Rock, BOTW argued that the proposed plan was not offered in good faith, as Debtor in Possession has failed to comply with court orders regarding cash collateral. BOTW contended that Debtor in Possession had used its cash collateral to make unauthorized payments to itself, unsecured creditors, and third-parties, including paychecks to Frank Coelho, draws by Mr. Coelho to himself, payments to Discover Card, Bank of America, and payments on life insurance and satellite television. BOTW also objected to its treatment under the proposed plan of amortization of the debt over 20 years at 4.75% and full payment within 7 years, which BOTW states is worse than the treatment provided in the prior plan.

The court noted in its ruling to deny the Motion to Confirm the Amended Plan that Debtor's plan relied on a Motion for Approval of Compromise and a Motion for Approval of Post-Petition Financing, both of which had been denied. As the plan is based on these motions being granted, the plan was not feasible. The court also determined that the evidence Debtor in Possession submitted in support of confirmation was insufficient. Debtor in Possession provided the court with yearly financial statements 2009-2012, which were illegible. The Debtor also provided the court with a Typical Annual Profit and Loss Projection intended to show that the plan is feasible. Exhibit C, Dckt. 149. The court was unable to determine even if the one month "projection" was at all plausible. Mr. Coelho, the responsible general partner representative for the Debtor in Possession, did not provide any information on how he determined these projections. Declaration, Dckt. 148. The court also stated that the lack of providing even minimal competent evidence was an indication that the plan has been proposed and prosecuted in bad faith. The court ultimately determined that the Plan did not comply with 11 U.S.C. § 1225 and denied confirmation of the Plan.

Debtor Should Not be Permitted to File a New Plan

Creditor argues that Debtor's in Possession Plan and Amended Plan were far from comprehensive and complete, as each drew objections from multiple creditors, and the court twice stated that the evidence supporting Debtor's proposed budgets were insufficient. In deciding whether to allow Debtor to file a new plan, courts have considered the following criteria:

> (1.) whether the original plan was substantially comprehensive and complete;
>
> (2.) the likelihood of confirmation of a new plan;
>
> (3) the length of the extension requested, and
>
> (4.) whether cash flow projections under the original plan make it likely that reorganization is possible.

In re Bentson, 74 BR 56 (1987)). Creditor argues that the defects of Debtor's in Possession Plans, and Debtor's in Possession inability to address these concerns and file complete, confirmable, and accurate Plans, indicates that the court should deny Debtor in Possession leave to amend and file new, revised plans.

Creditor further expresses its opposition to the Motion for Compensation of Thomas Gillis, which is being decided on this same calendar on this hearing date. Creditor asserts that nowhere have 282 hours, the amount of time that Debtor in Possession counsel's claims was spent on this case, have been invested in prosecuting this case. Creditor asserts that Debtor in Possession counsel has overstated the amount of hours spent on the case, and that the rate that Thomas Gillis charges for his professional services, $375.00 per hour, is excessively high compared to other reputable attorneys in the legal community of the area. Creditor states that Gillis's rate seems excessive, considering the quality of representation Debtor in Possession has received. Creditor alleges that the billing records of Debtor in Possession counsel were overstated, and that Debtor in Possession counsel is attempting to "drain the assets of the estate," and thus impedes Debtor's ability to be a viable dairy and replay its debtors.

BRIEFING SCHEDULE

Given the serious nature of the pattern of the misconduct and bad faith actions undertaken by Debtor, as alleged by Creditor above, the court's decision is to set the matter for a further briefing schedule.

Additionally, as stated in Debtor's Ex-Parte Application for an Order Shortening Time to File Opposition to Motion for Dismissal, Debtor's counsel alleges that he did not receive the Motion to Dismiss. Gillis claims that he did not receive notice of the Motion to Dismiss in the mail, and that the proof of service shows that Debtor was not served (even though the Certificate reflects that Gillis himself was served). Dckt. No. 406. Gillis further informed the court that he had suffered a recent bout with a cold that turned into an attack of bronchitis, which required emergency medical treatment, and that he was battling the infection for about a week. Gillis states that he has continued to work every day, but has been

overwhelmed to the point of exhaustion and illness and handling his volume of cases. Dckt. No. 441.

Based on the foregoing, Debtor will be afforded the opportunity to file Opposition to the arguments and evidence that Creditor has presented in the Motion to Dismiss. Then, Creditor will be allowed to file a Response to Debtor's Opposition, if so desired. This will allow the court to accurately and fairly rule on the Motion to Dismiss Case, which was improperly noticed by Creditor under Local Bankruptcy Rule 9014-1(f)(1). The court sets the following briefing schedule:

A. Opposition to the Motion to Dismiss Case, if any, shall be filed and served by Debtor on or before March 13, 2014.

B. A Reply to Debtor's Opposition, if any, shall be filed and served by Creditor on or before March 20, 2014.

C. The hearing on the Motion to Dismiss Case is continued to 10:30 AM on March 27, 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 Dismiss by Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is set for final hearing at 10:30 a.m. on March 27, 2014. On or before March 13, 2014, the Debtor shall file and serve the Opposition, if any, to the grounds and evidence presented by Black Rock Milling in its Motion to Dismiss, filed on February 12, 2014, Dckt. Nos. 403 and 405. On or before March 20, 2014, Creditor shall file a Response or Reply, if any, to the Opposition filed by Debtor.

17. 12-92570-E-12 COELHO DAIRY
TOG-23 Thomas O. Gillis

OBJECTION TO CLAIM OF BLACK ROCK MILLING, CLAIM NUMBER 24
2-11-14 [398]

Local Rule 3007-1(c)(1) Motion - No Opposition Filed.

Correct Notice Not Provided. The Proof of Service states that the Objection and supporting pleadings were served on the Chapter 12 Trustee, respondent creditor, and Office of the United States Trustee February 11, 2014. By the court's calculation, 23 days' notice was provided. 44 days' notice is required. That requirement was not met.

Final Ruling: This Objection to a Proof of Claim was not properly set for hearing on the notice required by Local Bankruptcy Rule 3007-1. Local Bankruptcy Rule 3007-1(b) requires that the objecting party filing an Objection to Proofs of Claim must file and serve the objection at least forty-four (44) days prior to the hearing date, unless the objecting party elects to give the notice permitted by Local Bankruptcy Rule 3007-1(b)(2).

The objecting party has not indicated that the Objection was set for hearing on 30 days' notice, pursuant to the alternative noticing procedure set out by Local Bankruptcy Rule 3007-1(b)(2). The Notice of Hearing simply states that the "Motion" is being noticed pursuant to Local Bankruptcy Rule 9014-1(f)(2), which is not sufficient for an Objection to Proof of Claim. Dckt. No. 399. Even if the objecting party had wanted to set this motion for hearing pursuant to Local Bankruptcy Rule 3007-1(b)(2), this Objection was not served at least thirty (30) days prior to the hearing date as required by Local Bankruptcy Rule 3007-1(b)(2).

The Proof of Service filed reflects that the Objection, Exhibits, supporting Declaration, Notice of Hearing, and Debtor's Amended Schedule F were filed on February 11, 2014, just 23 days prior to this hearing. Dckt. No. 402. Thus, proper notice under Local Bankruptcy Rule 3007-1 was not provided.

The Objection to Claim of Black Rock Milling is continued to 10:30 a.m. on March 27, 2014. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtor in Possession states that it objects to the allowance of Claim No. 24, held by Black Rock Milling, on the grounds that the amount claimed is not owed by Debtor. Debtor asserts that Black Rock Milling has overcharged the Debtor by $129,219.68. Debtor in Possession offers the "Accounting of Charges and Payments," filed in support of this objection as Exhibit A.

Although Frank Coehlo, who as a general partner of Coelho Dairy, states in his declaration that he prepared Exhibit A and believes that it "accurately reflects the charges and payments" (thereby satisfying the

authentication of evidence requirements as set forth be Federal Rule of Evidence 901), the declarant provides little information on the manner in which the statements were assembled. ¶ 3, Declaration of Frank Coehlo, Dckt. No. 400. Debtor does not provide any context on how these "Cash Register" statements, showing an accounting of the invoices and payments made to Black Rock Milling as a Class 5 Creditor, were prepared, and does not testify as to his personal knowledge of the veracity of the contents of the statements provided.

Opposition of Black Rock Milling to Debtor's Objection to Claim

On February 28, 2013, the Claimant Black Rock Milling ("Claimant") filed extensive opposition to Debtor in Possession Objection to their Claim. It appears, from the court's cursory review of the Objection, that Claimant is asserting that Debtor has failed to provide accurate, complete accounting to disprove Black Rock Milling's claim. For instance, Claimant argues that Debtor's accounting fails to consider any outstanding balance of Debtor prior to May of 2006, does not identify all of the invoices from May, 2006, to the present, and that the Debtor in Possession objection does not account for the attorney's fees clause of the contract that Debtor in Possession entered with Black Rock. Claimant alleges that, in reviewing the Debtor in Possession accounting, Claimant determines that Debtor's in Possession calculations are absent more than 20 invoices in their calculations, including 8 consecutive invoices from September 21, 2010, to October 13, 2010. Claimant points to this detail to demonstrate that the Statement, designated Dckt. No. 401, is deficient and inaccurate.

Because Debtor in Possession pleadings were not procedurally proper, and gave only 23 days for potential respondents to file opposition to the Objection, Claimant was forced to file untimely opposition, which was filed with the court only three and a half business days before this hearing.

In support of its opposition to the Objection of Claim, the Claimant has attached its own "Calculation of outstanding balance of Debtor to Black Rock Milling Co.", filed as Exhibit 1 in support of the motion, the monthly statements of Claimant for the account with Debtor, dated from 2002 to the present, the contract between Debtor and Claimant, as well as four declarations of individuals in support of its opposition. Dckt. Nos. 431-435. The invoices and statement of transactions, which include invoices sent to Debtor, and payments made by Debtor from the time period of December 30, 2002, to February 28, 2014, filed in addition to a multitude of billings statements showing the past due amounts owed by Debtor to Claimant, **total 159 pages**. Dckt. No. 431. Claimant's exhibits filed in support of the opposition, which offer conflicting information on the invoice amounts charged, and payment amounts made by Debtor, are critical, however to the court's determination of the actual amount owed on the claim filed by Claimant.

All opposing documents were filed, however, on February 28, 2014, just three business days before the date of the hearing on this Objection. Moreover, there is no Certificate of Proof filed on the court docket, reflecting that Claimant's opposition and supporting documents were served on Debtor, the opposing party.

The court's decision is to continue the Objection to the Claim of Black Rock Milling to 10:30 a.m. on March 27, 2014, to permit Claimant to serve the opposition and supporting exhibits and evidence to Debtor; and to allow the court the opportunity to fully deliberate on the pleadings and evidence presented by Debtor and Claimant on the amount owed on the Black Rock Milling claim, Claim No. 24 on the claims registry.

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 Objection to Claim of Black Rock Milling filed in this case by 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 Objection to Claim of Back Rock Milling is continued to the hearing time and date of 10:30 a.m. on March 27, 2014.

18. 12-92570-E-12 COELHO DAIRY
TOG-36 Thomas O. Gillis

AMENDED MOTION FOR COMPENSATION FOR THOMAS O. GILLIS, DEBTOR'S ATTORNEY(S), FEES: $91,565.00, EXPENSES: $1,725.75
2-20-14 [417]

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, all creditors, parties requesting special notice, and Office of the United States Trustee on February 20, 2014. By the court's calculation, 14 days' notice was provided. 21 days' notice is required.

Tentative Ruling: The 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 continue the hearing on the Motion to 10:30 am at March 27, 2014. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

FEES REQUESTED

Thomas O. Gillis, counsel for Debtor in Possession Coelho Dairy, 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 September 15, 2012 to December 31, 2013. The order of the court approving employment of counsel was entered on November 1, 2012. Dckt. No. 47.

Description of Services for Which Fees Are Requested

In his Motion for Compensation, Counsel reports that the below tasks were performed in the prosecution of Debtor's in Possession case.

Case Administration: Counsel states that he spent 42.35 hours on this task. Counsel coordinated the case and engaged in "compliance activities," including reviewing deadlines, creditor requests, and case management.

Motions, Responses, and Objections: Counsel states that he spent 90.70 hours on this task. Counsel prepared the Statement of Financial Affairs and Schedules, status reports, all motions, including use of cash collateral, motions to approve settlement of claims. Counsel also filed oppositions to responses. Counsel states that a critical issue was defending a motion for relief from the automatic stay, and the dismissal of case. Counsel states that he also filed motions to approve loans of Debtor-in-Possession and other motions outlined in Exhibit B.

Court Hearings: Counsel spent 41.65 hours in this category of tasks. Counsel states that attended multiple hearings during the application period.

Meeting with Clients and Opposing Parties: Counsel spent 39.60 hours on this task. Counsel met with clients and opposing parties. Counsel also arranged a private mediation with the plaintiff of a civil case, Black Rock Milling.

Fee/Employment Applications and Objections: Counsel spent 8 hours on this category of work performed. Counsel prepared the application seeking authority for employment, and all supporting documents, including the order authorizing employment. Counsel also prepared the Application for Attorney Fees and Expenses.

Plan: Counsel spent 12 hours on this task. Counsel prepared and filed a Chapter 12 Plan and attended the plan hearing. Written and Telephone Correspondence: Counsel spent 42.45 hours on this category of tasks. Counsel prepared various emails, called creditors, and Debtor-In-Possession numerous times.

Postage, Supplies, and other Costs: Counsel spent 6.45 hours on this task. Counsel states that he supplied copies, postage, and other costs for the duration of the case, and that a filing fee was advanced.

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.

REVIEW OF THE MOTION AND CASE HISTORY

The court questions whether Counsel's services have generated much benefit to the estate, and whether Counsel's services were actually beneficial to the Debtor in Possession and the estate, and were reasonable and necessary to the administration of the case under 11 U.S.C. § 330.

A review of the court docket reveals that the Chapter 12 case has had a prolonged, winding history, in which not much has happened by way of achieving the reorganization of the Debtor business, an organic dairy located in Modesto, California. Debtor filed its bankruptcy case on September 28, 2012. Almost a year and a half has passed from the commencement of Debtor's case, and Debtor in Possession has not yet confirmed a Chapter 12 Plan so that Trustee can begin disbursing funds to creditors. The inability of the Debtor in Possession to propose a confirmable plan; protracted wrangling over certain claims (such as Debtor's in Possession troubled attempts at resolving the claims of Creditor Black Rock Milling, which included agreed a settlement agreement that which Debtor in Possession allegedly breached (¶ 7, Motion to Dismiss, Dckt. No. 403)); denials of requests to incur debt; unsuccessful attempts to defend against Motions for Relief of Automatic Stay, are all signs that Debtor in Possession Debtor has mismanaged or ineffectively managed this case and unreasonably delayed in proposing a reorganization plan. In fact, two creditors, Bank of the West and Black Rock Milling, both filed Motions to Dismiss this bankruptcy case pursuant to 11 U.S.C. § 1208(c).

Debtor's in Possession failures to properly prosecute its bankruptcy case raises many of the red flags enumerated by 11 U.S.C. § 1208 and attendant case law that indicate that dismissal is warranted; cause under 11 U.S.C. § 1208 is statutorily defined to include unreasonable delay, or gross mismanagement, by the debtor in possession that is prejudicial to creditors; nonpayment of any fees and charges required for the case; failure to timely file a plan; failure to commence making timely payments required by a confirmed plan; denial of confirmation of a plan and denial of a request made for additional time for filing another plan or a modification of a plan; material default by the debtor with respect to a term of a confirmed plan; and other factors. 11 U.S.C. § 1208(c); Fed. R. Bankr. P. 1017(a).

A concern of the court is that Debtor in Possession has not filed a feasible plan that it has effectively prosecuted since the inception of its case. Furthermore, Creditors Black Rock Milling and Bank of the West have both filed Motions to Dismiss the Case, accusing Debtor in Possession of engaging in stall tactics and that Debtor's in Possession plan proposals have been filed in bad faith. Evidence of a bad faith filing constitutes "cause" for dismissal of a Chapter 12 case; to determine whether a Chapter 12 petition has been filed in bad faith, courts may look to the same factors analyzed in the Chapter 13 context; the ultimate inquiry behind the bad-faith ground for dismissal is whether the debtor has abused the bankruptcy process. *In re Burger*, 254 B.R. 692 (Bankr. S.D. Ohio 2000).

The Creditors both argue that Debtor has had ample opportunity to confirm a plan, but have failed to do so, and have used questionable tactics in advancing their case, such as reporting inaccurate financial data regarding their financial condition, making unauthorized payments and draws of the estate, further encumbering Debtor's property to accomplish refinancing, and breaching agreements entered in settlement negotiations

between claimants and Debtor. ¶ 23, Motion to Dismiss, Dckt. No. 403. Debtor's counsel has also faced accusations of exaggerating his work on the case, where Debtor has failed to confirm a plan in an almost 18-month period. ¶ 21, Motion to Dismiss, Dckt. No. 403. Debtor's latest attempt to confirm a modified plan is its filing on February 24, 2014. Dckt. No. 427.

First Proposed Chapter 12 Plan

The Debtor in Possession filed its first motion to confirm their Chapter 12 Plan on December 27, 2012. Unless the court grants an extension, the debtor must file a plan of repayment with the petition or within 90 days after filing the petition. 11 U.S.C. § 1221. The Debtor in Possession filed this plan 88 days before the deadline set by 11 U.S.C. § 1221. The Motion was opposed by the Creditor Black Rock Milling, Bank of the West, and the Chapter 12 Trustee, Jan Johnson. The Plan was opposed on the basis that Debtor in Possession failed to carry its burden of showing that the plan complies with 11 U.S.C. § 1225(a)(6).

With respect to the first proposed plan, the Trustee and responding Creditors asserted that although Debtor in Possession proposed to pay all of the unsecured creditors 100% of its claims by paying a lump sum into the plan on or before month 60 from a refinance of his real property, but there was no evidence before the court as to what real property will be refinanced in order to obtain the funds, when such loan will be taken out, or if the Debtor Plan Administrator would be able to qualify for that large of a loan. The Trustee also asserted that the claim of Blackrock Milling was estimated at $120,000.00 in the plan, but the Creditor filed a proof of claim in excess of $340,000.00. The plan stated that if any claim is more than the estimated amount, the re-finance loan will be increased to cover the excess amount. The Trustee expressed serious concerns as to whether the Debtor Plan Administrator would be able to comply with the plan terms if the creditors claim is in fact $340,000.00. The Motion to Confirm Plan was denied, and the Chapter 12 Plan was not confirmed. Civil Minutes, Dckt. No. 105.

Second Proposed Chapter 12 Plan

Debtor in Possession filed a Motion to Extend Time on April 29th, and the Motion was extended; Debtor in Possession was permitted an extension and ordered to file its Amended Plan on or before June 21, 2013. Civil Minute Order, Dckt. No. 136. On June 21, 2013, Debtor in Possession once again filed a motion for confirmation of their modified plan with the court.

In this second instance of attempted confirmation, Debtor's in Possession Chapter 12 Plan was again opposed by several parties in interest, and the Motion was Confirm was denied on multiple grounds. Civil Minutes, Dckt. No. 247. Creditor Black Rock Milling Co., LLC ("Black Rock") objected to the motion to confirm on the grounds that Debtor in Possession breached a Settlement Agreement, and that because of the breach, Black Rock was now entitled to full repayment of its outstanding debt. Dckt. No. 187. Black Rock asserted that its claim arose from a written contract for providing feed to Debtors in exchange for payment, and that Debtor failed to pay for the goods. Black Rock then filed a complaint in Stanislaus Superior Court for breach of contract seeking $332,608.51 in damages. On March 22, 2013, Black Rock and Debtor in Possession went to mediation in an attempt to

resolve the litigation prior to trial and an agreement was reached signed by all parties.

The agreement called for payments of $50,000.00 to Black Rock by May 10, 2013, and then to be paid $3,400.00 a month for 60 months. Black Rock stated that none of these payments were made despite being almost three months after the payment deadline, and that it had been sued for its inability to pay its debts with its own creditors, as a result of failure to make timely payments. Black Rock asserted that failure to make a payment was a condition precedent to the settlement agreement, which makes the agreement unenforceable.

Additionally, Black Rock asserted that the Amended Plan contained minimal changes from the original plan which was denied. Black Rock argued that Debtor in Possession intended to continue to operate the business without any significant changes to the dairy operation and without refinancing, and that Debtor in Possession has not shown evidence that it will be profitable in future years. Lastly, Black Rock made the serious allegation that Debtor in Possession failed to identify all of its assets in the bankruptcy schedules, including the 32.89 acre parcel on Claribel Road, Modesto, California, owned by Frank and Bernadette Coelho. Black Rock asserted that this shows bad faith on the part of the Debtor.

Creditor Westamerica Bank ("Westamerica") also opposed the plan on the grounds that it suffers from the same objectionable infirmities and the original plan, which was denied. Westamerica argued that the plan was not feasible as Debtor in Possession business operations do not generate sufficient income to fund the proposed payments to its creditors under the amended plan. Creditor Bank of the West ("BOTW") also opposed the plan on the grounds that the plan was not feasible as Debtor in Possession had not provided any sufficient evidence to support its overly optimistic budget projections, and that Debtor had incurred significant liabilities that could affect its cash collateral. BOTW stated that it has become aware that Debtor in Possession accountants had not been paid an were owed $8,800 for the preparation of records up to December 31, 2012, a past due silage bill of $11,000, breach of settlement agreement with Black Rock, and that Debtor in Possession had only paid $2,208 in total administrative expenses. BOTW also stated that the plan included an unnecessary and uncertain balloon payment that was contingent on future financing.

Similar to the arguments submitted by Black Rock, BOTW argued that the proposed plan was not offered in good faith, as Debtor has failed to comply with court orders regarding cash collateral. BOTW contended that Debtor in Possession had used its cash collateral to make unauthorized payments to itself, unsecured creditors, and third-parties, including paychecks to Frank Coelho, draws by Mr. Coelho to himself, payments to Discover Card, Bank of America, and payments on life insurance and satellite television. BOTW also objected to its treatment under the proposed plan of amortization of the debt over 20 years at 4.75% and full payment within 7 years, which BOTW states is worse than the treatment provided in the prior plan.

The court noted in its ruling on the Motion to Confirm the Amended Plan that Debtor's in Possession plan relied on a Motion for Approval of

Compromise and a Motion for Approval of Post-Petition Financing, both of which had been denied. As the plan is based on these motions being granted, the plan was not feasible. The court also determined that the evidence Debtor in Possession submitted in support of confirmation was insufficient. Debtor in Possession provided the court with yearly financial statements 2009-2012, which were illegible. The Debtor in Possession also provided the court with a Typical Annual Profit and Loss Projection intended to show that the plan is feasible. Exhibit C, Dckt. 149. The court was unable to determine even if the one month "projection" was at all plausible. The court noted that Mr. Coelho did not provide any information on how he determined these projections. Declaration, Dckt. 148. The court also stated that the lack of providing even minimal competent evidence was an indication that the plan has been proposed and prosecuted in bad faith. The court ultimately determined that the Plan did not comply with 11 U.S.C. § 1225 and denied confirmation of the Plan.

The inability to confirm a plan under 11 U.S.C. § 1225 is troubling in the context of Counsel's instant Motion for Compensation. Debtor in Possession counsel has filed multiple plans that have not complied with provisions of the Bankruptcy Code. It is clear that Debtor's second plan failed to address the concerns raised by the Trustee and various creditors during the confirmation hearing of the first proposed plan. Debtor's in Possession repeated filings, and alleged reporting of inaccurate information, violation of cash collateral orders, and failure to comply with a settlement agreement with Creditor Black Rock suggests a pattern of evasive, dishonest behavior in which Debtor in Possession has manipulated the Bankruptcy Code to improper ends.

Debtor in Possession failure to meet the basic requirement of confirming a plan within an 18 month time span may necessitate an inquiry into whether the Debtor in Possession, with the assistance of counsel, is attempting to abuse both the letter and the spirit of the Bankruptcy Code. This calls for the court to examine the conduct and state of mind of the Debtor in Possession and counsel with respect to the proposal of the plan. The court will evaluate whether Debtor in Possession and counsel engaging in fair dealings, and whether Debtor in Possession has been lawful and acting in good faith in dealing with the creditors and its claims. 11 U.S.C. § 1225(a)(3). *In re Zurface*, 95 B.R. 527 (Bankr. S.D. Ohio 1989).

This implicates the conduct of Counsel and the request for attorneys' fees in assisting the Debtor in Possession in its actions in this case. Counsel is asking for a total of $91,565.00 as compensation for services rendered by his law firm, and expenses and costs of $1,725.75. This is an extremely large amount for case in which a Plan has not even been confirmed and there has been no real contested litigation. Counsel states that 282.20 hours of professional services have been rendered, in a case that has gone nowhere in a slow, almost glacial pace. The only benefit that the court can discern in Counsel's prosecution of the case is Debtor in Possession continuing to use cash collateral in supporting its business as usual operations. Even the operation of the business by the Debtor in Possession has been questioned, as Debtor in Possession is accused of crafting overly optimistic budget projections, and incurring significant financial liabilities that have affected its use of cash collateral. Counsel's work seems to have generated very little benefit to the estate,

and instead has been directed to retaining possession and control of the estate's business without any restructuring or prosecution of the case by the Debtor in Possession and its principals.

COUNSEL'S MOTION FOR COMPENSATION

Costs v. Fees

Counsel claims to have spent 6.45 hours on the task category of "Postage, Supplies, and other Costs." Counsel billed the client for supplying copies, postage, and "other costs" for the duration of the case.

Date	Detail of Professional Services	Attorney Hours	Amount	Paralegal Hours	Amount
	(H) POSTAGE, SUPPLIES AND OTHER COSTS				
9/30/13	Prepared and Fedex Evidentiary Binders to Judge Sargis	3.00	$1,125.00	3.00	$525.00
10/24/13	Supplied Debtor copies of docs sent to K. Vote		$0.00	0.10	$17.50
10/25/13	Supplied Debtor copies of docs sent to K. Vote		$0.00	0.15	$26.25
11/26/2013	Emailed Copy of Signed Stipulation to Debtor		$0.00	0.20	$35.00
	TOTAL POSTAGE, SUPPLIES AND OTHER COSTS:	**3.00**	**$1,125.00**	**3.45**	**$603.75**

The court cannot fathom how Counsel believes that the acts of providing postage, supplies, and the costs of preparing evidentiary binders should be folded into the request for fees. The courts in this circuit have held courts have held postage expenses to be reimbursable or potentially reimbursable under 11 U.S.C. § 330. See *Matter of Rauch*, 110 B.R. 467, 20 Bankr. Ct. Dec. (CRR) 46, 22 Collier Bankr. Cas. 2d (MB) 751 (Bankr. E.D. Cal. 1990); and *In re Ginji Corp.*, 117 B.R. 983, 24 Collier Bankr. Cas. 2d (MB) 216 (Bankr. D. Nev. 1990). But these costs are just that--costs, and should not be billed to the client as professional fees for services performed.

Counsel is essentially charging the estate thousands of dollars for the "labor" of providing stamps and photocopying documents for the court. For instance, Counsel is charging three hours of attorney's fees, at his rate of $375.00, for preparing "evidentiary binders to Judge Sargis." Counsel's paralegal performs an additional 3 hours worth of work in helping Counsel with this task. The hourly rates for the fees billed in this case are $375.00/hour for counsel for 210.90 hours and $175.00/hour for a law clerk for 71.30 hours. This amounts to $1,650.00 worth of work, for six hours of preparing exhibit binders. The court does not understand why this work could not have been performed by an member of the administrative staff, such as a legal secretary, instead of Counsel. Other tasks, like sending copies of documents and supplying photocopies can also be assigned to filing clerks or secretaries. It is unclear why the act of emailing a copy of a stipulation to Debtor would be categorized as a professional service in the "postage, supplies, and other costs" category.

No Benefit to the Estate

In reviewing Counsel's itemized entries in the Motions, Responses, and Objections category, the court notes that Counsel spent over eight hours reviewing opposition/ objections by creditors and the Trustee to Debtor's Motion, as well as in preparing and filing responses to said items of opposition. These responses, however, are only made necessary because of Debtor's ineffective attempts to confirm a plan, to obtain post-petition financing, and to use cash collateral. The denials of such motions were not "close calls" or turned on resolving conflicting evidence. Rather, the denials generally flowed from the relief not be supported by the law or evidence.

For example, on in the entry dated 8/16/13 on page 42 of the billing records, Dckt. No. 420, Counsel states that he spent 1.20 hours, and his paralegal spent 1.00 hour, in preparing and filing a response to the Motion to Compromise the claim of Black Rock Milling. Debtor in Possession sought approval of a mediated settlement of Claim No. 24, filed by Black Rock Milling. This settlement was negotiated by the attorneys present at a scheduled mediation between the parties. Debtor in Possession argued that the settlement was fair to all creditors and beneficial to the estate, resolving an active civil lawsuit brought by Black Rock Milling.

The Creditor and party to the settlement, Black Rock, however, opposed the motion. Dckt. No. 186. Creditor Black Rock Milling Co. ("Black Rock") opposed Debtor in Possession Motion on the grounds that the settlement agreement was breached almost at inception and that it is no longer enforceable. This, it was argued, which meant that Black Rock is now entitled to full repayment of the outstanding debt. The agreement called for a payment of $50,000.00 to Black Rock by May 10, 2013, and the further payments Black Rock of $3,400.00 a month for 60 months. Black Rock stated that none of these payments were made despite being almost three months after the payment deadline. Black Rock stated that it agreed to take a reduced amount based on Debtor's in Possession promise to pay a lump sum by May 10, 2013 and made plans to use the payment to satisfy outstanding debts with its own creditors. Black Rock asserted that Debtor's in Possession failure to make a payment was a condition precedent to the settlement agreement, made the agreement unenforceable. Debtor's in Possession conduct contravened the very settlement agreement that Debtor in Possession sought to be approved, and had already breached before presenting the agreement in court.

In addition to the issues raised by Black Rock (the very creditor whose dispute that the settlement agreement was designed to resolve), the court identified other flaws in the Motion. In denying the Motion to Approve the Compromise, TOG-11, the court stated,

> Here, the Debtor [Debtor in Possession] fails to provide sufficient information in the pleadings for the court to determine if the proposed settlement agreement is reasonable. Debtor [Debtor in Possession] has not provided any legal authority or discussion regarding the settlement agreement.

> Furthermore, Debtor [Debtor in Possession] failed to state that it was already in material breach of the settlement agreement, by failing to make the initial $50,000 payment by the May 10, 2013 deadline and three additional monthly payments of $3,400.00. The court does not find this to be a non-material breach. Based on the foregoing, the Motion is denied.
>
> Civil Minutes, Dckt. No. 234

According to the entries in Counsel's billing records for this Motion, a total of 4.15 hours were spent by Counsel and his paralegal on filing and responding to Creditors' objections, for an amount of $1,246.25 charged. As noted by the court, however, the motion was devoid of any legal authority or discussion of the *In re A & C Props* factors in determining the reasonableness of the settlement agreement, and Counsel was remiss in mentioning that Debtor had already breached the terms of the settlement agreement by not making timely payments by the first several deadlines. Counsel should have been aware that this Motion lacked merit, and should have reasonably anticipated that Creditor would oppose the filing of this Motion. Counsel spent additional time corresponding with the parties on the Motion, and attending the hearing in which the motion was denied by the court. Counsel wasted the client's, creditors', and the court's time and funds by filing motions that Counsel should have known would be denied.

The same can be said of many of the other Motions that Counsel filed, including the multiple Motions to Confirm Plans, both of which were denied due to clear defects in the proposed provisions of the plans. For instance, Debtor's in Possession second Motion to Confirm the Chapter 12 Amended Plan, Dckt. No. 147, could not be granted. The Plan drew the same objections from creditors Bank of the West, WestAmerica, and Black Rock. Debtor had five months after its original plan to make the necessary corrections to its revised plan. Debtor in Possession did not attempt to submit sufficient evidence to support its proposed budgets, and the next attempt to propose an amended plan came 8 months after the second plan filed on June 21, 2013, and was rejected by the court.

Again, in reviewing the Plan category of the billing statements, the court notes that Counsel spent an inordinate amount of time preparing and filing pleadings that suffered from fundamental deficiencies, and were bound to be denied by the court. According to Counsel's billing statements, a total of 11 hours was spent on just preparing and filing the two motions to confirm Debtor's Chapter 12 Plan. Dckt. No. 420 at 48. Counsel charges for withdrawals based on his own mistakes, and even a notice of errata in Debtor's Motion to Incur Debt, which according to the entry dated August 15, 2013 in the Motions, Responses, and Objections Category of the billing statements, took almost 2 hours to complete by both Counsel and paralegal.

Double Billing

Finally, Counsel appears to have double billed by independently asking for the reimbursement of "costs," that have already been calculated in Counsel's request for attorney's fees in this motion. Counsel seeks the allowance and recovery of costs and expenses in the amount of $1,728.75.

Nowhere in Counsel's motion or evidence filed in support of the motion is information provided about these requested costs.

Rather, the court speculates that Counsel is asking for a costs that have already been factored into Counsel's request for attorney fees. Counsel breaks down his total request for $91,565.00 in attorneys fees as follows:

CATEGORY	Detail of Professional Services	Attorney Hours	Amount	Paralegal Hours	Amount
A	CASE ADMINISTRATION	38.15	$14,306.25	4.20	$735.00
B	MOTIONS, RESPONSES & OBJECTIONS	58.45	$21,918.75	32.25	$5,643.75
C	COURT HEARINGS	33.65	$12,618.75	8.00	$1,400.00
D	MEETINGS WITH CLIENTS & OPPOSING PARITES	39.60	$14,850.00		
E	FEE/EMPLOYMENT APPLICATIONS	4.50	$1,687.50	3.50	$612.50
F	PLAN	8.00	$3,000.00	3.00	$525.00
G	WRITTEN & TELEPHONE CORRESPONDENCE	25.55	$9,581.25	16.90	$2,957.50
H	POSTAGE, SUPPLIES AND OTHER COSTS	3.00	$1,125.00	3.45	$603.75
	TOTAL BY CATEGORY	**210.90**	**$79,087.50**	**71.30**	**$12,477.50**
	TOTAL HOURS	**282.20**			
	TOTAL COSTS	**$91,565.00**			

As described above, Counsel includes the following table, showing how his practice billed attorney and paralegal hours in performing menial tasks, like making copies and sending a copy of a signed stipulation to the Debtor. This table is again, presented below, showing that Counsel charged the client at his rate of $375.00 per hour, evidently to prepare exhibit binders.

Date	Detail of Professional Services	Attorney Hours	Amount	Paralegal Hours	Amount
	(H) POSTAGE, SUPPLIES AND OTHER COSTS				
9/30/13	Prepared and Fedex Evidentiary Binders to Judge Sargis	3.00	$1,125.00	3.00	$525.00
10/24/13	Supplied Debtor copies of docs sent to K. Vote		$0.00	0.10	$17.50
10/25/13	Supplied Debtor copies of docs sent to K. Vote		$0.00	0.15	$26.25
11/26/2013	Emailed Copy of Signed Stipulation to Debtor		$0.00	0.20	$35.00
	TOTAL POSTAGE, SUPPLIES AND OTHER COSTS:	**3.00**	**$1,125.00**	**3.45**	**$603.75**

The total "postage, supplies, and other costs" total $1,728.75, the exact amount Counsel is asking is asking for in the request for costs and expenses. As seen in the total computation of attorney's fees above, however, the amount of $1,728.75 has already been claimed for compensation for professional services. It appears that Counsel is attempting to claim that amount as both the reimbursement the costs, and as part and parcel of his work performed and billed as professional fees.

This confusion can perhaps be attributed to Counsel's imprecise use of the terms "fees" and "costs," as Counsel seems to use the terms interchangeably when discussing his requests for his compensation for professional work, and costs associated with the expenses incurred in travel, copies, and postage. The court cannot ascertain what the actual costs and expenses incurred by Counsel and his firm were in handling this case. The total costs in the amount of $1,728.75 are rejected on this basis.

Furthermore, the court does not find Counsel's hourly rates reasonable and that counsel effectively used appropriate rates for the services provided. The work performed in this case was not necessary and reasonable, and Counsel did not exercise good billing judgment with respect to the services that he and his paralegal undertook as part of the court's authorization to employ him to represent the Debtor in this case. In evaluating Counsel's work under the standard established in *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991), the court determines that Counsel's services have only marginally benefitted Debtor's estate.

At this stage of the case, one and half years after the case was filed, Debtor has failed to confirm a Chapter 12 Plan to date. Moreover, the court has been confronted with allegations that Debtor has violated cash collateral orders, mislead and possibly engaged in fraudulent reporting of the Debtor's finances, possibly filed of the case in bad faith as a strategy to delay a civil lawsuit for breach of contract filed by one of Debtor's creditors, bungled efforts to confirm a viable plan, and other failures. Instead of advancing Debtor's interests, Counsel's services can be seen as having set the estate back; Debtor's estate has declined in value, while this case has stayed stagnant for 18 months. Counsel has not zealously represented the Debtor by pursuing reorganization in this case, and has not performed at the level of skill, and performed the type of necessary and reasonable legal services as required and demanded by 11 U.S.C. § 330, that would warrant the granting of attorney's fees.

IDENTIFICATION OF POTENTIAL DISQUALIFYING CONFLICT

The attorney of record in the bankruptcy of Coelho Dairy is Thomas Gillis, whose signature appears on the last page of the Debtor's bankruptcy petition. Dckt. No. 1 at 3. The court authorized the employment of Mr. Gillis as counsel for the Debtor in Possession. Dckt. 47.

In the letter sent by Gillis to the court on February 17, 2014 in the case of *In re: Mary Coelho*, Case No. 13-91641, however, Gillis states that he had assisted Mary Coelho, a confirmed principal of the Debtor, with her *pro se* filing of her Chapter 12 case. Dckt. No. 44, *In re: Mary Coelho*,

Case No. 13-91641. In his letter, Counsel noted that he did not ask Mary Coelho for a fee for filing the case, and approached several local attorneys to take over the case to dismiss it or handle it. Counsel states that a lawyer based in Fresno, California, Nancy Klepac, eventually agreed to take over the and substitute into Mary Coelho's bankruptcy case as the attorney of record. Letter of Thomas Gillis, Dckt. No. 44, *In re: Mary Coelho*, Case No. 13-91641. The order granting the Motion to Substitute Attorney so that Nancy Klepac could appear as Mary Coelho's attorney in her bankruptcy case was entered on November 23, 2013, as Dckt. No. 35 in *In re: Mary Coelho*, Case No. 13-91641.

It has become apparent, however, from representations made by Counsel at the recent status conference and the letters, that Nancy Klepac has merely been acting at the behest of Gillis, and that Gillis's role in Mary Coelho's case has gone beyond simply recruited an "independent attorney" to work on Mary Coelho's individual Chapter 12 bankruptcy case. Rather, Gillis's own statements strongly suggest that Gillis was simultaneously handling the cases of Mary Coelho and the Coelho Dairy, and that Nancy Klepac may not have even ever met with Mary Coelho in substituting into Mary Coelho's case as her attorney of record.

As the court noted during the February 13, 2014 Status Conference on the Coelho Dairy Case, at the status conference,

> Thomas Gillis, counsel for the Debtor in Possession, disclosed that he "handled" the dismissal of the Mary Coelho bankruptcy case by hiring an attorney in Fresno to "represent" Mary Coelho. Mr. Gillis could not say whether the attorney in Fresno ever met with Mary Coelho. This raises even greater concerns that Mary Coelho is unaware of the transactions being entered into, representations made on her behalf, and the possible taking of her assets in an effort by this Debtor in Possession, Debtor, and counsel to "save" this dairy.
>
> Civil Minutes in the Coelho Dairy Bankruptcy Case, Dckt. No. 414.

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). This equally applies to the attorney representing the Chapter 12 debtor in possession.

Under 11 U.S.C. § 541 of the Bankruptcy Code, each estate is a separate and distinct entity. Under Chapter 12 of the Bankruptcy Code, the debtor-in-possession is expressly authorized to remain in possession of, and to continue to operate, his or her farm or commercial fishing operation. 11 U.S.C. § 1203. The debtor in possession is granted all of the rights and powers of a Chapter 11 trustee under 11 U.S.C. § 1106, except for the right to compensation under 11 U.S.C. § 330. The debtor in possession in a Chapter 12 case is also required to perform all of the functions and duties of a Chapter 11 debtor, except for the investigative duties specified in 11 U.S.C. § 1106(a)(3) and the filing of a statement of such investigation pursuant to 11 U.S.C. § 1106(a)(4). 11 U.S.C. § 1203. As in a Chapter 11 case, the court may prescribe limitations on the rights and powers of a Chapter 12 debtor-in-possession to operate the debtor's business. 11 U.S.C. § 1203.

Thus, in acting as the trustee" of the estate in bankruptcy and being entitled to hire professionals, 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).

The court is proceeding to issue orders to show cause in this case and in the Mary Coelho case to determine whether Mary Coelho has been represented by independent counsel, whether the Debtor in Possession has been represented by independent counsel, and what conflicts of interest may exist for Thomas Gillis in this case and whether he qualifies for employment pursuant to 11 U.S.C. § 327. Civil Minutes, Dckt. No. 414. This potential disqualifying conduct was identified in the Declaration of Mary Coelho, which was filed in support of the latest motion to confirm. Dckt. No. 392. In that declaration, Mary Coelho testifies under penalty of perjury that her property is secured for an obligation owing to Nevada State Bank. She believes that the property is worth $1,400,000.00, and has listed it with an undisclosed real estate broker.

The court recognized that this declaration was problematic, however, because it appears that the debt secured by Mary Coelho's property is that owed to Nebraska State Bank. Given that a bankruptcy case was filed by counsel for the Debtor in Possession for Mary Coelho, and as explained above, Counsel had hid his participation, these statements under penalty of perjury caused the court concern. Mary Coelho Bankruptcy Case, 13-91641.

In that case, this court found,

> Thomas Gillis appeared at the hearing, stating that he was not counsel for the Debtor in Possession. However, the court records show that he electronically filed the Petition for the Debtor, which filing certifies Case Number: 2013-91641 Filed: 10/10/2013 Doc # 23 that Mr. Gillis is the counsel for the Debtor [Mary Coelho].
>
> Mr. Gillis is counsel for the Coelho Dairy Partnership in its bankruptcy case, for which Mary Coelho is identified as a general partner for the Coelho Family Trust. Issues identified by the court include (1) whether Mr. Gillis has an irreconcilable conflict as the attorney for the Coelho Dairy Partnership and attempting to give legal advice to one of the general partners, (2) the contention that Mary Coelho was not able to understand that she was signing a deed of trust to secure debt of the Coelho Dairy Partnership, (3) the Schedules filed by Mary Coelho under penalty of perjury do not list any interests in any trusts and asserts a personal interest in the Coelho Dairy Partnership (not that of being a general partner in her fiduciary capacity as a trustee), (4) income of less than $800 a month on Schedule I, and (5) the Debtor showing ownership of no significant personal property assets other than the asserted 50% interest in the Coelho Dairy Partnership (which does not generate any income for the Debtor).
>
> The filing of this bankruptcy petition appears not to have been done by Mary Coelho knowledgeably and intentionally. She may well have been placed in bankruptcy through the actions of others, including the other general partner in the Coelho Dairy Partnership.

> At the hearing, Thomas Gillis stated that he was "looking for" bankruptcy counsel for Mary Coelho. This bankruptcy case was filed on September 11, 2013. It is now a month later and Mary Coelho is only having Mr. Gillis "looking for counsel."
>
> The court finds that the immediate dismissal of this case is necessary and proper to dismiss this case for cause. The court is convinced that Mary Coelho is not actively participating in the filing of this case and it continuing may work to harm her interests. Further, the Schedules filed in this case demonstrate that there is no good faith attempt being made to prosecute a Chapter 12 case. Third, though he filed the case for the Debtor, Thomas Gillis did not list his name on the Petition. The attempted secret representation of a debtor in possession in a Chapter 12 case is not conduct which shall be condoned.
>
> At the Status Conference Thomas Gillis, who stated that he "did not" file the case for Mary Coelho and that he was "looking for counsel" for Mary Coelho, represented that Mary Coelho did not oppose the court dismissing this Chapter 12 case. However, the court cannot determine if Thomas Gillis actually represents Mary Coelho or whether Mary Coelho actually is aware that she has commenced a Chapter 12 bankruptcy case. Further, there is grossly inaccurate information in the Schedules filed under penalty of perjury by Mary Coelho. The court will not ignore this conduct and grant the requested dismissal by counsel without further inquiry."

Civil Minutes, 13-91641, Dckt. 23. The court will require Counsel to appears at the hearings for the OSC's, explain why punitive sanctions should not be issued for Counsel making it appear that independent counsel was representing Mary Coelho in her case, and how Gillis had not breached his fiduciary duty to the estate in representing different parties with interests that may come into conflict with one another.

UNITED STATES TRUSTEE'S OPPOSITION TO THE MOTION FOR COMPENSATION

The United States Trustee filed Opposition to the Motion for Approval of Compensation and Reimbursement for Costs on March 3, 2014. Dckt. No. 445.

In the Motion, the United States Trustee ("UST") first states that the Notice of the Motion is confusing. The UST points out that On February 20, 2014, Notice of the Motion, Dckt. No. 418, was filed advising in the body that a hearing would be held on February 13, 2014. While the Notice of Hearing's caption appears to provide the actual date set for hearing of March 6, 2014, that hearing date is 14 days after the filing of the papers. In violation of Local Rule 9014-1(f)(2), which requires 28 days' notice of a hearing to require written opposition, the Notice requires written opposition be filed on the very day the Notice was filed.

Second, the UST argues that representation appears inadequate. The UST notes that Counsel in this case is requesting fees of $91,565 for a case without a confirmed plan and for which attempts to confirm a plan have been inadequate. The UST expresses the same concerns outlined by the court and creditors in previous motions to confirm (discussed above), regarding the inability of Debtor to confirm a feasible plan under 11 U.S.C. § 1225. The UST also notes that on February 24, 2014, a fourth plan was filed. Dckt. No. 427. While refinancing to obtain a lump sum has been removed from the Plan's treatment of Class 5 unsecured claims, the Plan offers no evidence to support that "there is about $192,000 remaining in loan proceeds from Nevada State Bank." The UST speculates that the court will still be unable to determine even if the one month "projection" is at all plausible as Mr. Coelho does not provide any information on how he determined the projections in support of the plan. Counsel continues to ignore providing even minimal competent evidence.

Third, the UST argues that counsel and paralegal time is duplicative. The UST argues that time appears to be duplicative for any task wherein a paralegal is involved. In every time entry for which a paralegal is associated, the paralegal is stated to have completed the very same task that Counsel did, providing no confidence that either the attorney's or the paralegal's time is accurate. The UST reviews wide swaths of entries that it alleges have exactly the same description and time charged by both the attorney and the paralegal, as well as entries that are suspect because they y have the same description for both the attorney and the paralegal, although the time attributed is different.

Fourth, the UST argues that many time entries appear to be merely standardized or approximations (e.g., every status conference attendance appears to have been charged at 1.5 hours).

Fifth, the Trustee alleges that Counsel appears to duplicates entries, stating that there are particular entries that appear to have been charged twice and possibly three times on the same date. Sixth, the UST states that Counsel is vague about what he has done and charges for prepetition services, offering entries that are too vague and nondescriptive to be deemed reasonable or necessary.

The issues raised by the United States Trustee cannot be underestimated, as these concerns may not only result in the reduction of fees, but disallowance of the entire amount of fees that have been requested by Counsel. Because the UST’s opposition was filed two days before the hearing date on this Motion (which may be partly be due to Counsel’s confusing Notice of Hearing filed for the Motion), the court will allow Counsel the opportunity and additional time to review the UST’s objection, and file responsive pleadings if necessary.

Counsel will be afforded the opportunity to file a response to the arguments and issues that the UST has raised in its opposition. This will allow the court to consider Counsel’s response to the UST’s arguments, and accurately and fairly rule on the Motion for Approval of Compensation and Reimbursement for Costs. The court sets the following briefing schedule:

A. A Reply to the United State's Trustee's Opposition to the Motion for Approval of Compensation and Reimbursement for Costs, if any, shall be filed and served by Debtor's counsel, Thomas Gillis, on or before March 13, 2014.

B. The hearing on the Motion for Approval of Compensation and Reimbursement for Costs is continued to 10:30 AM on March 27, 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 for Approval of Compensation and Reimbursement for Costs filed by 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 for Approval of Compensation and Reimbursement for Costs is set for final hearing at 10:30 a.m. on March 27, 2014. On or before March 13, 2014, Debtor's Counsel shall file and serve the Opposition, if any, to the grounds and evidence presented by the United States Trustee in its Opposition to the Motion for Approval of Compensation and Reimbursement for Costs, filed on March 3, 2014. Dckt. No. 445.

19. 10-94874-E-7 STEVEN/JOANNE JETT
SSA-3 Bryan L. Ngo

MOTION TO COMPROMISE CLAIM OR CONTROVERSY CONCERNING MEDICAL/PHARMA SUIT AND PAYMENT OF FEES AND COSTS TO SPECIAL COUNSEL, FEES: $17,266.16, EXPENSES: $2,246.50, FOR THE GOLDWATER LAW FIRM
2-3-14 [41]

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, all creditors, parties requesting special notice, and Office of the United States Trustee on February 3, 2014. By the court's calculation, 31 days' notice was provided. 28 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(3). 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 Compromise is denied without prejudice. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

REVIEW OF MOTION

The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

A. The Chapter 7 Trustee in this case, Michael D. McGranahan, files this Motion to Compromise Claim.

B. Debtors' bankruptcy case was closed as a "no asset" case on April 1, 2013. Dckt. No. 16.

C. Michael McGranahan, the Chapter 7 Trustee ("Trustee"), later learned, that Debtors had not included in their schedules a prospective pharma/medical claim, and settlement of approximately $43,165.41, arising out of a personal injury/product suit, which Joint Debtor Steven Jett had initiated back in 2009.

D. As such, the case was reopened on June 21, 2013.

E. Joint Debtor, Steven Jett ("Jett") was plaintiff in a state tort matter involving Jett's ingestion of a pharmaceutical drug. In his state court case, Jett alleges that he experienced a neuropsychological disorder as a result of ingesting a prescription drug. His symptoms included anger, hostility, aggression, and depressions, for which was prescribed medication and counseling.

F. Jett's claim was settled in an aggregate settlement, along with 693 other similarly situated claimants. All of the claimants were represented by Elizabeth Burke, the estate's current special counsel.

G. The Trustee took steps to appoint the firm of Richardson, Patrick, Westbrook & Brickman, LLC and the Goldwater Law Firm ("Contingency Fee Counsel") by order of this court on October 31, 2013, to represent Jett in the state court case. Dckt. No. 39.

H. The contingency fee contract for special counsel provides a 40% fee to counsel from the gross settlement amount obtained, with any litigation costs and expenses incurred to be deducted from the settlement. According to the terms of the appointment of special counsel, contingency fee of 40% between the two firms will be split as follows: the Richardson firm will receive 90% of the 40% fee award, and the Goldwater firm a 10% fee of the 40% fee award. Trustee's Application to Appoint Special Counsel Nunc Pro Tunc to Prosecute Pharma/Medical Claim, n.2, Dckt. No. 30 at

The Motion for Approval of Compromise 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. The motion merely states that the Trustee is seeking resolution of a controversy by requesting that the court approve the compromise of a claim, but it is not clear what "compromise" the Trustee is referring to.

Nowhere in the Motion does Trustee expressly state the terms of the compromise that Trustee requests be reviewed and approved by the court. Trustee describes the history and procedural posture of the case, stating that Debtors had failed to list in their schedules a prospective pharma/medical claim, and potential settlement of $43,165.41, arising out of

a personal injury and product liability suit that Joint Debtor Steven Jett had brought against an undisclosed pharmaceutical company back in 2009. Motion, Dckt. No. 45 at 2. Trustee then describes the facts of the bankruptcy case, and his efforts to employ the two firms as special counsel to represent Jett in prosecutor his product liability case. Trustee states the terms of the Contingency Fee Agreement approved by order of this court on October 31, 2013. Civil Minute Order, Dckt. No. 39.

Buried in Footnote 2 is a statement that the settlement amount is actually $42,165.41. Of that sum, $17,266.16 is to be paid to special counsel. It is further stated in the Footnote that bankruptcy counsel for the Trustee is projecting fees of $1,726.62 (which is stated to be an "assessment," an unknown bankruptcy term to the court). Then there is an additional $2,246.50 of costs (unidentified). This is then stated to bring the "net attorney fee award to $15,539.54 plus expenses of $2,246.50 for a total sum of $17,786.04." It appears that bankruptcy counsel's fees of $1,726.62 are subtracted from the 40% contingent fee, and then costs of $2,246.50 are added back in.

Footnote 2 directs the court to read Exhibit 1 and state for the Movant the settlement terms. Exhibit 1 contains what appears to be defined terms, including the following:

I.	Estimated Award Points	67.5
II.	Estimated Value of a Point	$579.62601
III.	Estimated Initial Gross Settlement Award	$39,124.76
IV.	Estimated Pro Rata Reserve Award	$4,040.65
V.	Estimated Appeal Award	$0.00
VI.	Estimated Final Gross Settlement	$43,165.41
VII.	Estimated Deduction for Attorneys' Fees	$15,539.54
VIII.	Estimated Attorneys Portion of MDL Assessment	$1,726.62
IX.	Estimated Local Probate Counsel Fees	$0.00
X.	Total Estimated Deduction for Attorneys' Fees	$17,266.16
XI.	Estimated Deduction for GRG Administrative and Lien Resolution Services	$700.00
XII.	Estimated Deduction for GRG Bankruptcy Coordination Service	$0.00
XIII.	Estimated Deduction for GRG Probate Coordination Service	$0.00
XIV.	Estimated GRG Postage, Printing, and Other "Pass Through" Expenses	$87.24
XV.	Total Estimated Deductions for Settlement Administration	$787.24
XVI.	Estimated Net Settlement Award Before Holdbacks for Potential Healthcare Reimbursement Options	$22,865.51
XVII.	Estimated Medicare Holdback	$0.00
XVIII.	Estimated Medicare Holdback	$0.00
XIX.	Estimated Other Healthcare Insurance Holdback	$0.00
XX.	Total Estimated Holdbacks for Potential Healthcare Reimbursement Obligations	$0.00
XXI.	Total Estimated Other Reimibursement Obligations (e.g. Legal Loans)	$0.00
XXII.	Estimated Net Settlement Award	$22,865.51

XXIII. Less Total Previous Payments.....$0.00
XXIV. Estimated Net Settlement Award Currently Payable...$22,865.51

Exhibit 1, Dckt. 46. The Motion fails to state any grounds relating to these terms. The court notes that these settlement terms are merely "Estimates," carefully couched so as not to appear as stating the actual settlement amount, and equally importantly, the "expenses" to be taken from any settlement.

Movant and Special Counsel (who is seeking payment of a 40% contingent fee) offer the court no explanation as to what the various terms mean used on Exhibit 1, how they relate to the claim the Trustee seeks to settle, or the actual, final, settlement amount which is property of the estate. The Motion almost reads as a statement that there is some settlement, nobody is quite sure what it is, but because some money could be paid to the Trustee, just approve it.

As almost a throwaway line, the last sentence of the Motion before the prayer states that the net settlement monies of $22,865.51 "will remain with the Trustee pending further hearing or administration of this matter." The court does not know if this represents unencumbered monies of the estate or that there are further claims against and interests in this "estimated net settlement" amount.

In the absence of a clear explanation of the settlement at issue, the court can speculate on a range of possibilities as to what Trustee is referring to: an agreement between special counsel and the estate, carving out fees to reimburse counsel for their services to the estate in connection to the state court case; a settlement entered between Jett and the pharmaceutical company being sued in Jett's pharma/medical claim; an agreement providing for the disbursal of proceeds from the pre-petition settlement to the estate; etc. This illustrates the problem with Trustee's pleadings; a mere allegation that a compromise has been reached, and should be approved by the court, is not sufficient.

STANDARD FOR APPROVAL OF COMPROMISE

Trustee requests the approval of the "foregoing settlement agreement," pursuant to Federal Rule of Bankruptcy Procedure 9019(a), but doesn't detail the agreement that is the subject of this motion. Trustee does not attach a copy of the proposed settlement to the Motion. The only documentation filed in support of the Motion is a "Settlement Program Projected Disbursement Statement," filed as Exhibit 1 in support of the Motion, Dckt. No. 46. The Statement reports the estimated values of the gross settlement award, with estimated deductions for attorney's fees, case expenses, settlement administration, potential healthcare reimbursement obligations, and holdbacks that would affect the calculation of Steven Jett's net settlement award. *Id.* at 2. It is not clear whether this represents the "settlement" referenced in Trustee's Motion.

Trustee further states that the "agreement will act as a compromise of all existing, present, and future claims and disputes between the parties," but does clarify on what the agreement is, what parties Trustee is referring to, and the dispute to be resolved. Trustee contends that the

compromise is in the best interests of the estate, but does not elaborate on the actual agreement to be approved. This is not sufficient, given the court's responsibility to evaluate whether the agreement meets the standard for the acceptability of compromises in this Circuit. 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 Trustee argues that the four factors outlined in *A & C Props* and *Woodson*, have been met, making vague assertions that the unidentified agreement will save the estate the uncertainty, time and expense of protracted litigation; that the litigation arising from Jett's ingestion of a prescription drug favors settlement; that the subject litigation involving a large pharmaceutical company is complex; and that the monetary benefit of the settlement would be great, and that the settlement is in the paramount interest of creditors. The court cannot determine whether the compromise meets the above-listed factors without understanding what the terms of the compromise are.

The Motion does not conform to the requirements of Federal Rule of Bankruptcy Procedure 9013, and is denied on this basis.

Improper Joinder of Claims

Additionally, the Motion seeks two different types of relief:

1) That the court approve an unidentified settlement;

2) Special Counsel be awarded 40% of the gross settlement, plus the reimbursement of expenses, in connection with their representation of Jett in his pharma/medical case.

Trustee further seeks authorization from the court to pay the fees and costs incurred by Special Counsel in representing Jett in the state product liability case. Trustee asserts that Special Counsel is entitled to $17,266.16 in fees, plus $2,246.50 in costs. No billing statements and itemization of costs were filed along with this motion. The Declaration of

Beth Middleton Burke, whose firm was appointed special counsel to pursue the estate's claims on behalf of the Jetts in state court, offers no explanation of the costs incurred in that action. Dckt. No. 44.

This combination of two types of relief in one pleading is procedurally incorrect. Federal Rule of Bankruptcy Procedure 7018 makes Federal Rule of Civil Procedure 18 applicable in adversary proceedings. While Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018 allow for a plaintiff to join multiple claims against a defendant in one complaint in an adversary proceeding, however, those rules are not applicable to contested matter in the bankruptcy case. Federal Rule of Bankruptcy Procedure 9014 does not incorporate Rule 7018 for contested matters, which includes motions. Debtors have improperly attempted to join two separate requests for relief in one motion.

As with the present Motion, the reason for not incorporating Rule 7018 into contested matters is in part based on the short notice period for motions and the substantive matters addressed by the bankruptcy court in motions. These include sales of property, disallowing claims, avoiding interests in real and personal property, confirming plans, and compromising rights of the estate- proceedings which in state court could consume years. In the bankruptcy court, such matters may well be determined on 28 days notice. The Supreme Court and Rules Committee excluded the provision of Fed. R. Bankr. P. Rule 7018 and Fed. R. Civ. P. Rule 18 from the rapid law and motion practice in the bankruptcy court. Allowing parties to combine claims and create potentially confusing pleadings would not only be a prejudice to the parties, but put an unreasonable burden on the court in the compressed time frame of bankruptcy case law and motion practice.

Further, in light of the failure to provide the court with an explanation of the actual rights of the estate being compromised and what the estate is receiving (not merely an estimate of monies that may or may not be subject to other claims or interests), it is clear that Special Counsel and bankruptcy counsel need to file their respective separate fee applications to determine what fees should be allowed and whether the provisions of 11 U.S.C. § 328 are applicable to any such fees. FN.1.

FN.1. This court has no aversion to attorneys being fully and fairly paid for the legal services provided. This is true even for the non-bankruptcy attorneys who take on highly speculative cases such as these medical class action cases. There is high risk and high reward, which is usually well deserved. The court has approve similar settlements in other cases where the court has been provided with the basic information about the estate asset, how the settlement works, and how expenses are allocated to the individual class members. In one case the court was provided, in camera, a copy of the actual settlement, for which a redacted version was placed on the docket. Such may well be the case here. But unfortunately, the Motion presented is little more than a story about the bankruptcy case and then a demand that the judge just sign an order because the Trustee and the attorneys want money.

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 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 is denied without prejudice.

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

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

Final Ruling: At the request of the court, the hearing on this matter is continued to **10:30 a.m.** on **March 27, 2014.** No appearance required at the March 6, 2014 hearing.

21. 13-91985-E-7 MICHAEL SMITTLE MOTION TO COMPEL ABANDONMENT
BSH-1 Brian S. Haddix 2-20-14 [18]

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on February 18, 2013, but the list of parties served is omitted. The Proof of Service does not list the parties served the Motion to Compel Abandonment, the Notice of Hearing, and the Declaration of Debtor in Support of the Motion. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

Final Ruling: The Motion to Abandon Real Property was not properly set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and Local Bankruptcy Rule 9014-1(f)(2). The court has determined that oral argument will not be of assistance in resolving this matter. No oral argument will be presented and the court shall issue its ruling from the pleadings filed by the parties.

The Motion to Abandon Real Property is denied without prejudice. No appearance is required.

SERVICE ISSUES

Federal Rule of Bankruptcy Procedure Rule 6007 requires that a trustee or debtor shall give notice of a proposed abandonment or disposition of property to the United States trustee, all creditors, indenture trustees, and committees elected pursuant to 11 U.S.C. § 705 in a Chapter 7 case. This procedure allows for a party in interest to file and serve an objection within 14 days of the mailing of the notice, or within the time fixed by the court. Fed. R. Bankr. P. 6007(a).

Here, the Certificate of Service does not include a list of the parties served. The court cannot determine whether the Chapter 7 Trustee and creditors were served the Motion to Compel Abandonment pursuant to Federal Rule of Bankruptcy Procedure 6007(a). Thus, the Motion is denied on this independent ground.

SUBSTANTIVE DEFECTS

The court also notes that the Motion suffers from major substantive flaws as well. The Debtor seeks an order compelling the Chapter 7 Trustee to abandon the estate's interest in certain assets. 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).

The Motion, however, does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013, because it does not state with particularity the grounds upon which the requested relief is based.

Debtor requests an order compelling the Chapter 7 Trustee to abandon the estate's interest in the following assets:

1. Real property located at 11000 Union Hill Road, Columbia, California

2. Edward Jones Brokerage Account

3. Bank of America Checking Account, ending in 1799

4. All of the debtor's household goods and furnishings as described in Exhibit A to Schedule B filled with the debtor's petition

5. The debtor's wearing apparel as listed in debtor's Schedule B

6. The debtor's Fishing Pole and Tackle as listed in the debtor's Schedule B

7. The debtors' interest in the Waste Management Retirement Plan worth approximately $8,000

8. A 1992 Chevy 1 Ton Truck (non-op)

9. A 1972 Chevy ½ Ton Truck (not running)

10. A 2004 Circle J Stock Trailer

11. A 1994 Chevy ½ Ton 4WD Truck

12. "One mixed breed dog named."

The court does not have sufficient information regarding the property to be abandoned. For instance, the Debtor describes the third asset as a Bank of America Checking Account, offering the last four digits of the account number for identification purposes, but the value of the funds in the account is not described. Debtor also requests that the interest in "all of debtor's household goods and furnishings as described in Exhibit A" be abandoned, but do not describe the specific pieces of property. Debtor does not describe the funds that remain in his brokerage account.

The motion fails to describe the personal property sought to be abandoned, and tasks the court with the responsibility to canvass Debtor's schedules and petition to determine the items of property to be abandoned, and the value of the property and value of the exemptions claimed on the property. The court cannot be reasonably expected to do so, and it will not issue vague orders from the insufficient descriptions provided in Debtor's pleadings. The Motion is denied on the basis that it does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013.

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 without prejudice.

22. **12-91889-E-7** **SLF-3** | **GERALD CRAWFORD** **Pro Se** | **MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH RICHARD CRAWFORD** **1-30-14 [59]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on January 30, 2014. By the court's calculation, 35 days' notice was provided. 21 days' notice is required. That requirement was met.

Final Ruling: The Motion to Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(3). 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 Compromise Controversy is granted. No appearance required.

The Chapter 7 Trustee in this case, Gary R. Farrar, seeks the court's authorization to compromise a controversy with Richard Crawford ("Crawford"), regarding the Debtor's transfers on or about April 18, 2012, and April 23, 2012, totaling $18,300 to Crawford, Debtor's brother, within one year of the bankruptcy.

This controversy is the subject of the adversary proceeding entitled *Farrar v. Richard Crawford*, Case No. 13-09035-E. In the adversary case, the Trustee seeks to avoid the transfers of money that Debtor had made to his brother on or about April 18, 2012, and April 23, 2012 to pay a past due debt under 11 U.S.C. § 547. Trustee's theory is that Debtor made preferential payments to a family member within one year before the filing of his bankruptcy, on account of antecedent debts. Trustee also alleged that the transfer occurred within two years of the filing of the bankruptcy case, and was done with actual intent do hinder, delay, or defraud creditors under 11 U.S.C. § 548. Debtor was probably insolvent when he made the transfers because he filed for bankruptcy less than 90 days later, and there is a "special relationship" between Debtor and the recipient of the transfers, suggesting that the "badges of fraud" indicating intent to effect fraudulent transfers under 11 U.S.C. § 548, are present.

Crawford does not dispute that the transfer was preferential pursuant to 11 U.S.C. § 547, or fraudulent pursuant to 11 U.S.C. § 548. He does, however, dispute the amount of the transfer. Crawford contends that the amount of the transfer was $8,000, not $18,400.

TERMS OF THE SETTLEMENT AGREEMENT

Under the proposed compromise, Crawford has agreed to pay the bankruptcy estate $10,000 in settlement of the adversary proceeding. Crawford agreed to pay $4,000 to the Trustee upon signing of a settlement agreement, and to pay $6,000 to Farrar within 90 days of the date of the Settlement Agreement. As of the date of the filing of this Motion, Crawford has paid $4,000 to the Trustee. A copy of the settlement agreement, stating those terms, has been filed as Exhibit H in support of the Trustee's Motion. Dckt. No. 64 at 11.

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 Trustee argues that the four factors have been met, and that the settlement agreement is in the best interest of the estate and should be approved under Federal Rule of Bankruptcy Procedure 9019(a).

Probability of Success

Trustee argues that the probability of success in the adversary proceeding would be uncertain, because there are disputed factual issues. Trustee asserts that the transfers are voidable as preferential transfers pursuant to 11 U.S.C. § 547 or as fraudulent transfers pursuant to 11 U.S.C. § 548.

Crawford asserts, however, that the amount owed as a result of his benefitting from the transfers is $8,000, and not $18,400. Trustee states that while it is likely that Trustee would succeed on the merits of the litigation, it is unclear if the outcome would result in a judgment against Crawford for an amount higher than the settlement amount.

Difficulties in Collection

Trustee has not investigated the assets of Crawford, and does not know whether Crawford has sufficient assets to satisfy a judgment. However, given the fact that the transfers took place over 18 months ago, Trustee argues that it is reasonable to believe that he likely spent the money from the transfers, and collection may present a challenge.

Expense, Inconvenience and Delay of Continued Litigation

Trustee maintains that it would be expensive and time consuming to continue litigating this matter. Continued litigation will require extensive discovery, with written discovery requests and multiple depositions, including the depositions of Crawford, the Debtor, and other potential witnesses to the transfers made. The litigation expenses could be large compared to the amount at issue, and the costs of litigation may consume most or all of the value of the transfers.

Paramount Interest of Creditors

The Trustee argues that settlement is in the paramount interests of creditors since as the compromise allows Trustee to collect $10,000 for the estate immediately without expense, uncertainty, or delay of litigation. Thus, the compromise would result in significant savings and administrative expenses by avoiding litigation.

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 Richard Crawford 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 H in support of the motion on January 30, 2014 (Docket Number 61).

23. 09-93492-E-7 HCS-2 | **ALISA MCKNIGHT** | **Kristen A. Koo** | **MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH THE HARPER LAWSUIT AND THE MCKNIGHT LAWSUIT** **2-6-14 [42]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on February 6, 2014. By the court's calculation, 28 days' notice was provided. 21 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(3). 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 Compromise Controversy is granted. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Chapter 7 Trustee in this case, Gary R. Farrar, seeks the court's authorization to compromise the estate's interest in two lawsuits that the Debtor filed, which are as follows:

A. On December 22, 2009, multiple plaintiffs, including the Debtor, filed the lawsuit entitled *Maurice Harper, et al. V. California Department of Corrections and Rehabilitation, et al.*, Case No. 34-2009-00067178 (the "Harper Lawsuit"), on behalf of themselves and a proposed class of current and former African American and Hispanic employees, against the California Department of Corrections ("Department") and four of its employees. Generally, the complaint alleges that the class was subjected to race discrimination and harassment in violation of the Fair Employment and Housing Act (FEHA) since the Debtor began her employment with the Department in 2002.

The court in that case has rejected the class action designation, but permitted Debtor to pursue her claims individually. Debtor, who is an African American female who worked as a registered nurse at the Deuel Vocational Institution from November 2002 to March 2013, alleges that she was denied a promotion to Supervising Registered Nurse II in 2009 because of race. She also claimed that Defendants harassed her on the basis of her race and weight, and retaliated against her for complaining about the alleged discrimination and harassment. Most of the allegations in this case relate to conduct that occurred prepetition.

B. On July 6, 2012, Debtor filed a second lawsuit against the Corrections Department and several employees, entitled *Alisa McKnight v. CDCR et al., Case No. 34-2012-001127518* (the "McKnight Lawsuit"). The complaint alleges causes of action for race, sex, and disability discrimination; harassment, and retaliation in violation of the FEHA; violation of the Family Medical Rights Act, and Whistleblower retaliation in violation of Labor Code Section 1102.5. Debtor alleges that all events giving rise to the *McKnight* action occured after she filed her bankruptcy petition.

Debtor did not schedule or disclose in the bankruptcy case either the lawsuits or the claims that gave rise to the lawsuits. Trustee believes that most, or all, of the claims contained in the *Harper* lawsuit are property of the bankruptcy estate, but that at least some, and perhaps "more than some" of the claims contained in the *McKnight* lawsuit may not be property fo the estate. Trustee and his counsel investigated the facts and circumstances giving rise to the lawsuits and concluded that it was logical to try to settle them.

Defendants in the lawsuits made an initial settlement offer of $7,500. Trustee made an initial settlement demand of $35,000.

TERMS OF SETTLEMENT AGREEMENT

Trustee states that eventually, the parties were able to reach an agreement for settlement for $25,000. They have signed a settlement agreement that the motion is requesting that the court approve.

Separate from this agreement, the Debtor also has a tentative settlement with Defendants, in the amount of $75,000, with respect to her own claims against Defendants. Her settlement is conditional on this court

granting the instant motion. There is no trial date set yet in the *Harper* Lawsuit; there is a trial date of December 16, 2014, in the *McKnight* Lawsuit. Trustee asserts that the estate has no funds to prosecute the lawsuits and it would be very expensive to prosecute them. Moreover, Defendants have significant defenses to the lawsuits. Therefore, Trustee argues that the proposed compromise of $25,000 is a fair compromise and that it is beneficial to the bankruptcy estate.

REVIEW OF THE AGREEMENTS

Exhibit E filed in support of the Motion appears to be a Settlement Agreement and Release ("Harper Settlement Agreement") entered between the Trustee and the California Department of Corrections, to resolve the: (1.) *Harper, et al. V. California Department of Corrections and Rehabilitation, et al.*, Case No. 34-2009-00067178; and (2) *Alisa McKnight v. CDCR et al., Case No. 34-2012-001127518* lawsuits. Provision C, Settlement Agreement; Exhibit E, Dckt. No. 48 at 50. According to Page 2 of the Settlement Agreement, the California Department of Corrections has agreed to pay the cash sum of $25,000.00, made payable to the Trustee, as settlement consideration for the aforementioned cases.

The Harper Settlement Agreement will provide for the settlement and release as well as a potential for sale of the claims in the actions that Debtor has brought against Defendants, that constitute property of the estate. ¶ 3, Agreement, Exhibit E at 2, Dckt. No. 48. The settling parties agree, upon this court's approval of the motion and agreement, that Trustee will release his claims against the Corrections Department, and that the Corrections Department will release and forever discharge the Trustee and the bankruptcy estate any and all claims that the Department ever had as of the date of the agreement. Id. at ¶ 4a. The Harper Settlement Agreement is signed by Dana A Suntag, as attorney for the Chapter 7 Trustee, and William H. Downey, Deputy Attorney General of California, and attorney for the California Department of Corrections and Rehabilitation.

Exhibit F is a separate settlement agreement (the "McKnight Settlement Agreement") entered between Debtor and the State of California. Exhibit F, Dckt. No. 48 at 57. The global McKnight Settlement Agreement states that the California Department of Corrections and Rehabilitation will pay Debtor and her attorney of record, the total gross sum of $75,000.00, as consideration for Debtor's dismissal of her individual action against the Department. The McKnight Settlement Agreement is signed by Debtor, and Robert K. Gaultney of the Office of Legal Affairs, for the California Department of Corrections and Rehabilitation, and other named Defendants in the case. Dckt. No. 48 at 64.

The Harper Settlement Agreement and McKnight Settlement Agreement will be collectively referred to as the "Compromise."

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 Trustee argues that the four factors have been met, and that the Compromise is in the best interest of the estate and should be approved under Federal Rule of Bankruptcy Procedure 9019(a).

Probability of Success

Trustee states that the probability of success on the lawsuits are uncertain, summarizing the prospects of prevailing as follows:

Debtors discrimination claims

Debtor alleges that the Department of Corrections and Rehabilitation discriminated against her based on race when it denied her a promotion to Senior Nurse II (SRN II) and promoted a white coworker to the position instead. Under the *McDonnell-Douglas burden* shifting test, to prevailing a prima on a FEHA discrimination claim, a plaintiff must prove that: (1) she was a member of a protected class; (2) she was qualified for the position sought; (3) she was denied the position sought; and (4) circumstances suggests discriminatory motive. *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317, 354-55 (2000).

Here, the Debtor, an African-American female, alleges that Department of Corrections and Rehabilitation discriminated against her when Defendant Gorman, a hiring authority within the Department of Corrections and Rehabilitation, chose to promote a white nurse (Blanks) instead of the Debtor despite the Debtor's qualifications. The Debtor alleges that Gorman's and Blanks' use of racially insensitive language in the past establish the circumstances suggesting a discriminatory motive behind Gorman's decision to promote Blanks instead of the Debtor. The State believes Department of Corrections and Rehabilitation is likely to prevail under the *McDonnell Douglas* burden-shifting analysis because Defendants have substantial, well-documented evidence that the promotion process used to select Blanks over Gorman did not favor one race over another. Declaration of Dana Suntag, Dckt. No. 45 at ¶ 13.

The State has informed Trustee that all of its records show the Department of Corrections and Rehabilitation hiring panel that promoted Blanks instead of the Debtor followed a race neutral application review and

interview process that was designed to ensure that the most qualified individuals capable of performing the essential functions of a SRN II were selected. The hiring process: (1) consisted of a three-member hiring panel; (2) ranked candidates based on their performance on a written exam; (3) used a race-neutral structured interview process that was designed at the institution to identify candidates whose background, personality, leadership, and technical skill level was compatible with the skill level and essential functions needed for the SRN II position; (4) interviewed a diverse array of candidates; and (5) ultimately resulted in offers to two African-Americans and one Filipino candidate. The State has advised the Debtor has not indicated she has any evidence showing that the Department of Corrections and Rehabilitation's race-neutral hiring process was a mere pretext to disguise a hiring decision based on race. Therefore, the State believes no reasonable juror could find in favor of the Debtor.

Debtor's harassment claims

Trustee states that in order to establish a hostile work environment race harassment claim under FEHA, a plaintiff must allege facts showing that she was subject to harassment based on race that was sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment. *Hughes v. Pair*, 46 Cal. 4th 1035, 1043 (2009). The *Harper* complaint alleges Defendants harassed the Debtor by understaffing her shift, increasing her workload, insulting her weight and appearance, and falsely accusing the Debtor of violating work rules and policies. The State, however, has advised Trustee that the evidence shows the Debtor was not subjected to severe or pervasive harassment. The Debtor admitted she never heard Defendants directly insult her weight or appearance. The evidence shows the Debtor and Defendants' schedules and attendance during relevant periods did not permit sufficient contact for the Debtor to establish the workplace was permeated with severe or pervasive discriminatory harassment. The State also has advised that there are no facts in the *Harper* Lawsuit that show Defendants treated the Debtor differently or harassed her because of her race. Declaration of Dana Suntag, Dckt. No. 45 at ¶ 13.

Debtor's retaliation claims

Trustee further provides that in order to establish a prima facie case of retaliation under FEHA, a plaintiff must show: (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) there is a causal link between the protected activity and the employer's action. *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1042 (2005). Here, the Debtor claims the combined "intentional" understaffing of her shift, increased workload, false accusations of rules violations, and other "harassment" by staff shortly after she filed an EEOC complaint constitute the adverse employment action necessary to sustain a FEHA retaliation claim. However, the State has represented it believes the Debtor's complaint is subject to a motion for judgment on the pleadings because she states insufficient facts to show that the harassment alleged was sufficiently severe and pervasive to constitute an adverse employment action under *Yanowitz*. The State further advises that the Debtor's remaining allegations of harassment do not portray harassment that was sufficiently severe or pervasive to establish a workplace so permeated with abuse that it

materially altered the terms and conditions of the Debtor's employment. Declaration of Dana Suntag, Dckt. No. 45 at ¶ 13.

Trustee maintains that it is difficult to predict the manner in which these issues would resolve because of the disputed factual issues. There is no certainty of a favorable result if the estate were to continue to prosecute the lawsuits.

Difficulties in Collection

Since the State of California is the Defendant in the lawsuits, it is assumed there would be no difficulties in collecting on a judgment.

Expense, Inconvenience and Delay of Continued Litigation

It is uncertain whether Debtor can prevail in the lawsuits, and the estate would have to locate special counsel to handle the lawsuits. Special counsel would have to litigate on a contingency basis and advance all costs because the estate is not holding any funds or other assets. Trustee claims that the lawsuits would be expensive to handle, and there would likely be multiple depositions and expert witnesses to hire. There is also no trial date set in the *Harper* Lawsuit. There is a trial date of December 16, 2014, in the *McKnight* Lawsuit. Even after trial, there could be post-trial motions and appeals that could delay any recovery for years.

Paramount Interest of Creditors

The Trustee argues that settlement is in the paramount interests of creditors since as the compromise allows Trustee to collect $25,000 for the estate without the expense, uncertainty, or delay of litigation. Thus, the Compromise results in a significant savings in time and administrative expense by avoiding litigation.

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. Trustee's analysis of the Compromise as measured by the factors of *A & C Props* above militates in favor of the court approving this compromise. 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 the Department of Corrections and Rehabilitation 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 E in

support of the motion on February 6, 2014 (Docket Number 48).

24. 08-90896-E-7 CHARLES/TINA WILLIAMS ORDER TO APPEAR FOR EXAMINATION
08-9067 SCF-3 (MARIE WILLIAMS)
PURCELL V. WILLIAMS ET AL 2-19-14 [42]

Notice Provided: Plaintiff served the Order to Appear for Examination, Subpoena to Produce Documents, and a the Declaration of Stephen C. Ferlmann on Debtor on February 22, 2014. 12 days' notice of the hearing was provided.

No Tentative Ruling.

Gilbert L. Purcell, a Law Corporation ("Plaintiff"), is the Plaintiff and Judgment Creditor in the adversary case of *Purcell v. Williams et al*, Adversary Proceeding Case No. 08-09067. The court entered a default judgment against Defendants, Gartside Williams and Tina Marie Williams, on October 7, 2008, in the amount of $897,504.92 and held that this judgment is nondischargeable. Default Judgment, Bankr. E.D. Cal., Adv. Proc. No. 08-09067. The adversary proceeding was closed on November 4, 2009.

On February 14, 2014, Plaintiff filed a *subpoena duces tecum* to require that Debtor, Tina Marie Williams ("Debtor") appear and produce certain items at this Examination. This is the third such request from Plaintiff; the first examination occurred on July 14, 2010, and the second application for an order to appear for examination was dropped from calendar. Civil Minutes Order, Dckt. No. 40. For this Order to Appear, Dckt. No. 42, Plaintiff has ordered that Debtor Tina Marie Williams produce the following items:

1. Debtor's individual income tax returns and the income tax returns of any partnership, corporation, or other entity in which Judgment Debtor has an interest greater than five percent (5%) for the past three (3) years inclusive including work papers for each return.

2. Debtor's checking account statements for the last three years on all of Debtor's bank accounts

3. Copies of all financial statements and/or loan applications made by the Debtor within the last three years

4. Copies of any statements of investments, including copies of stocks and bonds, and other investment securities of any kind

5. The most recent savings loan passbook, savings account passbook, credit union savings passbook, any certificate of deposit in which Judgment Debtor has any interest or any other savings plan or savings account in which Debtor has interest

6. A list of all the contents of any safety deposit box which Debtor has a right to access, or in which property owned by Debtor is contained

7. All life insurance policies, endowment, annuity, and retirement policies or similar polices in which Debtor has or may have an interest, and which has or may have cash redemption or loan provisions

8. Copies of deeds of conveyance, whether recorded or otherwise, as to any real estate which Debtor now owns, has owned, or in the near future will hold an equitable or legal interest

9. Certificates of title and/or pink slips to all motor vehicles, trucks, tractors, farm machinery, boats, travel trailers, campers, and licensable vehicles of any kind which are owned by the Debtor or in which Debtor claims to have an interest; together with a list of all similar motor vehicles requested n this paragraph which have been purchased or disposed of during the past three years

10. Written records evidencing property transfer

11. A list of all personal property owned by Debtor including copies of receipts for the purchase of any personal property items with a value in excess of $250.00 for the last two years

12. A copy of any records pertaining to any ownership in livestock for the past two years

13. A copy of records pertaining to any pending personal injury or worker's compensation claim for the last two years

14. A copy of records pertaining to any interest Debtor has in an estate or trust, or pending probate matter

15. A copy of Debtor's pay advises or pay stubs from wages and/or tips earned from employment for the past twelve months

16. A copy of any and all books, papers, or records in Debtor's possession or control that may contain information concerning property or income or indebtedness due to Judgment Creditor

MARCH 6, 2014 HEARING

At the hearing, XXXX

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 hearing on the Order to Appear for Examination having been conducted, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that XXXX.

25.	**14-90155-E-11**	**NORTH AMERICAN DIESEL INDUSTRIES, INC.** **Brian S. Haddix**	**CONTINUED 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]**

CONT. FROM 2-13-14

Debtor's Atty: Brian S. Haddix

Notes:

Motion to Extend Time to File Scheduled filed 2-20-14, Dckt#42

Balance Sheet and Profit and Loss filed 2-24-14, Dckt#45

The Status Conference is XXXX.

FEBRUARY 13, 2014 HEARING

At the hearing the court addressed with the parties the representation issues, as well as the

The parties reported at the hearing that the following has been agreed to:

I. Operation of Business by Debtor in Possession.

II. Express Personnel Services will provide employee who will work for the "business," and will report to the Receiver. Diesel industries, Inc. is the Debtor in Possession operating the business.

A. Two warehouses

a. Main Shop

b. 2nd Warehouse will have key that will be maintained by the Express Personnel Service person. Any access to the 2nd Warehouse

c. Security cameras will be added to the main shop, to which receiver will have access 24/7. To be in place before business operation commences.

2. All existing jobs disclosed to Receiver

3. All new jobs disclosed to Receiver for approval.

4. No cash payments to business. All to be by check, cashier's check, or wire.

5. No sale of inventory will be approved by Receiver

6. All monies deposited to DIP account, receiver will have right to review.

7. Receiver given remote access to computer system, all books records.

III. Receiver Motion

A. Set for 10:30 a.m. on March 6, 2014 the continued hearing on filing of the receiver's motion.

B. The Status Conference on whether one counsel may represent the two Debtors is continued to 10:30 a.m. on March 6, 2014.

The parties shall prepare a proposed order, approve it as to form, and lodge it with the court.

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

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).

INTERIM ORDER

The court entered an interim order excusing the Receiver from complying with 11 U.S.C. § 543(a), (b) and (c). Dckt. 51. The court further ordered that Diesel Engines Industries, Inc. employ a temporary worker provided from Express Employment Professionals located in Turlock, CA to work in the debtor-in-possession Diesel Engine Industries, Inc.'s business office. The temporary worker shall assist in the day-to-day business administrations of the debtor-in-possession by providing clerical support but shall report directly to the Receiver.

The court also ordered that Diesel Engines Industries, Inc. shall install a video camera surveillance system which can be accessed remotely via the internet with the Receiver having access to the video camera surveillance system via the internet. Further, that Debtor shall install remote access software (i.e., gotomypc.com) on the "Server" computer to allow the Receiver remote access to the computer files located on the

"Server" and provide the Receiver the online login and password of the debtor-in-possession bank account(s) wherever they shall be located.

Additionally, the court ordered that Diesel Engines Industries, Inc. shall not accept any cash payments for services rendered and all new work to be performed by Diesel Engines Industries, Inc. shall be approved by the Receiver. Diesel Engines Industries, Inc. shall submit the terms of new work via e-mail to the Receiver. The Receiver shall have 24-hours to approve new work to be performed by Diesel Engines Industries, Inc.

Lastly, the court ordered that Debtor shall not sell inventory without the written consent of the Receiver, that the Receiver shall have access to 916 W. Glenwood at all times, that the Receiver or his agents shall have access and hold keys to 890 West Glenwood.

MARCH 6, 2014 HEARING

26.	**14-90155-E-11**	**NORTH AMERICAN DIESEL INDUSTRIES, INC.** **Brian S. Haddix**	**CONTINUED ORDER SETTING STATUS CONFERENCE RE: DEBTOR IN POSSESSION COUNSEL** **2-10-14 [16]**

CONT. FROM 2-13-14

Debtor's Atty: Brian S. Haddix

Notes:

Motion to Extend Time to File Scheduled filed 2-20-14, Dckt#42

Balance Sheet and Profit and Loss filed 2-24-14, Dckt#45

The Status Conference is XXXX.

FEBRUARY 13, 2014 HEARING

The parties reported at the hearing that the following has been agreed to:

I. Operation of Business by Debtor in Possession.

II. Express Personnel Services will provide employee who will work for the "business," and will report to the Receiver. Diesel industries, Inc. is the Debtor in Possession operating the business.

A. Two warehouses

a. Main Shop

b. 2nd Warehouse will have key that will be maintained by the Express Personnel Service person. Any access to the 2nd Warehouse

c. Security cameras will be added to the main shop, to which receiver will have access 24/7. To be in place before business operation commences.

2. All existing jobs disclosed to Receiver

3. All new jobs disclosed to Receiver for approval.

4. No cash payments to business. All to be by check, cashier's check, or wire.

5. No sale of inventory will be approved by Receiver

6. All monies deposited to DIP account, receiver will have right to review.

7. Receiver given remote access to computer system, all books records.

III. Receiver Motion

A. Set for 10:30 a.m. on March 6, 2014 the continued hearing on filing of the receiver's motion.

B. The Status Conference on whether one counsel may represent the two Debtors is continued to 10:30 a.m. on March 6, 2014.

The parties shall prepare a proposed order, approve it as to form, and lodge it with the court.

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
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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
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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).

27.	**14-90155-E-11 BSH-1**	**NORTH AMERICAN DIESEL INDUSTRIES, INC. Brian S. Haddix**	**APPLICATION FOR ORDER EXTENDING TIME FOR FILING DOCUMENTS 2-20-14 [42]**

Notice Provided: The Order Setting Hearing was served by the Clerk of the Court through the Bankruptcy Noticing Center on all parties, on February 24, 2014. 8 days notice of the hearing was provided.

No Tentative Ruling.

North American Diesel Industries, Inc., Debtor, moves the court for an order extending the time to file missing documents including schedules and the statement of financial affairs. The Debtor seeks the entry of an order extending the time for the Debtor to file its Schedules and Statement of Financial Affairs.

The court set the *Ex Parte* Application for Order Extending Time for Filing Documents for hearing to March 6, 2014. Dckt. 47.

28.	**14-90156-E-11**	**DIESEL ENGINE INDUSTRIES, INC. Brian S. Haddix**	**CONTINUED ORDER SETTING STATUS CONFERENCE RE: DEBTOR IN POSSESSION COUNSEL 2-10-14 [16]**

CONT FROM 2-13-14

Debtor's Atty: Brian S. Haddix

Notes:

The Status Conference is xxxx.

FEBRUARY 13, 2014 HEARING

The parties reported at the hearing that the following has been agreed to:

I. Operation of Business by Debtor in Possession.

II. Express Personnel Services will provide employee who will work for the "business," and will report to the Receiver. Diesel industries, Inc. is the Debtor in Possession operating the business.

A. Two warehouses

a. Main Shop

b. 2nd Warehouse will have key that will be maintained by the Express Personnel Service person. Any access to the 2nd Warehouse

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2. No cash payments to business. All to be by check, cashier's check, or wire.

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D. All monies deposited to DIP account, receiver will have right to review.

1. Receiver given remote access to computer system, all books records.

III. Receiver Motion

A. Set for 10:30 a.m. on March 6, 2014 the continued hearing on filing of the receiver's motion.

B. The Status Conference on whether one counsel may represent the two Debtors is continued to 10:30 a.m. on March 6, 2014.

The parties shall prepare a proposed order, approve it as to form, and lodge it with the court.

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.

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> (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

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The *ex parte* motion asserts the following.

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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).

29.	**14-90156-E-11 SMO-1**	**DIESEL ENGINE INDUSTRIES, INC. Brian S. Haddix**	**CONTINUED 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]**

CONT. FROM 2-13-14

Debtor's Atty: Brian S. Haddix

Notes:

Motion to Extend Time to File Scheduled filed 2-24-14, Dckt#44

Balance Sheet and Cash Flow Statement filed 2-20-14, Dckt#41

The Status Conference is xxxx.

FEBRUARY 13, 2014 HEARING

The parties reported at the hearing that the following has been agreed to:

I. Operation of Business by Debtor in Possession.

II. Express Personnel Services will provide employee who will work for the "business," and will report to the Receiver. Diesel industries, Inc. is the Debtor in Possession operating the business.

A. Two warehouses

a. Main Shop

b. 2nd Warehouse will have key that will be maintained by the Express Personnel Service person. Any access to the 2nd Warehouse

c. Security cameras will be added to the main shop, to which receiver will have access 24/7. To be in place before business operation commences.

2. All existing jobs disclosed to Receiver

3. All new jobs disclosed to Receiver for approval.

4. No cash payments to business. All to be by check, cashier's check, or wire.

5. No sale of inventory will be approved by Receiver

6. All monies deposited to DIP account, receiver will have right to review.

7. Receiver given remote access to computer system, all books records.

III. Receiver Motion

A. Set for 10:30 a.m. on March 6, 2014 the continued hearing on filing of the receiver's motion.

B. The Status Conference on whether one counsel may represent the two Debtors is continued to 10:30 a.m. on March 6, 2014.

The parties shall prepare a proposed order, approve it as to form, and lodge it with the court.

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

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).

INTERIM ORDER

The court entered an interim order excusing the Receiver from complying with 11 U.S.C. § 543(a), (b) and (c). Dckt. 51. The court further ordered that Diesel Engines Industries, Inc. employ a temporary worker provided from Express Employment Professionals located in Turlock, CA to work in the debtor-in-possession Diesel Engine Industries, Inc.'s business office. The temporary worker shall assist in the day-to-day business administrations of the debtor-in-possession by providing clerical support but shall report directly to the Receiver.

The court also ordered that Diesel Engines Industries, Inc. shall install a video camera surveillance system which can be accessed remotely via the internet with the Receiver having access to the video camera surveillance system via the internet. Further, that Debtor shall install remote access software (i.e., gotomypc.com) on the "Server" computer to allow the Receiver remote access to the computer files located on the "Server" and provide the Receiver the online login and password of the debtor-in-possession bank account(s) wherever they shall be located.

Additionally, the court ordered that Diesel Engines Industries, Inc. shall not accept any cash payments for services rendered and all new work to be performed by Diesel Engines Industries, Inc. shall be approved by the Receiver. Diesel Engines Industries, Inc. shall submit the terms of new work via e-mail to the Receiver. The Receiver shall have 24-hours to approve new work to be performed by Diesel Engines Industries, Inc.

Lastly, the court ordered that Debtor shall not sell inventory without the written consent of the Receiver, that the Receiver shall have access to 916 W. Glenwood at all times, that the Receiver or his agents shall have access and hold keys to 890 West Glenwood.

MARCH 6, 2014 HEARING

30.	14-90156-E-11 BSH-1	DIESEL ENGINE INDUSTRIES, INC. Brian S. Haddix	APPLICATION FOR ORDER EXTENDING TIME FOR FILING DOCUMENTS 2-24-14 [45]

Notice Provided: The Order Setting Hearing was served by the Clerk of the Court through the Bankruptcy Noticing Center on all parties, on February 24, 2014. 8 days notice of the hearing was provided.

No Tentative Ruling.

Diesel Engine Industries, Inc., Debtor, moves the court for an order extending the time to file missing documents including schedules and the statement of financial affairs. The Debtor seeks the entry of an order extending the time for the Debtor to file its Schedules and Statement of Financial Affairs.

The court set the *Ex Parte* Application for Order Extending Time for Filing Documents for hearing to March 6, 2014. Dckt. 47.