UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

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

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1. 12-41713-E-11 MARVIN/ARNELLE BROWN
RLC-3 Stephen M. Reynolds

MOTION TO VALUE COLLATERAL OF BANK OF AMERICA, N.A.
2-11-14 [134]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on February 11, 2014. By the court's calculation, 30 days' notice was provided. 28 days' notice is required. That requirement was met.

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

The Motion to Value the Secured Claim of Wells Fargo Bank, N.A., which claim is identified as the fourth priority secured claim of Wells Fargo Bank, N.A. identified in Proof of Claim No. 9, is granted and the secured claim is determined to have a value of $0.00 pursuant to 11 U.S.C. § 506(a). 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 is accompanied by Debtor-in-Possession Marvin Brown's declaration. The Debtors in Possession are the owners of the subject real property commonly known as 2000 Daybreak Court, Fairfield, California. The Debtors in Possession seek to value the property at a fair market value of $350,000.00 as of the petition filing date. As the owner, a Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Debtors in Possession seek an order valuing the fourth priority lien asserted by Claimant Wells Fargo Bank in Claim No. 9, for the amount of $6,605.87. Proof of Claim No. 9. Wells Fargo Bank, N.A., describes the basis of the claim as for a "retail install contract," and the nature of the

secured claim as a "QUALITY FIRST HOME IMPROVE." The value of the property is stated to be $6,545.32. Debtors in Possession acknowledge that they believe the claim is related to solar equipment permanently attached to the Debtors' in Possession residence.

The first deed of trust secures a loan with a balance of approximately $372,637.00. Debtors in Possession are not requesting that the claim secured by the first deed of trust be valued with this motion. Rather, the Motion seeks to value the $6,605.87 claim filed by Wells Fargo, N.A., presumably for solar equipment installed in Debtors' in Possession's residence. The court addresses Debtors' in Possession statements regarding the second and third priority liens below.

"Stripped Junior Liens"

Debtors' in Possession statements concerning the current status of the second and third liens on the subject property are inaccurate. According to the Debtors' in Possession Schedule D, the first deed of trust of Bank of America, N.A., secures a loan with a balance of approximately $372,637.00. Creditor Self Help Federal Credit Union's second deed of trust secures a loan with a balance of approximately $154,460.00, whereas Creditor Pentagon Federal Credit Union's third deed of trust secures repayment of the loan in the amount of $175,932. The Debtors in Possession state that the "second and third priority liens, however, were 'stripped' by this courts orders dated January 24, 2013. This assertion is not completely accurate. FN.1.

FN.1. *See In re Frazier*, for a discussion of how, although the secured claim treatment under the Chapter 13 plan to reconvey a junior lien for a payment equal to the value of the collateral is commonly called a "lien strip," the term "lien strip" is not an accurate statement of the legal effect of the Chapter 13 plan, Bankruptcy Code, and order of the court. *In re Frazier*, 448 B.R. 803, 807 (Bankr. E.D. Cal. 2011) *aff'd. Frazier v. Real Time Resolutions, Inc.*, 469 B.R. 889 (E.D. Cal. 2012). In the valuing the amount of the claim pursuant to 11 U.S.C. § 506(a), the court does not remove or "strip" the lien from the property. Rather, **it is only upon the completion of the plan and payment of the value in the collateral securing the claim**, that the Debtor can then obtain a release of the lien. The secured claim amount has been paid at that point, and there is no remaining obligation secured by the lien. *In re Frazier*, 448 B.R. 803, 807. Also see *Martin v. CitiFinancial Services, Inc. (In re Martin)*, Adv. No. 12-2596, 2013 LEXIS 1622 (Bankr. E.D. CA 2013).

The debtor must obtain a discharge in order to obtain the release of a lien based on a secured claim valuation performed pursuant to 11 U.S.C. § 506(a). The discharge is issued upon completion of the Chapter 13 Plan. The entry of the discharge signifies that the debtor has successfully completed the Chapter 13 Plan by paying all creditors the amount required under this new contract embodied in the Plan. *In re Frazier*, 448 B.R. 803, 807-08 (Bankr. E.D. Cal. 2011) *aff'd sub nom. Frazier v. Real Time Resolutions*, Inc., 469 B.R. 889 (E.D. Cal. 2012).

Here, the second and third deeds of trust on the subject property, held by Self Help Federal Credit Union and Pentagon Federal Creditor Union, are still effective. On January 24, 2013, the court issued two orders: first, the court determined the secured claim of the Self Help Federal Credit Union to be $0.00. Civil Minute Order, Dckt. No. 34. Second, the court valued the collateral, the same subject property located at 2000 Daybreak Court, Fairfield, California, of Pentagon Federal Credit Union and determined that the creditor's secured claim is $0.00. Dckt. No. 35. It is inaccurate to assert that the second and third priority liens were "stripped" by court orders dated January 24, 2013, as the Debtors-in-Possession state in their Motion. Dckt. No. 134 at 2.

A review of the court docket shows, that the Debtors in Possession have not yet confirmed a Chapter 11 Plan, and have failed to confirm one since the case was filed on December 20, 2012. The Debtors in Possession have not completed a plan to render them able to release a lien through a discharge. Thus, the Debtors in Possession have not yet obtained a release of the second and third position liens on the subject property.

LIMITED OPPOSITION BY CREDITOR WELLS FARGO BANK, N.A.

Wells Fargo Bank, N.A., identifies itself as the Trustee for the "Holders of Banc of America Mortgage Securities, Inc. Mortgage Pass-Through Certificates, Series 2005-J," and as a creditor and secured party in interest with the first priority secured with regard to the property commonly known as 2000 Daybreak Court, Fairfield, California.

Wells Fargo Bank, N.A. claims to hold the first priority deed of trust on the Daybreak Court property. The property is Debtors' principal residence. According to the Wells Fargo Bank, N.A.'s second Proof of Claim, filed on or about April 8, 2013, the total amount of its claim is $372,834.22 with pre-petition arrearage of $2,493.38. Proof of Claim No. 16. Wells Fargo, N.A., states in its Limited Opposition that,

> [C]onsidering the alleged holder of the junior lien has a name similar to that of Secured Creditor herein, Secured Creditor is filing the instant limited opposition to ensure that its first priority lien on the Daybreak Court Property is not affected in any way by the Valuation Motion.

Wells Fargo Bank, N.A., asserts that its lien is entitled to the first priority position, among the many liens encumbering the Daybreak Court Property. Wells Fargo Bank, N.A. argues that since its senior lien is secured against the Daybreak Court Property, which is Debtors' principal residence and is partially secured, the lien cannot be modified pursuant to 11 U.S.C. § 1123(b)(5). Wells Fargo Bank, N.A. also characterizes the Motion as attempting to "strip only the junior lien on the residence, which is consistent with Debtors' proposed Plan that leaves the Secured Creditor's claim unimpaired." Wells Fargo Bank, N.A. argues that the title of the Motion merely indicates that Debtors seek to value the Daybreak Court property, and that the prayer for relief does not differentiate between the senior and junior liens on the Daybreak Court Property.

Wells Fargo Bank, N.A. does not believe that the Motion is intended

to avoid or modify its first priority of lien, but files this opposition in "abundance of caution to protect against a lien strip by ambush." Wells Fargo Bank, N.A. states that if the Debtors in Possession are willing to stipulate or specifically indicate in an order that the Motion shall not discharge, strip, or modify the rights of the claim of the first priority lien on the Daybreak Court Property, then Wells Fargo Bank, N.A. will withdraw this opposition.

DISCUSSION

In support of the request to value the $6,605.87 secured claim of Wells Fargo Bank, N.A., Proof of Claim No. 9, Debtors in Possession state that their opinion of the fair market value of the subject property is $350,00.00, which is evidence of the asset's value. Fed. R. Evid. 701; *Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004). The first deed of trust of Bank of America, N.A., has an outstanding balance of $372,637. Therefore, the respondent creditor's claim secured by a fourth position lien is completely under-collateralized.

Wells Fargo Bank, N.A.'s secured fourth position claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> The Motion for Valuation of Collateral filed by Debtors in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the secured claim of Wells Fargo Bank, N.A., secured by a junior deed of trust encumbering an asset described as 2000 Daybreak Court, Fairfield, California, such claim stated in Proof of Claim No. 9 in this case, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the asset is $350,000.00 and is encumbered by liens securing claims which exceed the value of the asset.

2. 13-24254-E-7 HSM-11 — RUSS TRANSMISSION INC. — Gary F. Zilaff — MOTION TO SELL AND/OR MOTION TO PAY — 2-20-14 [119]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on February 20, 2014. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) 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 Permit Debtor 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) and 1303. Here, the Trustee, Susan Didriksen, ("Trustee") proposes to sell the real property commonly known as 6671 Elvas Avenue, Sacramento County, Sacramento, California (the "Property").

In her Motion, Trustee seeks approval from the court for:

I. Trustee's entry of the Purchase Agreement and sale of the property pursuant to the terms outlined below;

II. Payment of other customary expenses of closing associated with this sale;

III. Payment of the commission to Agent consistent with the approved listing agreement, if the proposed sale is approved and consummated with the proposed Buyer or any successful Qualified Overbidder.

BACKGROUND

The Property was listed on Debtor's Schedule A, filed in this case on March 29, 2013 and valued at the amount of approximately $200,000.00.

The Property was described by Debtor as including a headquarters building (also referred to in the Purchase Agreement attached to the Motion as an approximately 1,320 sq. ft. residential unit), and a cell tower leased to AT&T. Debtor's Schedules indicated that the Property is not encumbered by a deed of trust, or other forms of scheduled debt.

To assist with the marketing and sale of the Property, the Trustee elected to retain Bluett & Associates, a real estate services and brokerage firm ("Brokers") and specifically Lori Bluett, as her real estate broker and agent ("Agent"). The employment of the Broker and Agent on behalf the estate was approve by this court on June 20, 2013. Dckt. No. 68.

Pursuant the efforts of the Agent, Trustee received a preliminary offer from a cell tower licensing company to acquire the Estate's leasehold interests in the existing cell tower lease, with the right to thereafter lease the portion of the Property containing the cell tower in perpetuity to continue managing and operating the existing cell tower. The cell tower leasing company offered to pay $210,000.00 for these cell tower lease interests of the Estate, subject to documentation of the terms for such perpetual lease. The licensing company indicated that it was only interested in purchasing these leasehold interests and did not want to acquire the entire Property.

Despite the Trustee's initial interest, the Trustee was unable to reach a timely agreement on the terms of the proposed sale. This failure was due in part, to delays in documentation and the licensing company's inclusion of proposed obligations and liabilities on the Estate as owner, that were unacceptable to the Trustee. As a result of the inability to reach an agreement of sale for these leasehold interests, the Trustee decided to defer the potential sale of the Estate's interests in the cell tower, and instead to market the entire Property for sale, including any and all leasehold interests of the Estate related to the leasing and operation of the existing cell tower located on the Property.

Due to the additional efforts of the Agent, the Trustee received and accepted an offer to purchase the Property from Friedland Boctor Enterprises, LLC, the proposed buyer ("Buyer"), for $225,000.00. The Purchase Price is more than Debtor's estimated value, and based on the offers received on the Property through the Agent's efforts, Trustee believes that the price represents fair value to the Estate, and a fair market value for the Property.

Furthermore, Trustee has independently concluded, based on her investigation of the Property and experience with the negotiations for the potential sale of the Estate's interest in the existing cell tower, that the price of $225,000.00 appears to be a fair and reasonable price for the Property. This conclusion is based, in part, on the Trustee's review with the Agent of the condition of the existing improvements to the Property, and the value of the Estate's rights under the existing cell tower lease with AT&T disclosed on Debtor's Schedule of existing leases filed in this case, and the potential value of Estate's interests to sell the rights to maintain the existing cell tower on the property beyond the term of the existing AT&T lease.

Purchase Agreement

Buyer's offer to purchase, as amended, the Property has been accepted by the Trustee, as Seller, through the mutual execution of a Standard Offer, Agreement, and Escrow Instructions for Purchase of Real Estate, dated for reference as of January 27, 2014, and an Addendum to Purchase Agreement dated January 27, 2014 (collective referred to as the "Property Sale Agreement"). The terms of the purchase agreement are set forth in the true and correct copy of the Property Sale Agreement, attached as Exhibit "A" in support of the Motion. Standard Offer, Agreement, and Escrow Instructions for Purchase of Real estate, and Addendum to Purchase Agreement. Dckt. No. 122.

The materials terms of the Purchase Agreement are as follows:

1. The purchase price for the Property is $225,000.00.

2. Buyer has deposited the sum of $19,000.00 into escrow. The deposit is creditable against the purchase price and is non-refundable, subject to Seller obtaining court approval of this agreement. If the Buyer fails to close the purchase due to default by Buyer, the deposit shall be non-refundable and be retained by the Trustee as liquidated damages for such breach.

3. Buyer has 15 days from the date of the Agreement to inspect and approve the condition of the Property, and 10 days from the receipt of the preliminary title report and existing leases on the Property to approve the title to the Property and leases on the Property.

4. Buyer will pay the purchase price and close escrow on or before seven (7) days after the satisfaction of all contingencies and approval of this Motion by the court.

5. The following costs will be allocated to the estate and be paid from the sales proceeds:

   a. one-half the cost of the escrow fee;

   b. the premium for the standard coverage title insurance policy;

   c. costs to prepare and record the grant deed;

   d. the prorated share of real property taxes and assessments secured against the property and rents and utilities;

   e. any amounts required to be withheld for state or federal taxes.

   The portion of the sales proceeds remaining after deduction of the costs allocable to the estate as Seller, and after

payment of commission to the Agent, shall be referred as the "Net Sale Proceeds."

6. Buyer will acquire the Elvas Landing Property in its "AS IS," "WHERE IS," "WITH ALL FAULTS" condition. Trustee is making no representations or warranties, directly or indirectly, with respect to the history or condition of the Proeprty.

7. Title to the Elvas Property shall be subject to all liens or encumbrances for real property taxes and/or assessments which are not delinquent as of the close of escrow

8. Trustee is not aware of any secured interests against the Property. If any other monetary liens are discovered to exist against the Property, the delivery of the title free and clear from other liens may require the cooperation and consent of such lien holders. The Purchase Agreement allows Trustee to request an extension of the hearing date to obtain the secured creditor's consent to the sale.

9. To the extent that any improvements or fixtures are located on the Property and the bankruptcy Estate owes any interest therein, including the residential unit and cell tower located on the Property, the Motion seeks authority to sell and transfer to the Buyer the Estate's interest in such assets as part of the Property.

10. The proposed sale to Buyer is subject to overbidding at the hearing on this Motion.

Overbidding Procedures

Trustee proposes that any entity or person wishing to become a Qualified Overbidder must deliver to the Trustee a non-refundable deposit in the amount of $10,000.00, in the form of a cashier's check or money order made payable to "Susan Didriksen, Chapter 7 Trustee of the Russ Transmission Inc Bankruptcy Estate," which will be applied to the purchase price for the property, if the Qualified Overbidder is the successful purchaser following the hearing on the Motion, and demonstrate to the Trustee the ability to close escrow within seven calendar days of the court's order approving the Motion.

Such financial showing shall include, without limitation, either overbidder qualification for financing acceptable to Trustee and sufficient to pay the purchase price for the property, or proof of the ability of the overbidder to fund payment of the purchase price in cash. The Overbidder Deposit and showing of financial ability to perform shall be delivered to the Trustee no later than two business days prior to the date scheduled for the hearing on this Motion. The overbidder may obtain permission to inspect the property. If a Qualified Overbidder is not successful at the hearing, the deposit shall be returned to the Overbidder upon entry of the order confirming the successful bidder for the Property.

Trustee proposes that the initial overbid be $227,500.00 and

subsequent overbids, if any, be in increments of $2,500. The high bidder must purchase the Property on terms identical to those set forth in the Purchase Agreement, including the waiver of all contingencies to closing (i.e. without any right to terminate the Purchase Agreement on the basis of any subsequent review or title or investigation of the condition of the Property), subject to any modifications ordered by the Court. If they Buyer is the higher bidder, it shall pay the greater of its high bid of $225,000.00 for the Property. In the event that a Qualified Overbidder outbids the Buyer, Buyer's offer to purchase the Elvas Property pursuant to the terms of the Purchase Agreement shall be maintained, for a period of 30 days after the conclusion of the hearing on this motion, as a back-up offer.

Authorization to Pay Commission to Agent

Trustee required the professional services of Agent to act as the Estate's agent to market and sell the Property. The Listing Agreement provides for the agent to receive a commission of six percent (6%) of the sales price of the Property. Trustee believes such a commission is within the range of customary and reasonable fees charged and paid in the area for professional brokerage services in connection with commercial real estate such as the Property. Trustee seeks authorization from the court to pay the commission to Agent upon closing the escrow from the Sales Proceeds.

Trustee is informed and believes that the Agent is disinterested within the meaning of the Bankruptcy Code for purposes of this engagement. As described in the Property Sale Agreement, the Broker represents both the Trustee and the Buyer in this transaction. Based on her experience, the Trustee is informed that such dual representation is common in the commercial real estate brokerage community. This dual representation was disclosed to the Trustee and the Buyer.

Because the Agent is acting as agent for both buyer and seller in this transaction, the entire six percent (6%) commission will be paid to the Broker, and will not be split with other parties. Trustee believes that the Agent has carried and continues to carry out its responsibilities under the Listing Agreement, and that the payment of the commission pursuant to the Listing Agreement is appropriate and reasonable.

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 Permit Debtor 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 Knights Landing Property.

Trustee further requests that the court waive the application of Federal Rule of Bankruptcy Procedure 6004(h). The Property Sale Agreement provides for escrow to close within seven (7) days of the approval of this Motion by the Court. Due to this short escrow period for the closing of the sale, a wavier that would otherwise stay the effectiveness of the court's order for a period of fourteen (14) days is asserted as necessary, so that Trustee may promptly consummate the sale to the Buyer or other successful Qualified Overbidder. Trustee states that the prompt closing the sale will enable the Estate to avoid additional interest accrual on the loan held by Dos Rios, thereby benefitting the Estate and Creditors.

Federal Rule of Bankruptcy Procedure 6004(h) provides a fourteen (14) day stay of enforcement on orders authorizing the use, sale, or lease of property other than cash collateral. The Trustee testifies that the Purchase Agreement provides for escrow to close within seven (7) days of the approval of this motion and due to this short period, a waiver of Rule 6004(h) is necessary and appropriate. Declaration ¶13, Dckt. 121. The court determines that cause exists to waive the application of Federal Rule of Bankruptcy Procedure 6004(h) in this case.

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 Susan Didriksen, the Chapter 7 Trustee ("Trustee"), is authorized to sell pursuant to 11 U.S.C. § 363(b)to Friedland Boctor Enterprises ("Buyer"), the residential real property commonly known as 6671 Elvas Avenue, Sacramento, County of Sacramento, California ("Real Property"), on the following terms:
>
> 1. The Property shall be sold to Buyer for $225,000.00, on the terms and conditions set forth in the Purchase Agreement, filed as Exhibit A in support of the Motion. Dckt. 122.
>
> 2. The Property will be sold on an "as is" "where is" "with all faults" basis, with no representations or warranties, express or implied, with respect to the property.
>
> 3. The Trustee is hereby authorized to execute any and all documents reasonably necessary to effectuate the sale of the Property to the Buyer.
>
> 4. The Trustee be and hereby is authorized to pay a real estate broker's commission in an amount no more than six percent (6%) of the actual purchase price upon consummation of the sale. The six percent (6%) commission shall be paid to the Trustee's real estate broker/agent, Lori Bluett.
>
> 5. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, other customary and contractual costs and expenses incurred in order to effectuate the sale. The

reasonable and necessary costs and expenses of closing include the Estate's pro-rata share of real property taxes and assessments secured against the Property, and the amount of all delinquent taxes secured against the Property, upon the closing of the sale from the Sale Proceeds thereof.

6. All proceeds of the sale, after payment of the amounts authorized above, shall be disbursed directly to the Trustee.

7. The fourteen (14) day stay of enforcement provided in Rule 6004(h), Federal Rules of Bankruptcy Procedure, is waived.

3. 13-27771-E-11 CWS-6 | **ANGELA CATARATA** | **Pro Se** | **MOTION FOR COMPENSATION FOR BOB BRAZEAL, BROKER(S), FEES: $1,050.00, EXPENSES: $0.00 2-13-14 [225]**

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 (*pro se*), Chapter 11 Trustee, all creditors, and Office of the United States Trustee on February 13, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required. That requirement was met.

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

The Final for Fees is granted. No appearance required.

FEES REQUESTED

Gary Farrar, the Chapter 11 Trustee in this case, applies for an order authorizing compensation to Bob Brazeal ("Mr. Brazeal"), a professional employed pursuant to an order of the court authorizing Brazeal to act as broker for the Trustee, from the bankruptcy estate or from cash on hand held by the Trustee collected in the bankruptcy case, in the amount of

$1,050.00 with administrative priority under 11 U.S.C. § 503(b)(2).

The period for which the fees are requested is for the period of September 18, 2013 to October 10, 2013. The order of the court approving employment of Mr. Brazeal was entered on November 12, 2013.

Description of Services for Which Fees Are Requested

From September 18, 2013, to October 10, 2013, Mr. Brazeal spent 10.5 hours on this matter. All of this time was spent evaluating and inspecting the property of the Debtor, and advising the Trustee regarding the results his investigations. To the extent that retroactive employment authorization is required for Mr. Brazeal is required to be compensated for his services, which were performed prior to the court's order authorizing his employment, the Trustee requests that Mr. Brazeal's employment be authorized nunc pro tunc as of September 18, 2013.

In his Declaration filed in support of the Motion, Dkct. No. 227, Bob Brazeal states that he entered into an agreement with the Trustee where Brazeal would be compensated for consulting services at a rate of $100 per hour, subject to court approval, except where he was to receive a commission from the sale of real property. Brazeal states that all of the time he spent on this case consisted of evaluating and inspecting the property of the Debtor, and advising the Trustee regarding his findings.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

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

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

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

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

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

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

Id. at 959.

A review of the application shows that Mr. Brazeal performed an analysis of several properties belonging to the Chapter 11 Estate, including preparing estimates of value for the following real properties: 991 Nestling Circle, Elk Grove; 5212 Blossom Ranch Drive, Elk Grove; 5225 Meadow Park Way, Sacramento; 2302 Sea Ranch Court, Stockton; 1027 Johnfer Way, Sacramento; 8042 Kingsdale Way, Sacramento; 6908 Allegheny Place, Stockton; and 8505 Center Parkway, Sacramento. Dkct. No. 228.

Included in Mr. Brazeal’s billing statement were entries made for his apparent analysis of a transfer of interest in the property known as

10003 Firestone Court, Sacramento, for Cliff Stevens. *Id.* Mr. Brazeal also physically inspected the interior of the above-listed properties with Trustee Gary Farrar, and adjusted the valuations of the 13 properties based on physical inspections performed on October 9, 2013. Broker's efforts have helped Trustee determined the value and condition of the Debtor-In-Possession's properties.

Neither Mr. Brazeal nor his associates has agreed with any other person or entity outside of his firm to share in the compensation requested. No payments have been received by or promised to Mr. Brazeal for services rendered in connection with this case other than the compensation authorized by the court. Mr. Brazeal's hourly rate of $100.00 per hour was disclosed in the Trustee's application to employ Mr. Brazeal.

FEES ALLOWED

The hourly rates for the fees billed in this case are $$100.00 per hour, which represent Mr. Brazeal's compensation for his consulting services at his usual hourly rate. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total fees in the amount of $1,050.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

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

Broker's Fees	$1,050.00
Costs and Expenses	$ 0.00

For a total final allowance of $1,050.00 in Broker's Fees and Costs in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Broker having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Bob Brazeal is allowed the following fees and expenses as a professional of the Estate:
>
> Bob Brazeal, Broker for the Trustee of the Estate
> Applicant's Fees Allowed in the amount of $1,050.00
> Applicants Expenses Allowed in the amount of $ 0.00,
>
> **IT IS FURTHER ORDERED** that this is a final award of

fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

IT IS FURTHER ORDERED that this is a final allowance of fees and the debtor in possession is authorized to pay such fees from funds of the Estate as they are able to be paid in the ordinary course of business and from such funds that are unencumbered or are cash collateral authorized to be used pursuant to a cash collateral stipulation or order.

4. 13-27771-E-11 ANGELA CATARATA
CWS-7 Pro Se

MOTION FOR COMPENSATION FOR GARY FARRAR, CHAPTER 11 TRUSTEE(S), FEES: $8,800.00, EXPENSES: $0.00
2-13-14 [231]

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 (*pro se*), Chapter 11 Trustee, all creditors, and Office of the United States Trustee on February 13, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required. That requirement was met.

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

FEES REQUESTED

Gary Farrar, the Chapter 11 Trustee appointed in this bankruptcy case, applies for an order authorizing compensation to the Trustee from the bankruptcy estate or from cash on hand collected through the bankruptcy case. The order of the court approving the United States Trustee's Appointment of Gary R. Farrar as Chapter 11 Trustee in the bankruptcy case was approved, pursuant to 11 U.S.C. § 1104, and entered by the court on September 17, 2013. Dckt. No. 163.

Description of Services for Which Fees Are Requested

On August 7, 2013, the United States Trustee moved to convert or dismiss the case for several reasons, including the Debtor's failure to notice of her three previous bankruptcy cases; (2.) Debtor's misrepresentation in her petition concerning claims against the estate; (3.) Debtor's failure to disclose interests in, and transfers of, real property; and (4.) Debtor's gross mismanagement of the estate, including her use of cash collateral without court authorization.

The matter was heard on August 29, 2013, and the court found cause to convert or dismiss. Rather than convert or dismiss, the court ordered the appointment of a Chapter 11 Trustee. The United States Trustee appointed the Trustee on September 16, 2013, and the court approved the appointment of the Trustee the following day. The court appointed the Trustee to evaluate the feasibility of a plan of reorganization, to determine the value of the adversary proceedings that the Debtor had filed shortly before the Trustee was appointed, and to offer a knowledgeable opinion as to whether the case should remain in Chapter 11 or be converted.

Trustee states that he performed the following duties, as stated in the Declaration of Gary Farrar filed in support of this application:

1. **Management of the Estate**: Trustee spent 17.3 hours on this category of tasks. Trustee researched the value, title, and condition of the real property that constituted the principal assets of the Debtor, inspected the property, and consulted with professionals and the Debtor concerning the same. Trustee managed proceeds from the real property of the estate, and sought the services of a property manager to assist with operation of the Debtor's numerous rental properties.

   The Trustee also retained legal counsel for assistance in evaluating and disposing of the adversary proceedings filed by the Debtor, and in successfully moving to convert or dismiss the case. Trustee conferred with counsel numerous times concerning the Debtor and the case.

2. **Debtor Communication**: Trustee spent 4.6 hours in meeting and corresponding with the Debtor, and attempted to obtain her cooperation in preparing a plan of reorganization.

3. **Case Administration:** Trustee spent 6.9 hours in performing the following tasks: preparing and filing an operating report, attending a court hearing, accepting appointment as the Chapter 11 Trustee and obtaining a bond for that purpose, and conferring with the United States Trustee's office concerning the case.

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 a trustee or professional of the estate 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). A trustee or professional must exercise good billing judgment with regard to the trustee or professional services undertaken. The appointment as trustee or court's authorization to be employed as a professional to work in a bankruptcy case does not give that trustee or professional "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, an attorney (the principles of which are equally applicable to trustees and other professionals) 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.

After investigating the assets of the Debtor, inspecting the property of Debtor's estate, and consulting with retained legal counsel and a broker (who provided valuation of Debtor's 13 properties), Trustee ultimately determined that due to Debtor's and creditors' lack of cooperation and inconsistent income derived from the Debtor's rental properties, that a plan of reorganization would not be feasible. Trustee dismissed the adversary proceedings that had been filed by Debtor, and moved for conversion or dismissal of the case.

On January 23, 2014, the court entered a minute order dismissing the case under 11 U.S.C. § 1112(b)(1). Dckt. No. 215. During his administration and management of the case, the Trustee received deposits totaling $49,486. The Trustee has made no disbursements to creditors or to the Debtor, but has paid $1,585.50 out of the estate funds for bond premiums, bank fees, postage, payments to the United States Trustee, and utilities. As of the date of this application, Trustee held a total of $47,828.91.

Trustee asserts that in cases where the dismissal of the bankruptcy case occurs prior to the distribution to creditors, the courts have held that it is proper to award the trustee compensation in *quantum meruit* for the reasonable value of his services, and to condition return of estate property to the debtor upon payment of such compensation to the trustee. (See e.g., *In re Flying S Land & Cattle Co., Inc.*, 28 B.R. 56, 58 (C.D.Cal.Bk. 1982)("limitations on trustee compensation in 11 U.S.C. § 326(a) shoudl not apply when funds are returned to the debtor because of a dismissal. Where the Trustee has rendered services the debtor will be unjustly enriched, upon dismissal, unless the trustee is compensated.")

OPPOSITION BY DEBTOR

The *pro se* Debtor in this bankruptcy proceeding, Angela Gay Catarata, filed an untimely opposition on March 6, 2014, just 7 days before the hearing on this Motion for Compensation. Local Bankruptcy Rule 9014-1(f)(1) provides that a respondent must file written opposition at least 14 days prior to the hearing on the matter. In accordance with Local Bankruptcy Rule 9014-1(f)(1), Trustee filed and served the Motion to Debtor on February 13, 2014, 28 days prior to the hearing date. The application was served on Debtor at her address of record, 9961 Netsling Circle, Elk Grove, California, on that date. Debtor was served and received proper notice under Local Bankruptcy Rule 9014-1(f)(1) of the hearing on this Motion.

Though untimely, the court considers the objection of the Debtor.

Debtor essentially challenges Trustee's statement that the Debtor would be unjustly enriched if funds held within the trust account were

returned to the Debtor. Debtor contends that the returned funds would be used to pay creditors as they were not paid prior to the dismissal. Debtor states that she has already begun paying on arrears to creditors with secured claims; funds from the trust account are necessary to prevent seizure of properties from mortgage companies, so there would be no unjust enrichment. Trustee and the Professionals have a fiduciary responsibility to both the creditors and estate to arrive at a viable and sustainable plan of reorganization; Debtor states that the Trustee himself determined that a plan would not be feasible and moved for dismissal or conversion. Debtor requests on this basis, that compensation be capped at $5,000.

Response by Trustee

Trustee objects to the consideration of Debtor's opposition, based on her failure to conform to the requirements of Local Bankruptcy Rule 9014-1(f)(1). Trustee states that Debtor was properly served, and her statement that she received the Motion pleadings by mail on March 3, 2014, refers to courtesy copies of the papers that were served by Trustee on that date. ¶ 3, Declaration of Michael R. Tener, Dckt. No. 248. Debtor had emailed the Trustee and requested that he send her papers to a different address than the address on file with the court; in accordance with this request, Trustee re-sent the same papers that had already been served to Debtor to her other address. Trustee argues that Debtor's untimely filing cannot be excused because of her purported failure to receive mail on her address of record under Local Bankruptcy Rule 2017-1(g), which provides that each party, whether the party is appearing with an attorney or pro se, is under a continuing duty to notify the Clerk and all other partie sof any change of address or telephone number.

DISCUSSION

Though untimely, the court has considered the Debtor's objection. The objection lacks merit based on the facts of this case. The gist of Debtor's argument is that Trustee was unable to confirm a viable plan of reorganization, and that Debtor would pay her creditors using the money that would be appropriated towards the compensation of the Trustee.

As Trustee points out, however, Debtor's case was dismissed in light of her own failure to prosecute her own Chapter 11 case, and Trustee's recognition that the case could not be salvaged following a pattern of misrepresentations and misconduct committed by the Debtor. The Debtor commenced the present case on June 6, 2013. This is not her first case. Prior bankruptcy cases and their resolutions are summarized as follows.

A. Chapter 7 Case No. 12-34580

1. Filed on August 9, 2012

2. Debtor filed the case in *pro se*

3. Dismissed on August 27, 2013, for failure to file,

   a. Form 22A
   b. Schedules A-J

c. Statement of Financial Affairs
d. Statistical Summary
e. Summary of Schedules

B. Chapter 13 Case

1. Filed November 26, 2012

2. Debtor represented by Mark Lapham, Esq. (Substituted in as counsel for pro se Debtor on January 8, 2013.)

3. Order extending time through and including January 7, 2013, for Debtor to file Form 22C, Chapter 13 Plan, Schedules D-J, Statement of Financial Affairs, Statistical Summary, and Summary of Schedules.

4. Case dismissed by order filed on January 8, 2013, for failure to file required documents by January 7, 2013.

5. *Ex Parte* Motion to Vacate dismissal and extend the automatic stay, filed February 13, 2013, denied.

C. Chapter 11 Case

1. Filed March 4, 2013

2. Debtor represented by Mark Lapham, Esq.

3. Because of the multiple filings by the Debtor, no automatic stay went into effect in the March 4, 2013 Chapter 11 case and no motion to impose an automatic stay was filed within the thirty day period following the commencement of the case. 11 U.S.C. § 362(c)(4) and (c)(4)(B).

4. Debtor motion to dismiss filed on April 29, 2013.

The Debtor commenced the current case on June 6, 2013 as a voluntary Chapter 11 case. On July 1, 2013, creditor Seterus, Inc. Filed a motion to confirm the termination of the automatic stay based on the prior bankruptcy cases of the Debtor which had been dismissed in the one-year period prior to commencement of this case. Dckt. 36. On July 7, 2013, the then Debtor in Possession filed a motion to impose the automatic stay. Dckt. 48. Through stipulation of the parties the hearings on these motions were continued.

On August 7, 2013, the U.S. Trustee filed a motion to covert or dismiss the bankruptcy case. Dckt. 97. The grounds of the U.S. Trustee's motion are summarized in the motion as follows,

> " The paramount duty of a debtor in a bankruptcy case is to provide honest, accurate, and complete disclosure about the debtor's assets, liabilities, and financial affairs. It is a duty reinforced by the fact that a debtor provides such information in the bankruptcy schedules, the Statement of

> Financial Affairs, and other required court filings, under the penalty of perjury. Here, in this case, the debtor's schedules and Statement of Financial Affairs were inaccurate and incomplete. Furthermore, the debtor admitted that, in the first month of the case, she used cash collateral and made at least one post-petition transfer, all without court approval. The debtor failed to file financial information and reports required under the Bankruptcy Code and Rules. Lastly, the debtor failed to provide information reasonably requested by the United States Trustee. All of the foregoing demonstrate 'gross mismanagement' of the bankruptcy estate and other 'cause' to convert or dismiss a Chapter 11 case."

Id.

In determining that cause exists to either dismiss, convert, or appoint a Chapter 11 Trustee for this case, the court found,

> "Additionally, Debtor has not shown the court she is appropriately managing the estate. "Gross mismanagement of the estate" constitutes "cause" to convert or dismiss a Chapter 11 case. See 11 U.S.C. § 1112(b)(4)(B). Here, according to Debtor's monthly operating report filed for June 2013, Debtor paid $5,721 for "Administrative," $3,036 for "Capital Expenditures," and $4,700 to "Mark Lapham." **The court has not authorized payment of professional fees or the use of cash collateral in this case.**
>
> Again, this is Debtor's fourth bankruptcy case filed in this bankruptcy court and both counsel and debtor should know that Debtors-in-Possession cannot use cash collateral without court authorization. **While Debtor argues that she did not misuse cash collateral because it was used for the routine maintenance of the properties of the estate, Debtor misses one major requirement: authorization by the court.** These unauthorized transactions, along with the Debtor's neglect of her duties as a debtor-in-possession as discussed above, **demonstrate the Debtor in Possession's gross mismanagement of the bankruptcy estate.** The Debtor in Possession's argument that violating the Bankruptcy Code prohibiting the use of cash collateral should be excused because "the Debtor in Possession used it for the right expenses" is not sufficient. **The law is not followed only when the Debtor in Possession chooses to or when she is "caught" by the UST or creditors.**
>
> The Debtor in Possession has been represented by counsel which she wanted to be approved as her counsel in this case. Based on the prosecution of this case and the prior case, the court denied that motion. Between the combination of counsel and this Debtor, the Debtor is not able to fulfill the duties and obligations of a debtor in possession.

> A review of the Debtor's schedules discloses that there appears to be a possible equity in the Debtor's real property assets, as well as non-exempt, unencumbered property. While the Debtor's purpose in filing these multiple bankruptcy cases was to preserve her family legacy, those assets must be properly administered under the Bankruptcy Code for the estate, not a debtor's own purpose.

Civil Minutes, Dckt. 158 (emphasis added).

The court had previously noted that Debtor did not disclose various interests and the amount of her secured claims in her Schedules and petition paperwork, and did not provide comprehensive and accurate information about a business interest in her Statement of Affairs. Debtor also did not disclose her transfer of real property to family members, and admitted to using cash collateral and making one post-petition transfer during the first month of the case, without court approval. Civil Minutes of the Court, Dckt. No. 216. These are serious concerns, which supported the court's decision to dismiss the case, and determine that no plan of reorganization could be proposed and confirmed by the court. Debtor's allocation of blame for the failure to confirm a Chapter 11 Plan, and pledges to pay her creditors using the funds being held by the Trustee, lack credence in the eyes of the court.

What the Debtor really agues that after seeking the extraordinary relief available under the United States Bankruptcy Code four times (the last two times with the assistance of counsel) and having failed all four times due to the breaches of basic obligations of a debtor and breaching the fiduciary duties of a debtor in possession, the Chapter 11 Trustee should be punished for her misdeeds. If this Debtor has even a small amount of interest in reorganizing her obligations as permitted by law and providing for payment of creditor claims, she would have so prosecuted the cases. After failing four times, the Debtor and her counsel would have either joined with the Chapter 11 Trustee (benefitting from the Trustee's independent status) or gone it alone to propose a good faith, financially feasible Chapter 11 Plan which would be confirmable under the Bankruptcy Code. They the Debtor and her counsel did not, with the court finding that the Debtor sought to have the process stymied and case dismissed.

> "Debtor has not consistently cooperated (as phrased by the Chapter 11 Trustee) with the Trustees efforts and appears to believe that she will be able to work out the secured claims outside of bankruptcy. Debtor has made it clear that she wants the case to be dismissed. Trustee states that the only significant assets of the estate are several parcels of real property whose market value does not exceed their liens and two parcels of real property that the Trustee may recover from the Debtors daughter. Without the Debtors cooperation, the Trustee will likely have to file an adversary proceeding or proceedings to recover the latter property. Those parcels appear at this time to be unencumbered but their value is uncertain. Although the encumbered parcels generate income, they do not do so reliably."

The court rejects Debtor's opposition. The Trustee's services to the estate were positive and beneficial to the interests of the estate – though the Debtor believes that they were not beneficial to her personal interests. This continues to show the Debtor's lack of understanding, or continued violation of, a debtor's in possession or trustee's fiduciary duty to the bankruptcy estate. It is because of the lack of cooperation of the Debtor that a Chapter 11 Plan was not advanced. Presumably, the Debtor and her counsel believed that a plan was proper when they commenced the present Chapter 11 case, the prior Chapter 11 case, and the prior Chapter 13 case which they sought to convert to Chapter 11. It was only when the Debtor did not get to dictate the terms (and attempt to veto what Congress has provided in the Bankruptcy Code) did the Debtor's ardor for a Chapter 11 Plan wane.

The Debtor's contentions that she should be given special consideration since she is a lay person appearing in pro se is advanced in bad faith. The Debtor has been represented by counsel in this Chapter 11 case and the prior Chapter 11 case. (As well as that counsel substituting into the Chapter 13 case as it was being dismissed and prosecuting motions to vacate the dismissal). The Debtor attempts to blame professionals who did not fulfill their fiduciary duties to her or settlements with creditors. Therefore, the Debtor requests the court to reduce the fees of the Trustee so that the Trustee may subsidize new "settlements" with creditors.

Requesting that fees of the Trustee be reduced to subsidize the Debtor's latest strategy to advance her interests is not grounds for denying otherwise reasonable compensation.

FEES ALLOWED

Accordingly, Trustee requests that the Court determine a fair rate of compensation for the Trustee's services and order that payment be made to the Trustee at that rate for the 29.6 hours that the Trustee worked on this case. Trustee submits that $300.00 is the proper rate, which is the Trustee's standard rate for receivership matters. The court finds that the hourly rates reasonable and that Trustee effectively used appropriate rates for the services provided. The total Trustee compensation fees in the amount of $8,880.00 are approved and authorized to be paid from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

Trustee is allowed, and is authorized to pay from the Chapter 11 Estate, the following amounts as compensation as a professional in this case:

Trustee's Fees	$8,880.00
Costs and Expenses	$ 0.00

For a total final allowance of $8,880.00 in Trustee's Fees and Costs in this case.

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

Findings of Fact and Conclusions of Law are stated in the

Civil Minutes for the hearing.

The Motion for Allowance of Fees and Expenses filed by 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 Farrar is allowed the following fees and expenses as a professional of the Estate:

Gary Farrar, Trustee for the Estate
Applicant's Fees Allowed in the amount of $8,880.00
Applicants Expenses Allowed in the amount of $ 0.00,

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate.

IT IS FURTHER ORDERED that this is a final allowance of fees and the debtor in possession is authorized to pay such fees from funds of the Estate as they are able to be paid in the ordinary course of business and from such funds that are unencumbered or are cash collateral authorized to be used pursuant to a cash collateral stipulation or order.

5. 13-27771-E-11 ANGELA CATARATA
CWS-8 Pro Se

MOTION FOR COMPENSATION BY THE LAW OFFICE OF NEUMILLER AND BEARDSLEE FOR MICHAEL R. TENER, TRUSTEE'S ATTORNEY(S), FEES: $25,097.50, EXPENSES: $1,556.76
2-13-14 [237]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 11 Trustee, all creditors, and Office of the United States Trustee on February 13, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required. That requirement was met.

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

FEES REQUESTED

Neumiller & Beardslee, a Professional Corporation ("Counsel"), makes this First and Final Application for Compensation as counsel for the Chapter 11 Trustee in this case, Gary Farrar. Counsel's employment was authorized by the court by entry of the court on October 22, 2013. The order authorized the firm's employment as Trustee's counsel, effective September 18, 2013. Counsel provided legal services for Trustee for the relevant service period of September 18, 2013, to the present. Counsel is seeking $26,654.26, including $25,097.50 in fees and $1,556.76 in reimbursement for actual and necessary expenses.

Description of Services for Which Fees Are Requested

On August 7, 2013, the United States Trustee moved to convert or dismiss the case for several reasons, including the Debtor's failure to notice of her three previous bankruptcy cases; (2.) Debtor's misrepresentation in her petition concerning claims against the estate; (3.)

Debtor's failure to disclose interests in, and transfers of, real property; and (4.) Debtor's gross mismanagement of the estate, including her use of cash collateral without court authorization.

The matter was heard on August 29, 2013, and the court found cause to convert or dismiss. Rather than convert or dismiss, the court ordered the appointment of a Chapter 11 Trustee. The United States Trustee appointed the Trustee on September 16, 2013, and the court approved the appointment of the Trustee the following day. The court appointed the Trustee to evaluate the feasibility of a plan of reorganization, to determine the value of the adversary proceedings that the Debtor had filed shortly before the Trustee was appointed, and to offer a knowledgeable opinion as to whether the case should remain in Chapter 11 or be converted. On October 18, 2013, the Trustee applied for the authority to employ the firm of Neumiller & Beardslee as counsel for Trustee in this case. On October 22, 2013, the court entered an order approving the firm as Counsel for Trustee.

Counsel states that the firm has not received payment for any fees or costs to date, and that Counsel billed a total of 103.10 hours in providing services to the Trustee of the Estate.

Counsel performed preliminary case review, prepared employment and fee applications for itself, the Trustee, and other professionals hired by the Trustee, including Bob Brazeal as a broker, and Paul Quinn, who was retained by Trustee as an accountant in the administration of the Estate. Counsel communicated with the Trustee, and Debtor, creditors, and other third parties. Counsel performed general case review, strategy, and research tasks, such as researching the titles and condition of properties of the estate; Counsel also made court filings and appeared at hearings for the adversary proceeding filed by Debtor in this case. Counsel spent several hours preparing and attending the hearing for Trustee's successful motion to convert or dismiss the Debtor's case.

Counsel has attached comprehensive summary sheets, setting forth the time spent by each professional that worked on the matter, as Exhibit "A" to this Application. Billing statements organized by chronological order, itemizing the time spent performing the work, the amounts charged for each item, and the professional that performed the work, are attached as Exhibit "B" in support of this Motion. Dckt. No. 239.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

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

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

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

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

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

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

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

Id. at 959.

A review of the application reveals that Counsel assisted the Trustee by preparing applications to employ Trustee's professionals and counsel in helping Trustee administer the case, Counsel advised the Trustee concerning general case strategies, and prepared pleadings and attended hearings on the Motion to Dismiss or Convert the Chapter 11 case, and the adversary proceedings filed by Debtor. Counsel also advised Trustee on the real property held by Debtor and the Debtor and Creditors' lack of cooperation in this case,. Counsel's responsibilities also included preparing demands on third parties and corresponding with parties in interest on behalf of the Trustee; researching the Debtor's properties and evaluating the actions and claims concerning those properties; appearing for the Trustee in court, and preparing Trustee's successful Motion to Dismiss the Case. Declaration of Gary Farrar in Support of Neumiller & Beardlee's First and Final Application for Compensation as Counsel for Trustee. Dckt. No. 241.

Counsel's services were necessary to facilitating the Trustee's effective administration of the estate, and the court determines that the work performed was reasonable and necessary, and benefitted the management of the estate.

OPPOSITION BY DEBTOR

Debtor essentially challenges Counsel's Application for Fees and Expenses on similar grounds as her opposition to Trustee's Motion for the Allowance of Fees and Costs. Debtor accuses Trustee and Counsel of not being able to obtain a viable Chapter 11 Plan, and that they were unable to elicit the cooperation of Creditor Wells Fargo in modifying the mortgages of the estate. Debtor states that she was never served with the Motion to Dismiss or Convert submitted by Counsel for Trustee. Debtor objects to the formatting of Counsel's billing statements, stating that "block billing renders it extraordinarily difficult to determine how much time was spent on a specific activity." Debtor makes the confusing argument that had the request for compensation of professionals been filed prior to the Motion to Dismiss, "additional costs to reopen the case to allow for compensation requests would not have been necessary."

Response by Trustee

Counsel objects to the consideration of Debtor's opposition, based on her failure to conform to the requirements of Local Bankruptcy Rule 9014-1(f)(1). Counsel states that Debtor was properly served, and her statement that she received the Motion pleadings by mail on March 3, 2014, refers to courtesy copies of the papers that were served by Trustee on that date. ¶ 3, Declaration of Michael R. Tener, Dckt. No. 248. Debtor had emailed the Trustee and requested that he send her papers to a different address than the address on file with the court; in accordance with this request, Trustee re-sent the same papers that had already been served to

Debtor to her other address. Counsel argues that Debtor's untimely filing cannot be excused by purported failure to receive mail on her address of record because of Local Bankruptcy Rule 2017-1(g), which provides that each party, whether the party is appearing with an attorney or pro se, is under a continuing duty to notify the Clerk and all other parties of any change of address or telephone number.

CONDUCT OF THE DEBTOR AND REJECTION ON THE MERITS OF OPPOSITION TO MOTION

Debtor's case was dismissed in light of her own failure to prosecute her own Chapter 11 case, and Trustee's recognition that the case could not be salvaged following a pattern of misrepresentations and misconduct committed by the Debtor. The Debtor commenced the present case on June 6, 2013. This is not her first case. Prior bankruptcy cases and their resolutions are summarized as follows.

A. Chapter 7 Case No. 12-34580

1. Filed on August 9, 2012

2. Debtor filed the case in *pro se*

3. Dismissed on August 27, 2013, for failure to file,

   a. Form 22A
   b. Schedules A-J
   c. Statement of Financial Affairs
   d. Statistical Summary
   e. Summary of Schedules

B. Chapter 13 Case

1. Filed November 26, 2012

2. Debtor represented by Mark Lapham, Esq. (Substituted in as counsel for pro se Debtor on January 8, 2013.)

3. Order extending time through and including January 7, 2013, for Debtor to file Form 22C, Chapter 13 Plan, Schedules D-J, Statement of Financial Affairs, Statistical Summary, and Summary of Schedules.

4. Case dismissed by order filed on January 8, 2013, for failure to file required documents by January 7, 2013.

5. *Ex Parte* Motion to Vacate dismissal and extend the automatic stay, filed February 13, 2013, denied.

C. Chapter 11 Case

1. Filed March 4, 2013

2. Debtor represented by Mark Lapham, Esq.

3. Because of the multiple filings by the Debtor, no automatic stay went into effect in the March 4, 2013 Chapter 11 case and no motion to impose an automatic stay was filed within the thirty day period following the commencement of the case. 11 U.S.C. § 362(c)(4) and (c)(4)(B).

4. Debtor motion to dismiss filed on April 29, 2013.

The Debtor commenced the current case on June 6, 2013 as a voluntary Chapter 11 case. On July 1, 2013, creditor Seterus, Inc. Filed a motion to confirm the termination of the automatic stay based on the prior bankruptcy cases of the Debtor which had been dismissed in the one-year period prior to commencement of this case. Dckt. 36. On July 7, 2013, the then Debtor in Possession filed a motion to impose the automatic stay. Dckt. 48. Through stipulation of the parties the hearings on these motions were continued.

On August 7, 2013, the U.S. Trustee filed a motion to covert or dismiss the bankruptcy case. Dckt. 97. The grounds of the U.S. Trustee's motion are summarized in the motion as follows,

> " The paramount duty of a debtor in a bankruptcy case is to provide honest, accurate, and complete disclosure about the debtor's assets, liabilities, and financial affairs. It is a duty reinforced by the fact that a debtor provides such information in the bankruptcy schedules, the Statement of Financial Affairs, and other required court filings, under the penalty of perjury. Here, in this case, the debtor's schedules and Statement of Financial Affairs were inaccurate and incomplete. Furthermore, the debtor admitted that, in the first month of the case, she used cash collateral and made at least one post-petition transfer, all without court approval. The debtor failed to file financial information and reports required under the Bankruptcy Code and Rules. Lastly, the debtor failed to provide information reasonably requested by the United States Trustee. All of the foregoing demonstrate 'gross mismanagement' of the bankruptcy estate and other 'cause' to convert or dismiss a Chapter 11 case."

Id.

In determining that cause exists to either dismiss, convert, or appoint a Chapter 11 Trustee for this case, the court found,

> "Additionally, Debtor has not shown the court she is appropriately managing the estate. "Gross mismanagement of the estate" constitutes "cause" to convert or dismiss a Chapter 11 case. See 11 U.S.C. § 1112(b)(4)(B). Here, according to Debtor's monthly operating report filed for June 2013, Debtor paid $5,721 for "Administrative," $3,036 for "Capital Expenditures," and $4,700 to "Mark Lapham." **The court has not authorized payment of professional fees or the use of cash collateral in this case.**

> Again, this is Debtor's fourth bankruptcy case filed in this bankruptcy court and both counsel and debtor should know that Debtors-in-Possession cannot use cash collateral without court authorization. **While Debtor argues that she did not misuse cash collateral because it was used for the routine maintenance of the properties of the estate, Debtor misses one major requirement: authorization by the court.** These unauthorized transactions, along with the Debtor's neglect of her duties as a debtor-in-possession as discussed above, **demonstrate the Debtor in Possession's gross mismanagement of the bankruptcy estate.** The Debtor in Possession's argument that violating the Bankruptcy Code prohibiting the use of cash collateral should be excused because "the Debtor in Possession used it for the right expenses" is not sufficient. **The law is not followed only when the Debtor in Possession chooses to or when she is "caught" by the UST or creditors.**
>
> The Debtor in Possession has been represented by counsel which she wanted to be approved as her counsel in this case. Based on the prosecution of this case and the prior case, the court denied that motion. Between the combination of counsel and this Debtor, the Debtor is not able to fulfill the duties and obligations of a debtor in possession.
>
> A review of the Debtor's schedules discloses that there appears to be a possible equity in the Debtor's real property assets, as well as non-exempt, unencumbered property. While the Debtor's purpose in filing these multiple bankruptcy cases was to preserve her family legacy, those assets must be properly administered under the Bankruptcy Code for the estate, not a debtor's own purpose.

Civil Minutes, Dckt. 158 (emphasis added).

The court had previously noted that Debtor did not disclose various interests and the amount of her secured claims in her Schedules and petition paperwork, and did not provide comprehensive and accurate information about a business interest in her Statement of Affairs. Debtor also did not disclose her transfer of real property to family members, and admitted to using cash collateral and making one post-petition transfer during the first month of the case, without court approval. Civil Minutes of the Court, Dckt. No. 216. These are serious concerns, which supported the court's decision to dismiss the case, and determine that no plan of reorganization could be proposed and confirmed by the court. Debtor's allocation of blame for the failure to confirm a Chapter 11 Plan, and pledges to pay her creditors using the funds being held by the Trustee, lack credence in the eyes of the court.

What the Debtor really agues that after seeking the extraordinary relief available under the United States Bankruptcy Code four times (the

last two times with the assistance of counsel) and having failed all four times due to the breaches of basic obligations of a debtor and breaching the fiduciary duties of a debtor in possession, the counsel for the Chapter 11 Trustee should be punished for her misdeeds. If this Debtor has even a small amount of interest in reorganizing her obligations as permitted by law and providing for payment of creditor claims, she would have so prosecuted the cases. After failing four times, the Debtor and her counsel would have either joined with the Chapter 11 Trustee (benefitting from the Trustee's independent status) or gone it alone to propose a good faith, financially feasible Chapter 11 Plan which would be confirmable under the Bankruptcy Code. They the Debtor and her counsel did not, with the court finding that the Debtor sought to have the process stymied and case dismissed.

> "Debtor has not consistently cooperated (as phrased by the Chapter 11 Trustee) with the Trustees efforts and appears to believe that she will be able to work out the secured claims outside of bankruptcy. Debtor has made it clear that she wants the case to be dismissed. Trustee states that the only significant assets of the estate are several parcels of real property whose market value does not exceed their liens and two parcels of real property that the Trustee may recover from the Debtors daughter. Without the Debtors cooperation, the Trustee will likely have to file an adversary proceeding or proceedings to recover the latter property. Those parcels appear at this time to be unencumbered but their value is uncertain. Although the encumbered parcels generate income, they do not do so reliably."

The Debtor's lack of good faith in opposing the fees is further shown by her contention that "The Declaration of Michael Tener in support of the request for compensation of counsel submitted to the court summarized work and blocked together multiple activities over various period of time is known as block billing. Block billing renders it extraordinarily difficult to determine how much time was spent on a specific activity." Opposition, Dckt. 246. In reality, Mr. Tener's declaration provides the "task billing analysis" as designated under the U.S. Trustee's fee guidelines and as required by this court. The detailed billing statements are provided in support of the Motion as Exhibits B (fees chronologically organized), C (fees categorically organized) and D (cost statements). Dckt. 239. The Debtor has ignored the exibits.

The court rejects Debtor's opposition. The Counsel's services to the estate were positive and beneficial to the interests of the estate – though the Debtor believes that they were not beneficial to her personal interests. This continues to show the Debtor's lack of understanding, or continued violation of, a debtor's in possession or counsel's fiduciary duty to the bankruptcy estate.

Just because the Debtor folded her arms and demanded the Trustee dismiss the case does not mean that the Trustee and Counsel grant the Debtor's wish. Such would have violated their fiduciary duties to the estate. It is because of the lack of cooperation of the Debtor that a Chapter 11 Plan was not advanced. Presumably, the Debtor and her counsel believed that a plan was proper when they commenced the present Chapter 11

case, the prior Chapter 11 case, and the prior Chapter 13 case which they sought to convert to Chapter 11. It was only when the Debtor did not get to dictate the terms (and attempt to veto what Congress has provided in the Bankruptcy Code) did the Debtor's ardor for a Chapter 11 Plan wane.

The Debtor's contentions that she should be given special consideration since she is a lay person appearing in pro se is advanced in bad faith. The Debtor has been represented by counsel in this Chapter 11 case and the prior Chapter 11 case. (As well as that counsel substituting into the Chapter 13 case as it was being dismissed and prosecuting motions to vacate the dismissal). The Debtor attempts to blame professionals who did not fulfill their fiduciary duties to her or settlements with creditors. Therefore, the Debtor requests the court to reduce the fees of the Counsel for the Trustee so that Counsel may subsidize new "settlements" with creditors.

Requesting that fees of the Counsel for the Trustee be reduced to subsidize the Debtor's latest strategy to advance her interests is not grounds for denying otherwise reasonable compensation. Rather, it continues to show the Debtor's abuse and misuse of the Bankruptcy Code to her personal goals, rather than what's in the best interests of the bankruptcy estate.

FEES ALLOWED

The hourly rates for the fees billed in this case are $300.00 per/hour, for 45.50 hours billed by attorney Clifford Stevens; $265.00 per/hour for 7.50 hours billed by attorney Michael R. Tener, as well as a discounted rate of $250.00 per/hour for an additional 16.20 hours billed by Michael R. Tener; $135.00 per/hour for 5.50 hours billed by Kim L. Abdallah; and $125.00 per/hour for 28.50 hours of work billed by T. Aymie Nguyen. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of $25,097.50 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of $1,556.76 for postage, photocopies, and filing and other fees. The total costs in the amount of $1,556.76 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

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

Attorneys' Fees	$25,097.50
Costs and Expenses	$ 1,556.76

For a total final allowance of $26,654.26 in Attorneys' Fees and Costs in this case.

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

holding that:

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

The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Neumiller & Beardslee is allowed the following fees and expenses as a professional of the Estate:

Neumiller & Beardslee, Counsel for the Estate
Applicant's Fees Allowed in the amount of $ 25,097.50
Applicants Expenses Allowed in the amount of $1,556.76,

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate.

IT IS FURTHER ORDERED that this is a final allowance of fees.

6. 13-29073-E-7 MPD-2 — AARON/JOLINE ROBERTSON — Bruce Charles Dwiggins — MOTION TO SELL, MOTION TO PAY AND/OR MOTION TO WAIVE THE FOURTEEN DAY STAY PROVISIONS OF RULE 6004(H) — 2-19-14 [48]

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, Debtor's Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on February 19, 2014. By the court's calculation, 22 days' notice was provided. 21 days' notice is required. That requirement was met.

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 Permit Debtor to Sell Property pursuant to 11 U.S.C. § 363(b). 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 THE MOTION

The Bankruptcy Code permits the Trustee to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b). Here, the Michael P. Dacquisto, the Chapter 7 Trustee in this case, seeks an order authorizing:

1. The sale of the Debtors' interest in real property described as rental property at 2850, 2852 and 2956 Henderson Road, Redding, CA Shasta County APN 107-410-041 (the "Property") free and clear of liens for $165,000.00;

2. The payment of a real estate commission of $9,900.00 to House of Realty ("HOR") for the Seller and Re/Max Town & Country ("ReMax") for the Buyer, to be split 50/50, costs of sale and liens of record; and a

3. Waiver of the fourteen (14) day stay pursuant to provisions of Rule 6004(h).

The Chapter 7 Trustee has accepted an offer from Todd Janes ("Buyer"), subject to the court's approval and potential overbids, to buy the Property for $165,000.00. Trustee understands the Buyer to be not

related to the Debtors in this bankruptcy proceeding. The terms are set forth in the Residential Income Property Purchase Agreement and Joint Escrow Instructions ("Purchase Agreement"), filed as Exhibit A in support of the Motion. Dckt. No. 52.

Trustee describes three liens on the property described as 2850, 2852 and 2956 Henderson Road, Redding, California. Trustee proposes to sell the real property pursuant to 11 U.S.C. § 363(f)(3) free and clear of the lien of Nationstar Mortgage, which Trustee states is the only deed of trust recorded against the property. Motion at page 3, Dckt. No. 48. Trustee does not provide further information about Nationstar Mortgage's security interest in the subject property, except that $130,000.00 out of the sales proceeds will be applied to the deed of trust of Nationstar Mortgage against the property. Debtor's Schedule D shows that the value of the secured claim held by Nationstar Mortgage is $150,000.00. Nationstar Mortgage has not filed a Proof of Claim in this case.

In his Declaration, Trustee describes two additional liens on the property (which are not reflected in Debtors' Schedule D, filed on July 22, 2013, Dckt. No. 12): (1.) the Shasta County unpaid property taxes lien; and (2.) the lien recorded in favor of Mary McAtee, a judgment creditor in state court proceeding alleging elder abuse and an unpaid loan. Proof of Claim of Mary M. McAtee, Claim No. 4.

REQUEST TO SELL FREE AND CLEAR OF LIENS

The title of the Motion states that it is a request to sell the Property Free and Clear of Liens. The Motion states with particularity (Fed. R. Bankr. P. 9013) the following grounds upon which relief is requested in the form of a sale being free and clear of liens:

a. Trustee requests the sale "[f]ree and clear of liens for $165,000.00" [Motion pg. 1:26];

b. After payment of the real estate commission, closing costs, property taxes, and the Nationstar secured claim, "The remaining balance of approximately $22,675 will be paid to the bankruptcy estate." [Motion pg. 3:18-25]

c. In the Conclusion [Prayer], "Enter an order that the sale is free and clear of liens under 11 U.S.C. § 362(f)(3) and (f)(4). [Motion pgs. 4:28, 5:1]

Motion, Dckt. 48. The above "grounds" are not sufficient under 11 U.S.C. § 363(f) for ordering the sale of property free and clear of liens. The Motion does not identify any liens which are to be the subject of any such "free and clear" order. The court is being requested to sign an order in blank for property to be sold free and clear of any and all undisclosed liens as "ordered" by the Trustee.

In the Points and Authorities (Dckt. 50) the Trustee has made other factual allegations not stated in the Motion. Buried in the four page Points and Authorities is a reference to Mary McAtee having a judgment lien with the Trustee disputes. Points and Authorities, pg. 3:15-18.

In his declaration, the Trustee provides his personal legal conclusions that the sale should be free and clear of liens pursuant to 11 U.S.C. § 363(f)(3) because he intends to pay the liens through the sale escrow. No such grounds are stated in the Motion. Further, the Trustee's personal legal conclusions do not state why this court should issue an order that the sale be free and clear when normal escrow sale procedures require a demand and lien release be presented for a creditor to be paid through escrow.

The Trustee also testifies that he has drawn the conclusion that the judgment lien of Mary McAtee is a preferential transfer and will be avoided under 11 U.S.C. § 547. There are not such allegations or grounds stated in the Motion. The Trustee also states that he has requested, but Mary McAtee has not provided a consent to the sale. However, the Trustee makes the legal conclusion that the sale should be free of Mary McAtee's interest pursuant to 11 U.S.C. § 363(f)(4).

Finally, the Trustee states in his declaration that the liens of Mary McAtee "may attach to the sales proceeds generated." Alternatively, since the Trustee states that the liens may attach, possibly he may also assert that later the liens do not attach. The legal conclusions stated by the Trustee do not identify the conditions by which the lien may, or may not, attach to the proceeds.

Pleading in federal court is not a process by which the court, creditors, U.S. Trustee, and other parties in interest are instructed by a movant to canvas various pleadings and assemble for movant their best guess as to the grounds which would have been alleged with particularity if the movant had complied with Federal Rule of Civil Procedure 7(b) or Federal Rule of Bankruptcy Procedure 9013.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. See also *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982); *Martinez v. Trainor*, 556 F.2d 818, 819-820 (7th Cir. 1977).

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

sufficient grounds that a plausible claim has been pled.

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

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

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

The Trustee not having stated any grounds upon which such relief can be requested, the sale is not ordered free and clear of the lien of Mary McAtee.

The Purchase Agreement also requires payment of certain customary costs of sale and payment of liens of record. The Trustee requests authorization for payment of these items from the sales proceeds. The Trustee asserts that failure to sell at this price and time may result in detriment to the bankruptcy estate, rather than gain, and that delay in the sale may result in diminution in value of the Property and potentially increased holding costs.

Trustee requests the sale proceeds be placed into the debtors' bankruptcy estate and be used to pay administrative expenses, legal fees and creditors pursuant to the normal statutory scheme. There is no exemption

claim being made against the sale proceeds.

Overbidding Procedures

The Chapter 7 Trustee proposes to accept overbids from prospective parties interested in purchasing the Property. All prospective purchasers should recognize they are offering to buy the Property on the identical terms contained in the Agreement, filed as Exhibit A in support of this Motion with two changes.

First, the price to be paid will be increased from $165,000.00 to the amount of the highest bid accepted by the court. Second, the name of the buyer of the Property will be substituted in as the highest bidder. All other terms of the filed Purchase Agreement will remain unchanged. The highest bidder agrees to sign all necessary documents and to be bound by these terms.

The Chapter 7 proposes the following terms for qualification to bid and for bidding.

1. All bidders will be required to deposit with the Trustee $5,000.00 in the form of cashier's check, wire transfer, or any other form acceptable to the Trustee in his sole discretion, no later than twenty four (24) hours before the scheduled hearing on March 13, 2014 (the "Deposit Due Date").

2. All bidders must provide the Chapter 7 Trustee with proof of an ability to close the sale, by way of cash, irrevocable letter of credit or in any other form acceptable to the Trustee in his sole discretion, no later than the Deposit Due Date.

3. The Chapter 7 Trustee also proposes that overbidding be allowed in a minimum increments of $1,000.00 or in any other amount the court deems appropriate. If accepted by the court, this would make any opening bid no less than $166,000.00.

4. The Trustee proposes that if a prospective purchaser deposits funds with him prior to the hearing and is not the highest bidder, those funds will be returned to the prospective purchaser no later than forty eight (48) hours after the sale is concluded in this court. The funds deposited with the Chapter 7 Trustee from the highest bidder will be credited towards the purchase price. If the highest bidder fails to close the sale, those funds will be retained by the Chapter 7 Trustee, without further order from this court, as constituting liquidated damages.

DISCUSSION

The court approves the sale pursuant to 11 U.S.C. § 363(b). From the sales price of $165,000.00, the following deductions will be made:

A. Six percent or $9,900.00, for the commission payable to HOR for the Seller and ReMax for the Buyer, to be split 50/50

B. Approximately one percent or $1,650.00 for the closing costs and customary costs of sale payable to First American Title Company

C. Approximately $775.00 payable to Shasta County for unpaid real property taxes

D. Approximately $130,000.00 to Nationstar Mortgage for the only deed of trust recorded against the property.

E. The secured claim of Mary McAtee. The court notes that a Proof of Claim has been filed by Mary McAtee in the amount of $202,461.00 as a secured claim. Proof of Claim No. 4.

The Chapter 7 Trustee has also requested a waiver of the fourteen (14) day stay of the provisions of Federal Rule of Bankruptcy Procedure 6004(h). Federal Rule of Bankruptcy Procedure 6004(h) provides a fourteen (14) day stay of enforcement on orders authorizing the use, sale, or lease of property other than cash collateral. Trustee has not, however, alleged any facts or provided evidence supporting a finding that cause exists to waive the application of Federal Rule of Bankruptcy Procedure 6004(h) in this case. Trustee merely demands the waiver of the stay of enforcement.

In the absence of evidence of cause, the court denies the request for a waiver of the fourteen (14) day stay of enforcement under Federal Rule of Bankruptcy Procedure 6004(h).

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 P. Dacquisto, the Chapter 7 Trustee ("Trustee"), is authorized to sell pursuant to 11 U.S.C. § 363(b) to Todd Janes ("Buyer"), the residential rental property commonly known as 2850, 2852 and 2956 Henderson Road, Redding, Shasta County, California, APN: 107-410-041 ("Real Property"), on the following terms:
>
> 1. The Real Property shall be sold to Buyer for $165,000.00, on the terms and conditions set forth in the Purchase Agreement, filed as Exhibit A in support of the Motion. Dckt. 52.
>
> 2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real

property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.

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

4. The Trustee be and hereby is authorized to pay a real estate commission of $9,900 to the House of Realty (broker for the Seller, the Trustee) and Re/Max Town & Country (broker for the Buyer), to be split 50/50.

5. Trustee is authorized to make the following distributions from the Net Sales Proceeds, based on the purchase price of $165,000.00:

a. Six percent or $9,900.00, for the commission payable to HOR for the Seller and ReMax for the Buyer, to be split 50/50

b. Approximately one percent or $1,650.00 for the closing costs and customary costs of sale payable to First American Title Company.

c. Approximately $775.00 payable to Shasta County for unpaid real property taxes.

d. Approximately $130,000.00 to Nationstar Mortgage for the only deed of trust recorded against the property.

e. The Secured Claim of Mary McAtee.

f. The remaining balance will be paid to the Trustee for the bankruptcy estate.

In authorizing the payment of the Secured Claim of Nationstar Mortgage and Mary McAtee, the court does not make any determination of the allowable claim amount, any rights, interests, claims, and avoiding powers of the Trustee and bankruptcy estate. Further, this Order authorizes the Trustee to sell the Property, but does not order him to sell the Property.

7. 10-41486-E-11 SHAUN/JENNIFER CLEARWATER MOTION FOR ENTRY OF DISCHARGE
CAH-17 C. Anthony Hughes 2-13-14 [242]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on all creditors, parties requesting special notice, and Office of the United States Trustee on February 13, 2014. By the court's calculation, 28 days' notice was provided. 14 days' notice is required. That requirement was met.

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

The court's tentative decision is to grant the Motion for Entry of Discharge. 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:

With some exceptions, 11 U.S.C. § 1142(d)(5) permits the discharge of debts provided for in the Plan or disallowed under 11 U.S.C. § 502 after the completion of plan payments.

The Debtors-in-Possession originally filed a Chapter 13 case on August 12, 2010 which was converted to Chapter 11 on May 16, 2011. On April 6, 2012, the court signed an order confirming the Plan of Reorganization proposed by the Debtors-in-Possession. On August 13, 2012, the Court entered an order for Final Decree and to close the case. Dckt. No. 233.

On or around January 29, 2014, Debtors-in-Possession completed the required Plan payments to the general unsecured creditors, which renders them eligible for discharge pursuant to 11 U.S.C. 1141(d)(5)(B). On February 3, 2014, the Court entered an order to Administratively Reopen Chapter 11 Case to Obtain a Discharge. Dckt. No. 239. On February 5, 2014 the Debtors-in-Possession completed their Financial Management Course and filed their certificates with the Court. The Debtors-in-Possession have not received a discharge in any bankruptcy preceding the filing of this case.

The Debtors-in-Possession state that they have completed all payments under the plan to the General Unsecured Creditors, Class 10. Exhibit A, Payment Breakdown. Dckt. No. 245. The Debtors-in-Possession paid $20,000 to the holders of general unsecured claims, $1,417.79 more than they would have received in a hypothetical Chapter 7 case. The Debtors-in-Possession state that they were able to accelerate payment to the creditors holding general unsecured claims, due to an unexpected sales commission Debtors received in 2013 and by withdrawing $13,000 from their Intel stock account. A modification is not feasible under section 1127 because the Debtors-in-Possession have complied with the plan payments.

The Debtors-in-Possession will continue to make continue to pay long term claims, unimpaired claims and impaired claims of Classes 7 and 9. Specifically, the Debtors will continue to pay the following claims:

A. Class 1a is an unimpaired claim for Priority claims

B. Class 1b is an unimpaired claim for U.S. Trustee Fees

C. Class 1c is an unimpaired claim for Administrative Expense Claims

D. Class 2 is an unimpaired claim: Friedman Financial

E. Class 3 is an impaired long term claim: GMAC Mortgage

F. Class 4 is an unimpaired long term claim: TruCap Grantor Trust 2010-1

G. Class 6 is an unimpaired claim: OneWest Bank

H. Class 7 is an impaired claim: Heritage Community Credit Union for a 2005 Acura TL

I. Class 9 is an impaired claim: Patelco Credit Union for a 2007 Chevy Suburban

Class 7 and 9 are the only impaired, non-long term claims not paid in full. The two impaired classes will retain their liens until the Debtors-in-Possession have paid their claims in full and are not prejudiced by this Discharge. Creditors may object to this discharge and are being given notice of the hearing and deadlines to object to the discharge of Debtors-in-Possession.

Morever, the Debtors-in-Possession state that they have not been required by a judicial or administrative order or by statute to pay a domestic support obligation as defined by 11 U.S.C. § 101(14A). The Debtors-in-Possession do not have any delinquent tax returns, and have complied with the terms of the plan. Debtors-in-Possession have not been convicted of any felonies. There are no pending criminal proceedings against Debtors-in-Possession.

Upon completion of all payments under the plan, Chapter 11 Debtors-in-Possession are entitled to a discharge. 11 USC § 1141(d)(5)(A). Creditors may object to requests for a hardship discharge by opposing the

debtor's motion on the grounds the Debtor-in-Possession has failed to make the required showing under § 1141(d)(5)(B). Here, however, Debtors-in-Possession have requested a "full compliance" discharge, and have made the proper showing that Debtors have made all of the payments required under their confirmed Chapter 11 Plan. This excepts continued payments that Debtors-in-Possession are making on unimpaired, long term claims, where the interest holders have retained their equity interests and receive distribution in the event funds become available from liquidation of the Debtors-in-Possession's assets after payment of all creditors. There being no objection from Creditors or other parties in interest, the Debtors-in-Possession are entitled to a discharge.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Entry of Discharge filed by the Debtors-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and the discharge of Debtors-in-Possession shall not be entered before March 13, 2014.