UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

March 22, 2018, at 10:30 a.m.

1.	**18-21107-E-11** **TBG-1**	**LAURELS MEDICAL SERVICES** **Stephan Brown**	**MOTION TO EMPLOY STEPHAN M. BROWN AS ATTORNEY** **3-8-18 [15]**

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Proposed Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on March 08, 2018. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor in Possession, creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Employ is xxxxxxxxxxx.

Laurels Medical Services ("Debtor in Possession") seeks to employ The Bankruptcy Group P.C. pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor in Possession seeks the employment of xxxxxxxxx, as the identified counsel of record, of the Bankruptcy Law Group ("Counsel") as its attorney of record in this Chapter 11 case. Application ¶ 9–10; Dckt. 15.

Debtor in Possession argues that Counsel's appointment and retention is necessary to to enable Debtor in Possession to faithfully execute its duties and to implement the restructuring and reorganization of Debtor in Possession. The Bankruptcy Group P.C. will provide legal advice to Debtor in Possession and act to preserve the bankruptcy estate of Debtor.

Stephan Brown, a shareholder in The Bankruptcy Group P.C., testifies that he conducted a conflicts check and that The Bankruptcy Group P.C. is a "disinterested person" under 11 U.S.C. § 101(14). Stephan Brown testifies he and the firm do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Debtor in Possession notes that the following individuals may be involved with this case as part of the employment of Counsel and CPA:

A. Edward Smith, Senior Attorney;

B. Stephan Brown, Attorney;

C. Eric Welch, Legal Administrator;

D. Brenda Guy, CPA;

E. Daniel Griffin, Attorney; and

F. Law clerks, paralegals, and administrative staff.

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

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

Need of Debtor in Possession to Employ Counsel

In connection with a Motion to Use Cash Collateral (Dckt. TGB-2) set for hearing on the same Calendar as this Motion to Employ, the court discusses that this bankruptcy estate is stated by Debtor under penalty of perjury to have assets of $0.00. Rather, it appears that this bankruptcy estate exists solely to pass money through to another entity, MYGORIDE, Inc., and pay $4,000.00 per month to the CFO, Secretary,

and 20% shareholder of Debtor. See Civil Minutes from March 22, 2018 hearing on Motion to Use Cash Collateral.

In his Declaration in Support of the Motion to Employ (Dckt. 17), Shiraz Mir, the CFO-Secretary-20% shareholder to be paid $4,000.00 per month, only states that he wants to retain Counsel as the attorney for Debtor in Possession. *Id.*, ¶ 2. FN.1. There is no indication of what Mr. Mir believes Counsel can do for this asset-less (as stated under penalty of perjury on Schedule A/B) company.

FN.1. In his Declaration Mr. Mir states that he is the "CEO." However, in the Statement of Financial Affairs, Shehla Tariq is identified as the "President." Statement of Financial Affairs Question 28, Dckt. 24. Mr. Mir has signed other documents under penalty of perjury in this case identifying himself as follows:

Petition
Under Penalty of Perjury.....Secretary
Dckt. 1 at 4

Statement Regarding Authority
to Sign and File Petition
Under Penalty of Perjury.....Secretary
Id. at 14

Resolution of Board of Directors
Authorizing Debtor to File Bankruptcy.....Secretary
Id. at 15
Non-Individual Debtors, Official Form 202
Under Penalty of Perjury.....Secretary
Dckt. 24 at 1

Statement of Financial Affairs
Under Penalty of Perjury.....Secretary
Id. at 28

At the hearing, xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

Decision

~~Taking into account all of the relevant factors in connection with the employment and compensation of Counsel and CPA, considering the declaration demonstrating that Counsel and CPA does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Stephan Brown and others in The Bankruptcy Group P.C. as Counsel for the Chapter 11 Estate on the terms and conditions set forth in the court's order. The court does not approve any specific the hourly rate for any persons authorized to be employed.~~

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

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

The Motion to Employ filed by Laurels Medical Services ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Employ is **xxxxxxxx**, and ~~Debtor in Possession is authorized to employ Stephan Brown and others in The Bankruptcy Group P.C. as Counsel and CPA for Debtor in Possession on the terms and conditions as set forth in the court's order.~~

~~**IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.~~

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

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

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

2. **18-21107-E-11** **LAURELS MEDICAL SERVICES** **MOTION TO USE CASH COLLATERAL**
TBG-2 **Stephan Brown** **3-8-18 [20]**

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Proposed Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on March 8, 2018. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion for Authority to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor in Possession, creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion for Authority to Use Cash Collateral is ~~xxxxxxx~~~~, and the hearing is continued to 10:30 a.m. on May 24, 2018.~~

Laurels Medical Services ("Debtor in Possession") moves for authority to use cash collateral consisting of income from a contract with the Department of Veteran's Affairs to pay monthly business expenses. The contract generates $112,000.00 per month to provide medical transportation services and is subject to a lien filed by the Internal Revenue Service, according to Debtor in Possession.

Debtor in Possession projects that the funds will be used for expense as follows:

Personal Property Collateral			
	Veteran's Affairs Contract	$112,000.00	

	MYGORIDE, Inc. (Medical Services Contractor)		($100,000.00)
	Salary of Officer, Shiraz Mir		($4,000.00)
	Payroll taxes		($400.00)

		Net Proceeds	$7,600.00

Debtor in Possession proposes that the cash collateral be approved with a 10% variance in each category and that remaining funds be retained by Debtor in Possession.

APPLICABLE LAW

Pursuant to 11 U.S.C. § 1101, a debtor in possession serves as the trustee in the Chapter 11 case when so qualified under 11 U.S.C. § 322. As a debtor in possession, the debtor in possession can use, sell, or lease property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

> (b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless–
>
> > (A) such sale or such lease is consistent with such policy; or
> >
> > (B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease–
> >
> > > (i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and
> > >
> > > (ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Federal Rule of Bankruptcy Procedure 4001(b) provides the procedures in which a trustee or a debtor in possession may move the court for authorization to use cash collateral. In relevant part, Federal Rule of Bankruptcy Procedure 4001(b) states:

(b)(2) Hearing

> The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

RULING

The court has reviewed the Schedules filed by Debtor. Dckt. 24. Debtor owns no real property. *Id.* at 4. For personal property, Debtor states that it has an interest in, owns, or leases the following:

> Bank Accounts.....$0.00
> No Accounts Receivable
> No Investments
> No Inventory
> No Leases
> No Furniture, Fixtures, or Equipment
> No Machinery or Equipment
> No Intangibles or Intellectual Properties
> No Notes
> No Tax Refunds
> No Insurance Policies.

Id. at 3–6. Debtor does state that it has a $4,100,000.00 contract dispute claim with the Department of Veterans Affairs, but values it at an "unknown" value. On the Summary of real and personal property assets as part of Schedule A/B, Debtor states under penalty of perjury that all of its assets have a value of $0.00. *Id.* at 6.

For Creditors, Debtor states that it has no creditors with any secured claims. *Id.* at 7. Debtor does state that it has priority unsecured claims for income taxes, and payroll taxes in excess of $600,000. Schedule E, *Id.* at 8–10. Then for general unsecured claims, Debtor lists more than $2,000,000 in such claims. Schedule F, *Id.* at 11–16.

On Schedule G, Debtor states that it has no Executory Contracts or Unexpired Leases. *Id.* at 18. However, there appears to be some contract with MYGORIDE, Inc, to which Debtor in Possession is seeking to pay it $100,000 per month for "Contract Medical Services."

On Schedule H, Debtor lists having a co-debtor on a number of debts, with that co-debtor identified as a "Shehla Tariq" (who is identified as the President of Debtor on the Statement of Financial Affairs). *Id.* at 19–20.

Though having no assets, Debtor states that for the July 1, 2016–June 30, 2017 period it had $2,891,000 in **gross revenue** from its business. *Id.* at 21. For the period July 1, 2015, through June 30, 2016, Debtor states that it had **gross revenues** from its business of $4,350,600. *Id.* But for the period July 1, 2017, through the February 27, 2018 filing date for this case, **Debtor states it had gross revenues of only $1.00.** *Id.*

The Statement of Financial Affairs states that there were seven law suits against Debtor pending when this case was filed. *Id.* at 22–23.

Debtor's shareholders and officers are stated to be Shehla Tariq and Shiraz Mir. *Id.* at 27.

From a review of the Schedules, Debtor has no assets around which a Chapter 11 case may be prosecuted. Though in the Motion now before the court it is alleged "Debtor in Possession has a contract with the Department of Veteran's Affairs for $112,000 per month to provide medical transportation services" (Motion ¶ 5, Dckt. 20), on Schedule A/B, Debtor clearly states under penalty of perjury it has no assets, other than possibly a "contract dispute" claim of unknown value that Debtor states has a value of $0.00 in computing the aggregate value of its assets.

It appears that there is no business being operated, no business in this bankruptcy estate, and no financial undertaking to be reorganized—at least based upon the information provided under penalty of perjury by Debtor in the Schedules and Statement of Financial Affairs.

Rather, it appears that Debtor, and now Debtor in Possession, seeks to use the bankruptcy estate, as a conduit to ship $100,000 per month to some entity named "MYGORIDE," with there being no economic benefit to the bankruptcy estate.

There is a $4,000.00 per month economic benefit to Shiraz Mir, the Secretary, CFO, and 20% shareholder in Debtor. Statement of Financial Affairs, Question 28; Dckt. 24. There is no explanation provided why Shiraz Mir is being paid $4,000.00 per month as the CFO and Secretary of a debtor, serving as the fiduciary debtor in possession, for a bankruptcy estate bereft of any assets.

At the hearing, **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

The Motion is **xxxxxxxxxx**, and Debtor in Possession ~~is/is not~~ authorized to use the cash collateral **for the period of March 22, 2018, through May 31, 2018. All surplus cash collateral is to be held in a cash collateral account and separately accounted for by Debtor in Possession**.

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 Authority to Use Cash Collateral filed by Debtor in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, pursuant to this order, for the period March 22, 2018, through May 31, 2018, and the cash collateral may be used to pay the following expenses, granting Debtor in Possession a variance of 10% in any individual line item expense as long as the total amount used does not exceed five percent of the monthly total budget:

Personal Property Collateral			
	Veteran's Affairs Contract	$112,000.00	
	MYGORIDE, Inc. (Medical Services Contractor)		($100,000.00)
	Salary of Officer, Shiraz Mir		($4,000.00)
	Payroll taxes		($400.00)

		Net Proceeds	$7,600.00

IT IS FURTHER ORDERED that the creditors having an interest in the cash collateral are given replacement liens in the post-petition proceeds in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim.

IT IS FURTHER ORDERED that the hearing on the Motion is continued to **10:30 a.m. on May 24, 2018**, to consider a Supplement to the Motion to extend the authorization to use cash collateral. On or before, May 17, 2018, Debtor in Possession shall file and serve supplemental pleadings for the further use of cash collateral and notice of the May 24, 2018 hearing. Any opposition to the requested use of cash collateral may be presented orally at the hearing.

3.	**18-90029-E-11** **MF-8**	**JEFFERY ARAMBEL** **Matt Olson**	**MOTION TO EMPLOY ARCH & BEAM GLOBAL, LLC AS RESPONSIBLE INDIVIDUAL AND FINANCIAL ADVISOR** **2-28-18 [107]**

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors, parties requesting special notice, and Office of the United States Trustee on March 7, 2018. By the court's calculation, 15 days' notice was provided. The court set the hearing for March 22, 2018. Dckt. 128.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor in Possession, creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Motion to Employ Arch & Beam Global, Inc. to provide services to Debtor is ~~denied without prejudice~~.

Jeffery Arambel ("Debtor in Possession") seeks to employ Arch & Beam Global, LLC ("Advisor") as a Responsible Individual and Financial Advisor pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor in Possession seeks the employment of Advisor to assist and advise Debtor in Possession respecting performance of debtor in possession duties. FN.1.

FN.1. As discussed below, the Original and now the Amended Agreement for such employment clearly state that it is for the employment by Debtor individually, not as the fiduciary debtor in possession to employ professionals who have a fiduciary duty to the bankruptcy estate in performing duties for and of the fiduciary debtor in possession.

Debtor in Possession argues that Advisor's appointment and retention is necessary to provide a smooth administration of the Chapter 11 estate in this case. Debtor in Possession states that Advisor will perform the following services:

A. Installation of a financial reporting process appropriate to the company's strategy;

B. Development of the required financial and operational data for control and planning purposes;

C. Conversion of financial data into meaningful trend and exception information reports to improve performance and controls, including, but not limited to, weekly cash forecasts, weekly sales trends and weekly inventory requirements;

D. Development and implementation of a facilities closure strategy;

E. Review of leases;

F. Management of accounts receivables collection;

G. Negotiations of debt with creditors;

H. Development of long term financial forecast;

I. Preparation of a plan of reorganization;

J. Direction of the liquidation of selected assets; and

K. Assistance with performance of fiduciary duties.

Howard Bailey, a Senior Managing Director of Arch & Beam Global, LLC, testifies that he is a Certified Turnaround Professional with over thirty years of experience in banking, restructuring, and bankruptcy. Mr. Bailey testifies he and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

CREDITOR'S OBJECTION

American AgCredit, FLCA ("Creditor") filed an Objection on March 5, 2018. Dckt. 118. Creditor argues that the Motion should be set on noticed hearing instead of as an *ex parte* motion so that all parties have adequate time to respond. Creditor's argument has been resolved by the court setting this matter for a hearing.

U.S. TRUSTEE'S OBJECTION

Tracy Hope Davis ("U.S. Trustee") filed an Objection on March 5, 2018. Dckt. 124. The U.S. Trustee opposes terms in the employment agreement that would give Advisor duties of a debtor in possession and that would limit Advisor's liability.

The U.S. Trustee notes that the Engagement Letter includes language that Advisor "**shall have no responsibility for mistakes or omissions on our part arising as a result of having relied upon information, representations and books & records provided by the Debtor that were inaccurate or incomplete.**" *Id.* at 2. The U.S. Trustee notes that the engagement letter also includes an indemnification clause that would essentially absolve Advisor from liability for its own negligence.

The U.S. Trustee also narrows down on Debtor in Possession's language in the Memorandum of Points and Authorities that Advisor is needed to "take over the duties and responsibilities related to the administration of the Chapter 11 process." *Id.* at 4 (citing Dckt. 108 at 2:17–19). The U.S. Trustee is not even sure what Advisor could do in this case because the Memorandum cites to the Northern District's Local Rule 4002-1 for the concept of a Responsible Individual when the debtor in possession is not an individual, but in this case, the debtor in possession is an individual.

REVISED PROPOSED AGREEMENT

Debtor in Possession and Advisor, in considering the Oppositions have proposed a modified version of the employment of Advisor. Reply, Dckt. 145. In the Reply, it is stated that Advisor's role will be tailored back, no longer filling the "Responsible Individual," but serve only as a financial advisor. Howard Bailey provides his Declaration (Dckt. 146) addressing these changes and his role as the Financial Advisor. Jeffery Arambel, the individual debtor who sought to have Mr. Bailey employed as the Responsible Representative, has not provided a Declaration explaining how he will now be able to serve personally as the Responsible Representative for the fiduciary Debtor in Possession.

Review of Amended Agreement

Upon review the Amended Agreement (Exhibit A, Dckt. 147), the court distills the terms of the Financial Advisor employment to be:

A. The employment is to assist "Debtor" (not Debtor in Possession) in the Chapter 11 Bankruptcy Case of Jeffery Arambel. FN. 2.

FN.2. The proposed employment does not get off on a strong footing, the Financial Advisor either not appreciating the fiduciary duties of a debtor in possession and the fiduciary duties to the bankruptcy estate of a professional hired to be employed by the debtor in possession; does not understand the difference between the debtor and the fiduciary debtor in possession; or seeks to be paid by the estate for doing private work for Debtor that may conflict with the fiduciary duties of Debtor in Possession.

B. Mr. Bailey will serve only as the Financial Advisor to "Debtor."

C. Mr. Bailey's firm will, in addition to serving as the Financial Advisor to "Debtor," will "staff the Case with additional consultants from Arch + Beam." FN.3.

FN.3. Using the terminology "Staff the Case" sounds in the nature of running the Chapter 11 bankruptcy case in the place of the fiduciary debtor in possession, as opposed to merely providing "financial advise" to "Debtor" or a debtor in possession.

D. As Financial Advisor to "Debtor," Mr. Bailey and the others at his firm are to provide the followings services :

a. Installation of a financial reporting process appropriate to Debtor's company's planning purposes;

b. Develop the required financial and operational data for control and planning purposes;

c. Convert the data into meaningful trend and variance reports to improve performance and controls, including, but not limited to, weekly cash forecasts, weekly sales trends and weekly inventory turnover trends;

d. Develop and implement an optimal facilities closure strategy;

e. Review leases and renegotiate lease rates where possible;

f. Negotiate debt with creditors;

g. Develop long term financial forecast;

h. Aid in development of Debtor's Plan;

i. Implement administrative controls to maximize timely collection of accounts receivables;

j. Identify surplus, inventory, machinery and equipment;

k. INTENTIONALLY LEFT BLANK; and

l. Assist Debtor in performing its fiduciary duties.

Exhibit A, p. 2 of 8; *Id.*

Those services sound less in the "financial advisor" role but more in the chief executive officer, chief financial officer, chief operations officer, manager, or responsible representative for a debtor in possession role. The last item, "Assist Debtor in performing its fiduciary duties" appears to be a clear statement that Financial Advisor does not seek to be employed pursuant to 11 U.S.C. § 327 as a professional for the fiduciary Debtor in Possession, but only personally by Debtor to assist the individual Debtor personally and avoid any fiduciary duties to the bankruptcy estate. Debtor may so elect to employ personal professionals who are not employed by the fiduciary debtor in possession or who owe a fiduciary duty to the bankruptcy estate—but such personal professionals are not hired pursuant to 11 U.S.C. § 327.

APPLICABLE LAW

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

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

RULING

As noted by the U.S. Trustee in opposing the original agreement, it sought to replace the individual Debtor as Debtor in Possession and appoint the Financial Advisor to stand in that role. This was seeking to have what is commonly called a "Chief Restructuring Officer" or a business manager put in place to run the business and structure the reorganization. Though not commonly done in this District, good reason can exist to do so, even in individual debtor Chapter 11 cases. The individual debtor may well be so beaten down by the financial and personal struggles leading up to the bankruptcy case that the individual debtor may not have the emotional energy to undertake the lead responsible representative role for the bankruptcy case on his or her own. Additionally, it may be that the individual debtor does not have the financial and business ability to run and reorganize the business, it having ended up in Chapter 11 under his or her direction. Whatever the reason, it is not a negative moral mark on a debtor in possession seeking the proper assistance of legal, financial, and other professionals to successfully navigate the complex Chapter 11 case.

The crux of the U.S. Trustee's original opposition was that the Financial Advisor appears to be watering down his fiduciary duties and responsibilities to the bankruptcy estate by including a substantial "non-responsibility" caveat to his professional employment as the Responsible Representative.

As noted above, the current proposed employment and the original employment both get off on the wrong foot describing it as the mere individual Debtor who is seeking to employ the Financial Advisor. For this to be authorized by the court, and for the scope of the services, it has to be the fiduciary Debtor in Possession.

In the original Motion and Agreement, for the services to be provided, Debtor in Possession and the Responsible Representative got it right; the employment is to hire a Responsible Representative to fulfill for Debtor in Possession many of the duties of Debtor in Possession—it appearing that these include: running the business, reviewing and evaluating claims, developing plan terms, and advancing the case. It appears that Debtor in Possession personally would continue in that role, having some overall final decision say as the fiduciary debtor in possession (much in the way that the CEO has the final say over the acts of the various other officers and managers running the business of a corporate debtor in possession).

Exhibit B is a redline comparing the original Agreement to the Amended Agreement. Dckt. 24 at 10–16. Interestingly, the duties to be performed do not change. Rather, the Amended Agreement merely drops the reference to those duties being in the nature of those of a court-appointed responsible representative. The Amended Agreement also removes the limitation of liability provision that would appear to gut the fiduciary responsibilities of any professional authorized to be employed pursuant to 11 U.S.C. § 327.

It appears that Debtor in Possession and the Financial Advisor overreacted to the opposition of the U.S. Trustee and some creditors. It is clear in this case that creditors believe that Debtor in Possession needs substantial business, financial, operational, and legal assistance in attempting to prosecute this and the related Filbin Land & Cattle Co, Inc. cases—which are stated by the two debtors to have assets in excess of $200,000,000.00 and large operating revenues.

The court is not convinced that there needs to be a Chapter 11 trustee in both, or possibly either, of the bankruptcy cases. Bringing in proper and responsible operations and management assistance may well be what is necessary (and is likely what any Chapter 11 trustee would have to do). The appointment of possible Chapter 11 trustees will turn on whether the court concludes that Mr. Arambel is able to fulfill his fiduciary duties as Debtor in Possession in his individual case and as the responsible representative in the *Filbin* case, as well as whether there are irreconcilable conflicts that preclude Mr. Arambel from serving in both, or either, fiduciary roles.

However, what cannot be approved is for Mr. Arambel, as "Debtor," to hire the Financial Advisor to run the Chapter 11 case. Paraphrasing William Shakespeare, who appears to have been anticipating this case, "A Responsible Representative/CRO is a Responsible Representative/CRO by any other name." FN.4.

FN.4. William Shakespeare, 1597, *Romeo and Juliet*, Act II, Scene II; "What's in a name? that which we call a rose By any other name would smell as sweet;. . . ."

The court has pending the Motion of the U.S. Trustee to convert or dismiss this case. As noted by the court at prior hearings, this includes the option of appointing a Chapter 11 Trustee. The question of

whether a Chapter 11 Trustee should be appointed will turn, for this individual Chapter 11 case, on whether the fiduciary Debtor in Possession and hired professionals pursuant to 11 U.S.C. § 327 provide professional services and fulfill their respective fiduciary duties to the bankruptcy estate. The pending request, which appears to actually sound in the nature of the employment of a CRO or business and financial operational and restructuring professionals to take over much of the operational and restructuring duties and obligations from the individual Debtor in Possession, may well serve to get this case on track. Or, it may not. Such will turn on getting the proper agreement and scope of services (for which employment may be authorized pursuant to 11 U.S.C. § 327 by a debtor in possession).

At the hearing, **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by Jeffery Arambel ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ ~~by the Debtor is denied without prejudice~~.

4.	**18-90030-E-11 STJ-2**	**FILBIN LAND & CATTLE CO., INC. Matt Olson**	**MOTION TO EMPLOY MICHAEL ST. JAMES AS ATTORNEY 3-5-18 [101]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Proposed Attorney, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on March 8, 2018. By the court's calculation, 14 days' notice was provided. The court set the hearing for March 22, 2018. Dckt. 111.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor in Possession, creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Motion to Employ is granted.

Filbin Land & Cattle Co., Inc., ("Debtor in Possession") seeks to employ Michael St. James of St. James Law, P.C., ("Counsel") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor in Possession seeks the employment of Counsel to provide legal services and representation in this Chapter 11 case.

Debtor in Possession argues that Counsel's appointment and retention is necessary to meet the requirements of the Bankruptcy Code and of the U.S. Trustee, to administer claims, to evaluate and negotiate debt reorganizations, to assist with possible sales of real property, and to formulate a plan of reorganization. Debtor in Possession wishes to employ Counsel at a fee rate of $625.00 per hour, subject to court approval.

Michael St. James, a shareholder and officer of St. James Law, P.C., testifies that he is representing only the Debtor in Possession and that he has waived any pre-petition claim that he may have had against the Estate. Mr. St. James testifies he and the firm do not represent or hold any interest adverse

to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys, but he discloses that he has represented Jeffery Arambel previously.

CREDITORS' OBJECTION

Dorothy Arnaud, individually, and as Co-Trustee of the Patrick H. and Margaret J. Filbin Trust UTA, dated December 30, 1973; and Helen F. Jacobson, individually, and as Co-Trustee of the Patrick H. and Margaret J. Filbin Trust UTA, dated December 30, 1973, ("Creditors") filed an Objection on March 15, 2018. Dckt. 117.

Creditors argue that there may be a potential conflict because Counsel's Declaration states that "the Firm may have previously represented other entities or persons with claims against or obligations to the Filbin debtor or the Filbin debtor in possession which have thus far not been disclosed to or identified by Michael St. James or the firm."

Creditors also argue that there is no showing of need to employ Counsel because there is already a minimum of three attorneys working on the matters.

Finally, Creditor argues that Counsel's hourly rate is not reasonable for matters occurring in the San Joaquin Valley, even if Counsel believes that his rates are reasonable for the Bay Area.

DISCUSSION

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

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

Creditors oppose Counsel's employment on three grounds, but each of them is insufficient. First, the court does not interpret Counsel's Declaration in the same way that Creditors do. Counsel's statement that there may be undisclosed matters appears to be generic language that if other matters exist, then they have not been disclosed to Counsel or identified by him. That does not rise to a conflict of interest.

Creditors also ignore that the court has expressed concerns about the same law firm being employed in this case and the related case of Jeffery Arambel. *See* Dckt. 73, 116. Employment of separate counsel in the two related cases is a better alternative than having the same attorneys representing two possibly conflicting debtors.

Creditors' final ground is that the proposed hourly rate is unreasonable. Creditors argue that the case centers around real property in the San Joaquin Valley and that the rates should match what is comparable in that area. Creditors have not proposed what they believe is an appropriate rate. Chapter 11 cases require a significant amount of work and diligence, and if Debtor in Possession wishes to hire a Bay Area attorney with considerable experience in that field, then Counsel would be expected to use his normal rate.

Taking into account all of the relevant factors in connection with the employment and compensation of Counsel, considering the declaration demonstrating that Counsel does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Michael St. James as Counsel for Debtor in Possession on the terms and conditions set forth in these minutes. Approval of fees is subject to the provisions of 11 U.S.C. § 328 and review of the fees at the time of final allowance of fees for the professional.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by Filbin Land & Cattle Co., Inc., ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted, and Debtor in Possession is authorized to employ Michael St. James of St. James Law, P.C., as Counsel for Debtor in Possession on the terms and conditions as set forth in the court's civil minutes for the March 22, 2018 hearing on this Motion.
>
> **IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.
>
> **IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.
>
> **IT IS FURTHER ORDERED** that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.
>
> **IT IS FURTHER ORDERED** that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted

only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

5.	**17-22347-E-11** **JJG-4**	**UNITED CHARTER LLC** **Jeffrey Goodrich**	**MOTION FOR COMPENSATION FOR THE VIRTUAL REALTY GROUP, BROKER(S)** **2-22-18 [169]**

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on February 22, 2018. By the court's calculation, 28 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Allowance of Professional Fees has not been set properly for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Allowance of Professional Fees is xxxxxxxxxx.

The Virtual Realty Group (Team VRG), the Broker ("Applicant") for United Charter, LLC, Debtor in Possession ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested pursuant to a listing agreement that calls for Applicant to receive a 6.00% commission for total lease payments. The order of the court approving employment of Applicant was entered on January 26, 2018. Dckt. 155. Applicant states that Debtor in Possession entered into a lease with H&K Express, Inc., on February 4, 2018, for a five-year term with monthly rent of $5,000 (subject to 3.00% annual increases).

Applicant requests $19,122.88 as a leasing commission, $9,556.44 of which will go to Applicant, and $9,556.44 of which will go to a cooperating broker identified as Ryker Flint Commercial.

INSUFFICIENT NOTICE OF MOTION

Applicant provided twenty-eight days' notice of this Motion. Federal Rule of Bankruptcy Procedure 2002(a)(6) requires a minimum of twenty-one days' notice of the hearing, and Local Bankruptcy Rule 9014-1(f)(1)(B) requires an additional fourteen days for parties to file written opposition. Those time periods do not run concurrently. Those two minimums total thirty-five days. Applicant has provided seven fewer days than the minimum. Therefore, the Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by The Virtual Realty Group (Team VRG) ("Applicant"), Broker for United Charter, LLC, Debtor in Possession, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF APPLICANT PROVIDES SUFFICIENT NOTICE OF THE MOTION

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

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

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

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

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate;
(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). A professional must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

APPLICABLE LAW

Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the professional's services, the manner in which services were performed, and the results of the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the professional exercise reasonable billing judgment?

In re Garcia, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis cab be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

Even if the court finds that the services billed by a professional are "actual," meaning that the fee application reflects time entries properly charged for services, the professional must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. A professional must exercise good billing judgment with regard to the services provided because the court's authorization to employ a professional to work in a bankruptcy case does not give that professional "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

In re Puget Sound Plywood, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's services for the Estate include leasing commercial real estate.

DISCUSSION

Applicant seeks an award of $19,122.88 pursuant to a listing agreement with H&K Express, Inc., entered into in February 2018. The requested amount reflects the total commission that Applicant could receive over the period of a five-year lease.

The court's Order authorized the employment on the terms and conditions stated in the Lease Listing Agreement filed as Exhibit A, Dckt. 129. Order, Dckt. 155. Going to the actual Agreement, the stated terms include:

> 3. COMPENSATION:
> **Notice: The amount or rate of real estate commissions is not fixed by law. They are set by each Broker individually and may be negotiable between Owner and Broker (real estate commissions include all compensation and fees to Broker).**
>
> A. Owner agrees to pay to Broker as compensation for services, irrespective of agency relationship(s), as specified below:
>
> (1) For fixed-term leases:
>
> (a) Either ☒ 6.000 percent of the total rent for the term specified in paragraph 2 (or if a fixed term lease is executed, of the total rent payments due under the lease); or (ii) _____ ;
>
> (b) Owner agrees to pay Broker additional compensation of _____; if a fixed term lease is executed and is extended or renewed. Payment is due upon such extension or renewal.
>
> (2) For month-to-month rental: Either (I) _____ percent of _____; or (ii) _____

Dckt. 129 at 4.

The lease for which the compensation is sought is a five-year lease of 20,000 square feet to H & K Express, Inc. This case has been fraught with allegations of leases, alleged breaches of leases, failure to prosecute claims of the bankruptcy estate (preference actions against insiders), and the Responsible Representative treating the bankruptcy estate as his personal financial vehicle into which he could make "capital contributions."

Using the California Secretary of State website, the court checked for the existence of an H & K Express, Inc. The Secretary of State reports that there are two different active corporations in California with the name H & K Express. FN.1.

FN.1. https://businesssearch.sos.ca.gov/CBS/SearchResults?SearchType=CORP&SearchCriteria=H+%26+K+Express&SearchSubType=Keyword

---

The Lease Agreement itself purports to be between H & K Express, Inc., and United Charter, LLC, Raymond Zhang, its Manager. Exhibit A, Dckt. 171. Again, Mr. Zhang appears to ignore the fact that United Charter, LLC, the debtor, does not have the right and power to be leasing property of the Bankruptcy Estate. On its face, the fiduciary Debtor in Possession does not appear to be the lessor. The Lease Agreement continues with this failure to have Debtor in Possession be a party to or to exercise its rights, and only its rights, to lease the property.

Debtor in Possession, Counsel for Debtor in Possession, and the Leasing Agent appear to have created a serious legal issue for the Bankruptcy Estate concerning whether there is any lease that can be enforced by the Bankruptcy Estate.

Before the court approves compensation for services **Provided to the Bankruptcy Estate** by a **Professional Hired By Debtor in Possession**, the court needs to believe that the services were provided **for Debtor in Possession and the Bankruptcy Estate**, as well as there being any **enforceable rights for the Bankruptcy Estate**.

The Motion is **xxxxxxxxxxxxxxxxxxx**.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by The Virtual Realty Group (Team VRG) ("Applicant"), Broker for United Charter, LLC, Debtor in Possession, ("Client") 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 **xxxxxxxxxx**.

6. 17-22347-E-11 **UNITED CHARTER LLC** **MOTION TO USE CASH COLLATERAL**
JJG-7 **Jeffrey Goodrich** **3-8-18 [193]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

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

Sufficient Notice Not Provided. No Proof of Service was filed with the Motion. 14 days' notice is required.

The Motion for Authority to Use Cash Collateral was not properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor in Possession, creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion for Authority to Use Cash Collateral is denied without prejudice.

United Charter LLC ("Debtor in Possession") moves for an order approving the use of cash collateral from Debtor in Possession's real property. Debtor in Possession does not request a specific period of time for its cash collateral request. Instead, Debtor in Possession refers to "the three-month period between the date of hearing on this motion and the date the DIP expects to have a confirmation hearing on its plan of reorganization." Dckt. 193 at 3:9–11. No confirmation hearing has been set.

Debtor in Possession's proposed budget includes the following expenses:

Expense Name	**Amount**
Cal Water	$118
PGE	$250
Insurance	$2,560.41
Maintenance	$200

Bay Alarm	$103
Contingency	$500
FTB	$76.84
Accounting	$1,200
Total	**$5,008.25**

INSUFFICIENT SERVICE OF MOTION

Debtor in Possession did not file a Proof of Service with the Motion. The court has no evidence that all necessary parties have been notified of the Motion so that they can respond and appear at the hearing. For this Motion in particular, Debtor in Possession alleges a dispute with East West Bank about whether any order authorizing the use of cash collateral should include language requiring Debtor in Possession to turnover all net monthly proceeds to the bank.

Without evidence that the bank has been served, there is no reason to believe that a party that will likely oppose the Motion has been notified that this hearing has been set. Accordingly, the Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Authority to Use Cash Collateral filed by Debtor in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF PROPER SERVICE IS PROVIDED TO ALL NECESSARY PARTIES FOR THIS MOTION

APPLICABLE LAW

Pursuant to 11 U.S.C. § 1101, a debtor in possession serves as the trustee in the Chapter 11 case when so qualified under 11 U.S.C. § 322. As a debtor in possession, the debtor in possession can use, sell, or lease property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

> (b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that

> if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless–
>
> > (A) such sale or such lease is consistent with such policy; or
> >
> > (B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease–
> >
> > > (i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and
> > >
> > > (ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Federal Rule of Bankruptcy Procedure 4001(b) provides the procedures in which a trustee or a debtor in possession may move the court for authorization to use cash collateral. In relevant part, Federal Rule of Bankruptcy Procedure 4001(b) states:

> (b)(2) Hearing
>
> The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

DISCUSSION

For prior motions to authorize the use of cash collateral, the court had approved a stipulation between Debtor in Possession and East West Bank that included an agreement between the parties that the bank be paid net monthly proceeds as adequate protection. *See* Dckt. 149. Now, Debtor in Possession wishes to avoid making those payments.

The bank has not responded to this Motion, possibly because of Debtor in Possession's failure to prove that service was provided, but given Debtor in Possession's request not to make adequate protection payments each month, the court anticipates that the bank will want to present arguments opposing the Motion in what has a been a very contentious case between Debtor in Possession and East West Bank.

Review of Monthly Operating Reports

On March 15, 2018, Debtor in Possession filed its Monthly Operating Report for February 2018. Dckt. 200. It is asserted that this Monthly Operating Report shows how the bankruptcy estate is turning the corner.

On it, Debtor in Possession shows $26,500.00 in "Gross Sales." *Id.* at 2. Because the Bankruptcy Estate is the lessor of commercial property, the "Gross Sales" are gross rents. Debtor in Possession also states "income" in the form of a "Deposit" in the amount of $10,000.00. If this is a rental deposit, it commonly includes first and last months' rents and a security deposit. *See* H & K Express Lease, Exhibit A; Dckt. 171 at 5. Thus, at best a portion of this would be the first month of rent (if due in the month the payment is made) while most would be held to pay future obligations or be refunded. It is likely that the $10,000 is not income, but a "deposit" for which there needs to be a corresponding deduction/reserve.

The February 2018 monthly operating reports shows minimal expenses, with the only expense being paid being PG&E ($2,000 of the $2,195 in expenses).

Expenses

For the requested three months of operation, Debtor in Possession lists minimal expenses. There is no set aside for property taxes. There is no set aside for necessary professional fees. There is no set aside for taxes (other than a minor $75 per month). The proposed budget does not appear to be a real, accurate projection of the actual expenses of operating the business.

Decision

At the hearing, East West Bank stated **xxxxxxxxxxx**.

The Motion is **xxxxxxxxxxxxx**.

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 Authority to Use Cash Collateral filed by Debtor in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is **xxxxxxxxxxxx**.

7. **14-29361-E-7** **WALTER SCHAEFER** **MOTION FOR COMPENSATION FOR**
DNL-28 **Douglas Jacobs** **LUIS CARBALLO, SPECIAL COUNSEL**
2-22-18 [434]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 22, 2018. By the court's calculation, 28 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Allowance of Professional Fees has not been set properly for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Allowance of Professional Fees is granted.

Luis Carballo, the Special Counsel ("Applicant") for Kimberly Husted, the Chapter 7 Trustee ("Client"), makes a Request for the Pre-Allowance of a Flat Fee in this case. FN.1.

FN.1. The present Application is identified as being filed by the attorneys of Desmond, Nolan, Livaich & Cunningham, such attorneys having been authorized to be employed by the Chapter 7 Trustee. However, the Application is filed by Kimberly Husted, the Chapter 7 Trustee. No information has been provided to the court that Ms. Husted is a lawyer who is a partner or associate attorney with the Desmond Firm. Counsel for the Chapter 7 Trustee addressed this at the hearing, advising the court **xxxxxxxxxxxxxxxxxxxxxxxxx**.

Applicant has not specified what section of the Bankruptcy Code applies to this Motion, but typically, fees are awarded under 11 U.S.C. §§ 330 or 331. Given that Applicant is requesting all fees to be approved before they are incurred, the court treats this Motion is a final request for fees under 11 U.S.C. § 330.

The order of the court approving employment of Applicant was entered on April 30, 2015. Dckt. 114. Applicant requests pre-approval of a flat fee in the amount of $22,500.00.

NOTICE OF MOTION

Applicant provided twenty-eight days' notice of this Motion. Federal Rule of Bankruptcy Procedure 2002(a)(6) requires a minimum of twenty-one days' notice of the hearing, and Local Bankruptcy Rule 9014-1(f)(1)(B) requires an additional fourteen days for parties to file written opposition. Those time periods do not run concurrently. Those two minimums total thirty-five days. Applicant has provided seven fewer days than the minimum.

The court treats this Motion as one noticed pursuant to Local Bankruptcy Rule 9014(f)(2), for which only twenty-one days' notice was required, but the court may consider oral opposition at the hearing.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). An attorney must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

APPLICABLE LAW

Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

In re Garcia, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis cab be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen*

Factors, Inc. (In re Kitchen Factors, Inc.), 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

In re Puget Sound Plywood, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's services for the Estate include prosecuting an action in Costa Rica.

DISCUSSION

Here, Applicant is requesting that the court award fees before they have been incurred. In fact, in the Motion, Applicant states that "payment of the total fee may not be required if the lawsuit is dismissed at an earlier phase as the fees are incurred at certain phases of the litigation per Costa Rican law." Dckt. 434 at 4:8–10.

This is presented as a flat fee agreement, which the Chapter 7 Trustee and her counsel have determined is a proper fee mechanism. It is broken into three payments, which are tied to the prosecution of the action in Costa Rica.

This is a reasonable funding mechanism for fees. This is an unusual case, one in which Debtor has actively worked to prevent the Chapter 7 Trustee from administering property of the Bankruptcy Estate in Costa Rica. This activity could well include the work of a cohort, doing whatever he can to not properly

assert a secured claim in this case and using proceedings in foreign courts to impede the exercise of federal court jurisdiction in this court.

The Motion is granted, and the Chapter 7 Trustee is authorized to employ Luis Carballo as special counsel in the action filed by Michael Pechbrenner in Costa Rica with the flat fee of $22,500.00 authorized, subject to the provisions of 11 U.S.C. § 328.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Luis Carballo ("Applicant"), Special Counsel for Kimberly Husted, the Chapter 7 Trustee, ("Client") 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 Kimberly Husted, the Chapter 7 Trustee is authorized to employ Luis Carballo as special counsel pursuant to 11 U.S.C. § 327 on the following terms and conditions, in addition to the legal and ethical obligations of Applicant to Client: (1) to represent Client and ABC Trustee of California Sociedad Anoima ("ABC," the entity created by Client to take title to the real property commonly identified as 184 Los Delfines, Tambor, Costa Rica ("Condo 184") in the action filed against Client and ABC by Michael Pechbrenner in Costa Rica; and (2) The total legal fees in defending Client and ABC is a flat fee of $22,500, broken down into three phases with payment of $7,500 due at each respective phase, which are (a) response to the lawsuit; (b) execution of the proving phase; and (c) sentencing. The approval of the flat fee of $22,500.00 is subject to the provisions of 11 U.S.C. § 328. The above flat fee amount and authorization for payment is made by this order, with no further orders pursuant to 11 U.S.C. §§ 330 or 331 required.