

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

March 9, 2017, at 10:30 a.m.

1. <u>16-23600</u> -E-7 DNL-4	TODD SHAW Cindy Lee Hill	MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH TODD ALLEN SHAW 2-9-17 [75]
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Tentative Ruling: 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.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 9, 2017. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Approval of Compromise has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

<p>The Motion for Approval of Compromise is granted.</p>

Alan Fukushima, the Chapter 7 Trustee ("Movant"), requests that the court approve a compromise and settle the exemption claimed by Debtor Todd Shaw ("Debtor") in the claims of the bankruptcy estate regarding medical malpractice claims for injuries to Debtor's gallbladder. The Trustee has engaged special counsel in the prosecution of the state court claims. Those state court claims have been settled (the subject of a separate motion).

March 9, 2017, at 10:30 a.m.

Movant and Settlor have resolved the disputes relating to the exemption stated by Debtor in the state court claims, subject to approval by the court, on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 79):

- A. Any recovery on account of the state court case shall be distributed first to special counsel Poswall White & Brelsford (employed at Dckt. 62) for allowed attorneys' fees and costs incurred during litigation, as approved by the court, and second from the remaining amount (i.e., net recovery) 50% to the bankruptcy estate and 50% to Debtor.
- B. Debtor irrevocably waives any and all claims of exemption available under any applicable law that has been made or that could be made against the bankruptcy estate's 50% portion of the net recovery from the state court case.
- C. Any settlement of the state court case by the Trustee shall be subject to bankruptcy court approval under Federal Rule of Bankruptcy Procedure 9019.

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 Constr.)*, 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 Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (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); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Movant argues that the four factors have been met.

Probability of Success

Movant argues that he could object to any claim of exemption against the state court case because of Debtor's failure to disclose his interest in that case and the underlying claims, but the result of such litigation is unknown because it would depend on state law defenses to exemptions, such as estoppel.

Difficulties in Collection

Movant has not addressed any difficulties in collection, but he notes that the difference between the net amount in dispute (\$26,880.85) and the amount recovered under the stipulation (\$13,440.42) creates a risk that litigation would consume the amount available for recovery.

Expense, Inconvenience, and Delay of Continued Litigation

Movant argues that the matter is not complex, but the proposed compromise eliminates any expense and delay associated with litigation.

Paramount Interest of Creditors

Movant argues that compromise enables a sure recovery for the bankruptcy estate of \$13,440.42 without any risk, delay, and expense caused by litigation, which is in the best interest of creditors.

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to Movant to purchase or prosecute the property, claims, or interests of the estate present such offers in open court. At the hearing -----.

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 because it secures a recovery for the Estate that may otherwise be consumed through further litigation. 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 Approve Compromise filed by Alan Fukushima, the Chapter 7 Trustee (“Movant”), 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 Compromise between Movant and Debtor Todd Shaw (“Settlor”) is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit A in support of the Motion (Dckt. 79).

2.

16-23600-E-7
DNL-5

TODD SHAW
Cindy Lee Hill

**MOTION TO COMPROMISE
CONTROVERSY/APPROVE
SETTLEMENT AGREEMENT
2-9-17 [81]**

Tentative Ruling: 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.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 9, 2017. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Approval of Compromise has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Approval of Compromise is granted.

Alan Fukushima, the Chapter 7 Trustee ("Movant"), requests that the court approve a compromise and settle competing claims and defenses with James Goldberg, M.D.; Amber Bender, P.A.; and Anne Marie McLellen, D.O. ("Settlor"). The claims and disputes to be resolved by the proposed settlement are from state court litigation regarding medical malpractice claims for injuries to Todd Shaw's ("Debtor") gallbladder.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 85):

- A. Movant and Settlor have agreed to a gross settlement payment of \$50,000.00 in exchange for a dismissal with prejudice of *Shaw v. Goldberg, et al.*, Sacramento County Superior Court, Case No. 34-2015-00185750, and for a release of all known and unknown claims against Settlor.

- B. After deducting Trustee's special counsel's costs of \$5,198.59 and fees of \$17,920.56 (40% of \$50,000.00), and subject to bankruptcy court approval, the net settlement amount is \$26,880.85.

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 Constr.)*, 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 Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (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); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Movant argues that the four factors have been met.

Probability of Success

Movant argues that success in litigation is unknown. Movant's special counsel has advised that success in litigation will depend in part on expert testimony concerning Settlor's actions and the applicable standard of care and that the issue of establishing the extent of damages could be particularly difficult.

Difficulties in Collection

Movant understands that under California law, non-economic damages in medical malpractice actions are capped at \$250,000.00, but he has not actually argued that there is a difficulty in collecting any recovery.

Expense, Inconvenience, and Delay of Continued Litigation

Movant argues that the underlying claims in the state court case are complex, and costs for expert witnesses and other associated trial costs will be significant, substantially reducing any recovery beyond attorneys' fees.

Paramount Interest of Creditors

Movant argues that compromise enables a sure recovery for the bankruptcy estate without any risk, delay, and expense caused by litigation, which is in the best interest of creditors.

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to Movant to purchase or prosecute the property, claims, or interests of the estate present such offers in open court. At the hearing -----.

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 because it avoids litigation that, according to Movant, would substantially reduce any recovery for 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 Approve Compromise filed by Alan Fukushima, the Chapter 7 Trustee (“Movant”), 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 Compromise between Movant and James Goldberg, M.D.; Amber Bender, P.A.; and Anne Marie McLellen, D.O. (“Settlor”) is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit A in support of the Motion (Dckt. 85).

3.

16-23600-E-7
DNL-6

TODD SHAW
Cindy Lee Hill

MOTION FOR COMPENSATION BY
THE LAW OFFICE OF POSWALL WHITE
& BRELSFORD FOR WILLIAM L.
BRELSFORD, JR., SPECIAL COUNSEL(S)
2-9-17 [70]

**THE COURT HAS SET THIS UNOPPOSED MOTION AS A TENTATIVE
RULING IN LIGHT OF THE RELATED HEARING ON THE MOTION
FOR APPROVAL OF SETTLEMENT SET FOR HEARING WITH A
TENTATIVE RULING TO GRANT THE MOTION**

**NO APPEARANCE BY SPECIAL COUNSEL REQUIRED
If Tentative Ruling is Not Adopted, the Court Will Continue
the Hearing to Allow Special Counsel to Address Any Issues Which Arose**

Tentative Ruling: 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.

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, creditors, parties requesting special notice, and Office of the United States Trustee on February 9, 2017. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Allowance of Professional Fees is granted.

Poswall White & Brelsford, the Attorney ("Applicant") for Alan Fukushima, the Chapter 7 Trustee ("Client"), makes a first and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period October 20, 2015, through January 13, 2017. The order of the court approving employment of Applicant was entered on December 12, 2016. Dckt. 62. Applicant requests fees in the amount of \$17,920.56 and costs in the amount of \$5,198.59.

STATUTORY BASIS FOR PROFESSIONAL FEES

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). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

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 for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors’ Comm. 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 services provided 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 [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including appearing as special counsel for Client in Sacramento County Superior Court Case No. 34-2015-00185750 and subsequent related correspondence and meetings with Client. With the assistance of Applicant, the medical malpractice claims have been settled for \$50,000, with the net proceeds divided equally between Debtor and the Bankruptcy Estate. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

Sacramento County Superior Court Case No. 34-2015-00185750: Applicant spent 14.8 months in this category. Applicant assisted Client with acting as special counsel to pursue the bankruptcy estate's interest in the State Court Case, meeting and advising the debtor regarding his claims, recovering medical records and engaging experts for the State Court Case, filing the complaint and taking depositions in the State Court Case, engage in settlement negotiations, and subsequent related correspondence and meetings with the debtor and Client.

Applicant computes the fees for the services provided as a percentage of the monies recovered for Client. Applicant represented Client in litigation to Sacramento County Superior Court Case No. 34-2015-00185750 asserting certain medical malpractice claims, for which Client agreed to a contingent fee of 40% of the gross settlement. In approving the employment of applicant, the court approved the contingent fee, subject to further review pursuant to 11 U.S.C. § 328(a). \$44,801.41 of net monies (exclusive of these requested fees and costs) was recovered for Client.

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$5,198.59 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Deposition Costs		\$1,194.90
Expert Fees		\$2,500.00
Filing Fees in State Court Case		\$435.00
Mediator Fees		\$533.33
Medical Records		\$535.36
Total Costs Requested in Application		\$5,198.59

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the fees computed on a percentage basis recovery for Client are reasonable and a fair method of computing the fees of Applicant in this case. Such percentage fees are commonly charged for such services provided in non-bankruptcy transactions of this type. The court allows Final Fees of \$17,920.56 pursuant to 11 U.S.C. § 330 for these services provided to Client by Applicant. The Trustee is authorized to pay from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

Costs & Expenses

First and Final Costs in the amount of \$5,198.59 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

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

Fees	\$17,920.56
Costs and Expenses	\$5,198.59

pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Poswall White & Brelsford (“Applicant”), Attorney for 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 Poswall White & Brelsford is allowed the following fees and expenses as a professional of the Estate:

Poswall White & Brelsford, Professional employed by the Trustee

Fees in the amount of \$17,920.56

Expenses in the amount of \$5,198.59,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Trustee.

IT IS FURTHER ORDERED that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

4.	<u>16-20852</u> -E-11 DNL-1	MATHIOPOULOS 3M FAMILY LIMITED PARTNERSHIP Luke Hendrix	CONTINUED MOTION TO USE CASH COLLATERAL 4-21-16 <u>[40]</u>
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Final Ruling: No appearance at the March 9, 2017 hearing is required.

The matter is removed from the calendar.

On February 24, 2017, the court confirmed Debtor in Possession’s plan of reorganization. Dckt. 197. With a confirmed plan in effect, Debtor in Possession no longer needs to move for authority to use cash collateral. This matter is removed from the calendar.

Tentative Ruling: 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.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 16, 2017. By the court's calculation, 21 days' notice was provided. 21 days' notice is required (Fed. R. Bankr. P. 2002(a)(6), twenty-one-day notice requirement when requested fees exceed \$1,000.00).

The Motion for Allowance of Professional Fees was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 offer 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. At the hearing, -----
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The Motion for Allowance of Professional Fees is granted.

Gonzales & Associates, Inc., the Accountant ("Applicant") for J. Michael Hopper, the Chapter 7 Trustee ("Client"), makes a first and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period October 26, 2015, through February 6, 2017. The order of the court approving employment of Applicant was entered on January 29, 2017. Dckt. 194. Applicant requests fees in the amount of \$3,026.00 and costs in the amount of \$6.80.

STATUTORY BASIS FOR PROFESSIONAL FEES

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). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Benefit to the Estate

Even if the court finds that the services billed by a professional are “actual,” meaning that the fee application reflects time entries properly charged for services, the professional must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors’ Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). A professional must exercise good billing judgment with regard to the services provided as the court’s authorization to employ a professional to work in a bankruptcy case does not give that professional “free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible]

recovery.” *Id.* at 958. According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including performing tax related accounting services, income tax preparation in compliance with state and federal authorities, and subsequent related correspondence and meetings with Client. The Estate has \$137,406.00 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant has not provided a task billing analysis, but has provided evidence for the services provided, which are categorized as a whole:

Accounting Services: Applicant spent 11.70 hours in this category. Applicant assisted Client regarding Client’s tax filing requirements, advised Client on the estate’s tax obligations, including those arising from the Client’s sale of the 8th Street Property and the Acacia Property, prepared the estate’s 2016 tax returns, prepared 11 U.S.C. § 503(b) tax determination letter, and advised the Client with respect to general tax related issues throughout the case.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Gene Gonzales, Accountant	2.20	\$330.00	\$726.00
	2.40	\$340.00	\$816.00

Lori Cima, Accountant	0.70	\$200.00	\$140.00
	6.40	\$210.00	\$1,344.00
Total Fees For Period of Application			\$3,026.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$6.80 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage		\$6.80
Total Costs Requested in Application		\$6.80

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$3,026.00 approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

Costs & Expenses

First and Final Costs in the amount of \$6.80 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	\$3,026.00
Costs and Expenses	\$6.80

pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Gonzales & Associates, Inc. (“Applicant”), Accountant for 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 Gonzales & Associates, Inc. is allowed the following fees and expenses as a professional of the Estate:

Gonzales & Associates, Inc., Professional employed by the Trustee

Fees in the amount of \$3,026.00

Expenses in the amount of \$6.80,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Trustee.

IT IS FURTHER ORDERED that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

6. [15-20081](#)-E-7 JANET ROBINSON
DNL-16 Pro Se

MOTION FOR COMPENSATION BY
THE LAW OFFICE OF DESMOND,
NOLAN, LIVAICH & CUNNINGHAM FOR
J. LUKE HENDRIX, TRUSTEES
ATTORNEY(S)
2-16-17 [\[216\]](#)

Tentative Ruling: 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.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 16, 2017. By the court's calculation, 21 days' notice was provided. 21 days' notice is required (Fed. R. Bankr. P. 2002(a)(6), twenty-one-day notice requirement when requested fees exceed \$1,000.00).

The Motion for Allowance of Professional Fees was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 offer 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. At the hearing, -----

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The Motion for Allowance of Professional Fees is granted.
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Desmond, Nolan, Livaich & Cunningham, the Attorney ("Applicant") for J. Michael Hopper, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period March 29, 2015, through February 8, 2017. The order of the court approving employment of Applicant was entered on April 30, 2015. Dckt. 61. Applicant requests fees in the amount of \$36,952.00 and costs in the amount of \$1,058.10.

STATUTORY BASIS FOR PROFESSIONAL FEES

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). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

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 for services, the an attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors’ Comm. 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 services provided as the court's authorization to employ an attorney to work in a bankruptcy case does not give that an attorney "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including investigation and administration of 8th Street Property and Acacia Property, turnover and contempt proceedings and related matters, assisting and advising the Client regarding discharge matters, and employment and fee applications. The estate has \$137,406.00 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

Investigation and Administration of 8th Street Property and Acacia Property: Applicant spent 53.70 hours in this category. Applicant assisted Client with researching and advising the Client regarding competing claims of interest in the same, preparing all motions and supporting documentation for sale of the properties, and drafting the Client's application for order shortening time to hear the Clients motion to pay administrative taxes. Applicant also engaged in subsequent related correspondence and meetings with Client and the debtor's counsel.

Turnover and Contempt Proceedings and Related Matters: Applicant spent 35.70 hours in this category. Applicant drafted Client's motion and supporting documentation for an order compelling the debtor to account for all post-petition rents on the 8th Street Property and Acacia Property, turn over of matters relating to those properties, and application to issue discovery to Wells Fargo regarding the debtor's claims of both properties. Applicant also engaged in subsequent related correspondence and meetings with Client and the debtor's counsel.

Assisting and Advising Client Regarding Discharge Matters: Applicant spent 37.30 hours in this category. Applicant drafted a stipulation to extend the deadline to object to the debtor's discharge, the Client's complaint objecting to the debtor's discharge and gave advice pertaining to the discharges and proceeding. Applicant also engaged in subsequent related correspondence and meetings with Client and the debtor's counsel. Applicant also engaged in subsequent related correspondence and meetings with Client and the debtor's counsel.

Employment and Fee Applications: Applicant spent 16.20 hours in this category. Applicant drafted employment applications for the Applicant, the Client's real estate broker, and the bankruptcy estate's accountant. Applicant also drafted final fee applications for the accountant and itself.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
J. Russell Cunningham, attorney	19.90	\$400.00	\$7,960.00
	8.50	\$425.00	\$3,612.50
J. Luke Hendrix, attorney	3.90	\$275.00	\$1,072.50
	5.10	\$325.00	\$4,907.50
Gabriel Herrera, attorney	65.60	\$195.00	\$12,792.00
	28.10	\$225.00	\$6,322.50
Nicholas Kohlmeyer, attorney	1.30	\$200.00	\$260.00
Laurie Moede, courier	0.50	\$50.00	<u>\$25.00</u>
Total Fees For Period of Application			\$36,952.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$1,058.10 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage		\$228.65
Photocopies	\$0.05	\$166.90
Advances (i.e. parking, recording/filing fees)		\$662.55
Total Costs Requested in Application		\$1,058.10

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$36,952.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

First and Final Costs in the amount of \$1,058.10 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	\$36,952.00
Costs and Expenses	\$1,058.10

pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Desmond, Nolan, Livaich & Cunningham (“Applicant”), Attorney for 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 Desmond, Nolan, Livaich & Cunningham is allowed the following fees and expenses as a professional of the Estate:

Desmond, Nolan, Livaich & Cunningham, Professional employed by the Trustee

Fees in the amount of \$36,952.00

Expenses in the amount of \$1,058.10,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Trustee.

IT IS FURTHER ORDERED that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

7. [14-29284-E-7](#) **CHARLES MILLS**
DNL-26 **Lucas Garcia**

**MOTION FOR COMPENSATION BY
THE LAW OFFICE OF DESMOND,
NOLAN, LIVAICH & CUNNINGHAM FOR
J. LUKE HENDRIX, TRUSTEES
ATTORNEY(S)
2-9-17 [[472](#)]**

Final Ruling: No appearance at the March 9, 2017 hearing is required.

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, creditors, parties requesting special notice, and Office of the United States Trustee on February 9, 2017. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is granted.

Desmond, Nolan, Livaich & Cunningham, the Attorney ("Applicant") for Kimberly Husted, the Chapter 7 ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period December 29, 2014, through January 25, 2017. The order of the court approving employment of Applicant was entered on January 7, 2015. Dckt. 170. Applicant requests fees in the amount of \$75,000.00 and costs in the amount of \$1,507.97.

STATUTORY BASIS FOR PROFESSIONAL FEES

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). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

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 for services, the an attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors’ Comm. 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 services provided 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 [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery.” *Id.* at 958. According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

(a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including administration of Rua Esperanza, administration of the Pinehurst property, exemptions, investigations and administration of other assets, and employment and fee applications along with all related matters. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

In her declaration, the Chapter 7 testifies that the Estate currently has approximately \$145,000, with a state tax refund of \$17,797 expected to be recovered. Dckt. 474. From that, the Trustee has to pay approximately \$24,367 to Tony Manning pursuant to the court approved settlement.

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

Administration of Rua Esperanza and Related Matters: Applicant spent 74.90 hours in this category. Applicant assisted Client with researching and advising regarding liens asserted against the property, reviewed the Motion for Relief from Automatic Stay filed against the Rua Esperanza, participated in negotiations and all sale agreement processes, drafted Client's motion to approve use of cash collateral, reviewed and drafted necessary documents for the sale, and engaged in subsequent related correspondence and meetings with Client and the debtor's counsel.

Administration of the Pinehurst Property and Related Matters: Applicant spent 49.40 hours in this category. Applicant researched and advised Client of the claim of lien against the property, drafted the settlement agreement and subsequent related motions, reviewed and drafted all motions regarding the sale agreement, and engaged in subsequent related correspondence and meetings with Client and the debtor's counsel.

Exemptions and Related Matters: Applicant spent 86.90 hours in this category. Applicant researched and advised the Client regarding the debtor's claim of homestead exemption against the Pinehurst Property and various other claims of exemptions. Applicant also drafted objections to claim of exemptions,

settlement agreements, and a motion for turn over of the Pinehurst Property and other things. Applicant also engaged in subsequent related correspondence and meetings with Client and the debtor's counsel.

Investigations and Administration of Other Assets and Related Matters: Applicant spent 46.30 hours in this category. Applicant drafted the motion to approve the Client's auction of various items of personal property recovered, the sale agreement with the debtor concerning the Hummer, applications to issue discover to various individuals and entities regarding the debtor's business affairs, and several stipulations with the debtor providing extensions of the deadline to object to the debtor's discharge and exemptions. Applicant also engaged in subsequent related correspondence and meetings with Client and the debtor's counsel.

Employment and Fee Applications: Applicant spent 25.90 hours in this category. Applicant drafted employment applications for itself, Keller Williams Realty, Reed Block Realty, and West for dealing with matters pertaining to this case and the Rua Esperanza and Pinehurst Properties. Applicant also prepared this fee application.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
J. Russell Cunningham, attorney	2.00	\$400.00	\$800.00
J. Luke Hendrix, attorney	185.80	\$275.00	\$51,095.00
	79.20	\$325.00	\$25,740.00
Nabeel Zuberi, attorney	6.30	\$175.00	\$1,102.50
	7.80	\$200.00	\$1,560.00
Laurie Moede, courier	2.30	\$50.00	<u>\$115.00</u>
Total Fees For Period of Application			\$80,412.50

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$75,000.00 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage		\$576.77
Photocopies	\$0.05	\$419.90
Advances (i.e. parking, recording/filing fees)		\$511.30
Total Costs Requested in Application		\$1,507.97

FEES AND COSTS & EXPENSES ALLOWED

Fees

Applicant seeks to be paid a single sum of \$75,000.00 for its fees incurred for the Client. First and Final Fees and Costs in the amount of \$75,000.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

First and Final Costs in the amount of \$1,507.97 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	\$75,000.00
Costs and Expenses	\$1,507.97

pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Desmond, Nolan, Livaich & Cunningham (“Applicant”), Attorney for 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 Desmond, Nolan, Livaich & Cunningham is allowed the following fees and expenses as a professional of the Estate:

Desmond, Nolan, Livaich & Cunningham, Professional employed by the Trustee

Fees in the amount of \$75,000.00

Expenses in the amount of \$1,507.97,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Trustee.

IT IS FURTHER ORDERED that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

8. [17-90129](#)-E-12 J & B DAIRY
AAS-1 Patrick Greenwell

**MOTION TO CONFIRM TERMINATION
OR ABSENCE OF STAY AND/OR
MOTION FOR AN ORDER THAT
DEBTOR IS NOT ELIGIBLE TO FILE
ANOTHER CASE FOR 180 DAYS O.S.T.
2-28-17 [\[10\]](#)**

No Tentative Ruling: 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.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 12 Trustee, and Office of the United States Trustee on February 28, 2017. By the court's calculation, 9 days' notice was provided.

The Motion to Confirm Absence of the Automatic Stay and for an Order that Debtor is Ineligible to File Another Bankruptcy Case for 180 Days was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). 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 offer 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. At the hearing -----.

The Motion to Confirm Absence of the Automatic Stay is denied, and the Motion for an Order that Debtor is Ineligible to File Another Bankruptcy Case for 180 Days is XXXXXXXXXXXXXX.

J & B Dairy ("Debtor" and the Chapter 12 "Debtor in Possession") commenced this bankruptcy case on February 23, 2017. Bank of Stockton ("Movant") seeks confirmation that the automatic stay is not in effect in this bankruptcy case pursuant to 11 U.S.C. § 362(c)(4)(A)(i) & (ii) and seeks an order that Debtor is ineligible to file a bankruptcy case for a period of 180 days pursuant to 11 U.S.C. § 109(g). FN.1.

FN.1. The court notes that this Motion attempts to join multiple claims for relief in one motion. The first being confirmation that there is no automatic stay pursuant to 11 U.S.C. § 362(j). The second motion is for an order that Debtor is not eligible to file bankruptcy as provided in 11 U.S.C. § 109(g). This second motion sounds in the nature of a motion to dismiss, based on 11 U.S.C. § 109(g).

Though parties may join multiple claims in an adversary proceeding, with Federal Rule of Civil Procedure 18 being incorporated into Federal Rule of Bankruptcy Procedure 7018, Rule 18 has not been incorporated into the bankruptcy contested matter (bankruptcy case motion, objection, application process). Fed. R. Bankr. P. 9014(b). Movant has improperly joined the dismissal motion, based on 11 U.S.C. § 109(g) with the automatic stay relief request.

In looking at the Certificate of Service, it does not appear that Movant has served all other parties in interest with the Motion or notice of motion requesting that the bankruptcy case be dismissed. Cert. of Service, Dckt. 16; Fed. R. Bankr. P. 2002(a)(4).

This is Debtor's third bankruptcy petition pending in the past year with the prior two cases having been dismissed. Debtor's prior bankruptcy cases (Nos. 16-90923 and 16-91096) were dismissed on December 7, 2016, and February 13, 2017, respectively. *See* Order, Bankr. E.D. Cal. No. 16-90923, Dckt. 30, December 7, 2016; Order, Bankr. E.D. Cal. No. 16-91096, Dckt. 43, February 13, 2017.

To address repeatedly filed bankruptcy cases, Congress has provided in 11 U.S.C. § 362(c)(4) that (emphasis added):

“(c) Except as provided in subsections (d), (e), (f), and (h) of this section—

...

(4) (A) (i) if a single or joint case is filed **by or against a debtor who is an individual under this title**, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case;”

While addressing multiple filings of bankruptcy cases, 11 U.S.C. § 362(c)(4) is limited to an “individual” who is a debtor. Here the Debtor is a partnership, not an individual. *See* 11 U.S.C. § 101 provisions defining individual as a human, something separate and apart from corporations, partnership, and other non-human entities, including 11 U.S.C. § 101 (8), (18), (19A), (30), (41), (41A), and (45).

Here, the Debtor is a partnership (Petition, Dckt. 1 at 1). It is not an “individual,” and therefore 11 U.S.C. § 362(c)(4) does not apply to this filing by Debtor.

11 U.S.C. § 109(g)—Eligibility to be a Debtor

Congress has also enacted 11 U.S.C. § 109(g) relating to the eligibility of a person (which includes partnerships, 11 U.S.C. § 101(41)) providing:

Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

The Motion requests that the court “order” that Debtor is not eligible to file this bankruptcy case under the above section. The Motion appears to focus on the Debtor not responding and prosecuting the prior two cases, both being dismissed due to the failure to file the basic documents required of any debtor—Schedules and Statement of Financial Affairs.

On its face, there is not a provision for the court to decide if a debtor should be barred from filing a bankruptcy pursuant to 11 U.S.C. § 109(g), with Congress having specified in that section who is not permitted to be a debtor in a bankruptcy case.

As with 11 U.S.C. § 362(c)(4), the first potentially prohibited person from being a debtor by 11 U.S.C. § 109(g) is an “individual.” As discussed above, the Debtor is a partnership, not an individual.

The second potentially prohibited person from being a debtor by 11 U.S.C. § 109(g) would be a “family farmer.” That term is defined in 11 U.S.C. § 101(18) to be:

“(18) The term “family farmer” means—

(A) **individual or individual and spouse** engaged in a farming operation whose aggregate debts do not exceed \$4,153,150 and not less than 50 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual’s or such individual and spouse’s gross income for—

(i) the taxable year preceding; or

(ii) each of the 2d and 3d taxable years preceding;

the taxable year in which the case concerning such individual or such individual and spouse was filed;

or

(B) corporation or **partnership in which more than 50 percent of the outstanding stock or equity is held by one family**, or by **one family and the**

relatives of the members of such family, and such family or such relatives conduct the farming operation,”

In reviewing the Petition, it is signed by John Knutson as the General Partner, and the Statement Regarding Authority to Sign and File Petition is signed by “John Knutson, General Partner,” and “Brenda Calhoun Knutson, General Partner.” Dckt. 1.

It appears that the partnership Debtor may qualify for consideration under 11 U.S.C. § 109(g), but because no Statement of Financial Affairs has been filed (in this or prior cases), the court does not know all of the partners and whether it is the family members operating the farming operation.

Neither the Motion nor the Points and Authorities address whether the passive allowing multiple prior bankruptcy cases to be dismissed for failure to file documents constitutes a “willful failure of the debtor . . . to appear before the court in proper prosecution of the case” or “debtor [requesting and obtaining] the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362.”

DEBTOR’S RESPONSE

Debtor in Possession filed a Response on March 4, 2017. Dckt. 21. Debtor is represented by a different attorney in this case than in the prior case. Debtor states that it intends to file a motion to “impose” the stay under 11 U.S.C. § 362(c)(4)(A)(i). Debtor explains, as the court is aware, Debtor’s former counsel encountered serious health problems during the prior two cases.

At the hearing, in light of Debtor being a partnership, with respect to potential 11 U.S.C. § 362(c)(3)(A)(i) relief, counsel for the Debtor in Possession explained **XXXXXXXXXXXXXXXXXXXX**.

MARCH 9, 2017 HEARING

At the March 9, 2017 hearing, **XXXXXXXXXXXXXXXXXXXXXXXXXXXX**.

No other or additional relief is granted by the court.

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 Confirm Absence of the Automatic Stay and for an Order that Debtor is Ineligible to File Another Bankruptcy Case for 180 Days filed by Bank of Stockton (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED the Motion for Order Confirming that the automatic stay provisions of 11 U.S.C. § 362(a) are not in effect in this case is denied.

IT IS FURTHER ORDERED that the Motion for Order that Debtor J&B Dairy is not eligible to be a debtor in this bankruptcy case is **XXXXXXXXXXXXXXXXXXXXX.**