# UNITED STATES BANKRUPTCY COURT
Eastern District of California

**Honorable Ronald H. Sargis**
Bankruptcy Judge
Sacramento, California

**April 13, 2023 at 10:30 a.m.**

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| **1.** | **21-23209-E-7**<br>**ETL-1** | **FLAVIANO/JESSICA NAVA**<br>**Matthew DeCaminda** | **MOTION TO APPROVE LOAN MODIFICATION**<br>**3-14-23 [30]** |

**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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and the Office of the United States Trustee on March 14, 2023. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The court notes that although Movant complied with notice requirements, the case has since been converted from a Chapter 13 to a Chapter 7. Therefore, it is not clear whether Chapter 7 trustee has received notice of the proceedings.

Additionally, Movant failed to use the proper Proof of Service Form. Local Bankruptcy Rule 7005-1 requires the use of a specific Eastern District of California Certificate of Service Form (Form EDC 007-005). This required Certificate of Service form is required not merely to provide for a clearer identification of the service provided, but to ensure that the party providing the service has complied with the requirements of Federal Rule of Civil Procedure 5, 7, as incorporated into Federal Rule of Bankruptcy Procedure 7005, 7007, and 9014(c).

At the hearing, **xxxxxxx**

The Motion to Approve Loan Modification has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re*

*Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion to Approve Loan Modification is granted.**

The Motion to Approve Loan Modification filed by U.S. Bank National Association in its capacity as Trustee for RMTP Trust Series 2021 Cottage-TT-V ("Creditor") seeks court approval to enter into a loan modification with Flaviano Nava and Jessica Nava ("Debtor") on the Note and Deed of Trust on the real property commonly known as 4385 Country Run Way, Antelope, California ("Property"). Dckt. 30. Debtor will use funds received from the Secretary of Housing and Urban Development ("HUD") to bring the arrears on Debtor's Loan with Creditor current. Dckt. 30. Creditor has agreed to a loan modification that will bring Debtor's arrears current without altering the terms of the original note.

The Motion is supported by the Declaration of Brian Gaske. Dckt. 32. The Declaration affirms Debtor and Creditors' arrangement whereby Debtor will use funds obtained from HUD to pay off the arrears on the Claim, without changing the terms of the agreement.

This case being converted to a Chapter 7 case, and there being no objection from the Chapter 7 Trustee or other parties in interest, and the Motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification is granted.

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 to Approve Loan Modification filed by U.S. Bank National Association ("Creditor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
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> **IT IS ORDERED** that the court authorizes Debtor to amend the terms of the loan with U.S. Bank National Association ("Creditor"), which is secured by the real property commonly known as 4385 Country Run Way, Antelope, California, on such terms as stated in the Modification Agreement filed as Exhibit A in support of the Motion (Dckt. 33).

**2.** **20-00202-E-0 RHS-1** | **IN THE MATTER OF THOMAS OSCAR GILLIS, FEE RUBRIC** | **CONTINUED STATUS CONFERENCE RE: RECOVERY OF OVERPAYMENT OF LEGAL FEES AND ENFORCEMENT OF FEE RUBRIC ORDER AND RELATED ORDERS**
**6-23-22 [248]**

Notes:
Continued from 3/14/23

[RHS-1] Status Report of Thomas O. Gillis filed 3/23/23 [Dckt 284]

**The Status Conference is xxxxxxx**

Mr. Gillis filed a Status Report on March 23, 2023. Dckt. 284. Some of the matters addressed related to this Order to Show Cause. He states that he has no objection to the court implementing the distribution process stated in the Order to Show Cause. He suggests that the court have a bilingual Notice to make a claim for to participate in the pro rata distribution of the monies deposited with the Clerk of the Bankruptcy Court. He also suggest that the court simplify the "legal stuff" (the court's terminology).

At the Status Conference, **xxxxxxx**

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| 3. | 20-00202-E-0<br>RHS-2 | IN THE MATTER OF THOMAS<br>OSCAR GILLIS, FEE RUBRIC | ORDER TO SHOW CAUSE<br>3-13-23 [280] |

**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. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

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**The Order to Show Cause is xxxxxxxxxx**

**APRIL 13, 2023 HEARING**

Two of Mr. Gillis' former clients filed responses to the Order to Show Cause. Dckts. 286, 287. Both are represented by Nancy D Kelpac, Esq., and each assert that they have incurred additional attorney's fees for which they have a claim to assert to participate in the distribution of monies pursuant to the Order to Show Cause.

**Joao Vaz Reply**

The first is filed for Joao Vaz, who was formerly represented by Thomas O. Gillis in Mr. Vaz's Bankruptcy Case, Bankr. E.D. Cal. 18-13980. (There is a clerical error in the Reply, incorrectly stating Mr. Vaz's case number to be 18-13580.) Mr. Vaz directs the court to an order issued by the Hon. Jennifer Niemann, the judge in his bankruptcy case, determining that Mr. Gillis disgorge $800 in legal fees that he had paid Mr. Gillis.

A copy of Judge Niemann's order is attached as Exhibit A to Mr. Vaz's Response. Dckt. 286 at 3-4. The $800 is ordered to be disgorged as fees for Phase IV of the Fee Rubric adopted for addressing the overpayment of fees and the disgorgement thereof.

Though no declaration of Mr. Vaz is provided, it is asserted that he hired Ms. Kelpack's law firm to represent him in his bankruptcy case when Mr. Gillis no longer could. The Reply does not allege what fees, if any, that the court allowed for Ms. Kelpack's firm and what Mr. Vaz has paid Ms. Kelpack's firm.

Reviewing the Chapter 13 Trustee's Final Report in Mr. Vaz's case states that no attorney's fees were paid through the Plan. 18-13980; Dckt. 78 at 2.

In the Motion to Disgorge; *Id.*, Dckt. 54; it states that Mr. Vaz seeks the $800 disgorgement "in order to compensate his new attorney."

The court's order confirming Mr. Vaz's Modified Chapter 13 Plan does not provide for the allowance of attorney's fees for Ms. Kelpack's firm. *Id.*; Order. However, the Modified Plan states that Debtor's attorney is to be paid $3,000 additional fees through the Plan, which must be approved by the court

in accordance with 11 U.S.C. §§ 329 and 330. *Id.*; Plan ¶ 3.05. See L.B.R. 2016-1 requiring that a Chapter 13 Debtor's attorney's fees be approved by the court prior to such attorney being paid.

The court cannot locate any order in the Vaz case allowing attorney's fees for Ms. Kelpack and her firm for representing Mr. Vaz in his Chapter 13 case.

At the hearing, **xxxxxxx**

**Dimas Coelho Reply**

The second Reply was filed for Dimas Coelho. Dckt. 287. He too has obtained a disgorgement order from the Hon. Rene Lastreto, II, in his bankruptcy case; Bankr. E.D. Cal 18-13595. The order required the disgorgement of $800. 18-13595; Order, Dckt. 97. In the *Coelho* case, Mr. Kelpac and her firm obtained an order granting Ms. Kelpac $3,900 in fees for the legal services provided Mr. Coelho in the bankruptcy case. *Id.*; Dckt. 112.

For Mr. Coelho, he has documented having incurred additional legal fees due to Mr. Gillis not being able provide the legal representation, and the $800 are damages to be included in the *pro rata* distribution.

**Status Report Filed by Thomas Gillis**

Mr. Gillis filed a Status Report on March 23, 2023. Dckt. 284. Some of the matters addressed related to this Order to Show Cause. He states that he has no objection to the court implementing the distribution process stated in the Order to Show Cause. He suggests that the court have a bilingual Notice to make a claim for to participate in the pro rata distribution of the monies deposited with the Clerk of the Bankruptcy Court. He also suggest that the court simplify the "legal stuff" (the court's terminology).

At the hearing on the Order to Show Cause, **xxxxxxx**

**ORDER TO SHOW CAUSE**

The court issues this Order to Show Cause as the next step in addressing possible economic damages to the former debtor clients of Thomas O. Gillis following his inability to continue in the practice of law. These former debtor clients had Chapter 13 cases filed by Mr. Gillis for which he was not able to provide legal services for the remaining term of the Chapter 13 Plan or the prosecution of the case.

Mr. Gillis' Former Clients (identified on Attachments One, Two, Three, and Four attached hereto), the Chapter 13 Trustees, the U.S. Trustee, and any other parties in interest, shall show cause, if any, why the court should not order:

A. Why the court should not order that the $13,532.00 deposited with the Clerk of the Bankruptcy Court by the Chapter 13 Trustee (monies which Mr. Gillis was allowed for attorney's fees in Chapter 13 Cases and levied upon) be disbursed *pro rata* to Mr. Gillis' Group One Former Clients listed on Attachment One, whose bankruptcy cases have been dismissed.

There would be no disbursements to the other three Groups of Mr. Gillis' Former Clients:

1. Group Two, Mr. Gillis' Former Clients who have already received their discharge.

2. Group Three, Mr. Gillis' Former Clients who have completed their Chapter 13 Plans and have filed the necessary certifications to obtain their discharge, and the Former Clients who have completed their Chapter 13 Plans but have not yet filed the necessary certifications.

3. Group Four, Mr. Gillis' Former Clients who are still performing a Chapter 13 Plan (all of which will be completed in 2023 or 2024).

B. Why the court should not establish an opt-in claim process for Mr. Gillis' Group One Former Clients which includes:

1. The Former Client must return the opt-in claim form to receive a *pro rata* distribution (a percentage based upon the dollar amount of the claims for Former Clients who opt-in) from the monies deposited with the Clerk of the Bankruptcy Court within thirty (30) days of the Clerk mailing the forms (a specific date to have it returned will be set by the court).

2. Failure to timely return the opt-in form will result in the Former Client not participating in the *pro rata* distribution from the $13,532.00 deposited with the Clerk of the Bankruptcy Court, but will not prejudice any other rights of the Former Client to recover monies owed directly from Mr. Gillis.

3. The opt-in form will include the Former Client providing bank account information for electronic payment, payment by check, and other information that the Clerk of the Bankruptcy Court is required to obtain for the disbursement. Failure to provide the required information will result in the Former Client not obtaining a distribution from the Clerk of the Bankruptcy Court.

**SUMMARY OF ORDER TO SHOW CAUSE**

In the detailed discussion below, the court provides an analysis of the Chapter 13 Cases filed by Thomas O. Gillis as attorney for his former Chapter 13 debtor clients (now identified as Mr. Gillis' "Former Debtor Clients"). In February 2020, Mr. Gillis was suspended from the practice of law and therefore could not provide further representation for these Former Debtor Clients.

Recognizing that the detailed discussion, while lawyer-friendly, may not be quite so clear for the Former Debtor Clients, the court provides the following summary of what the court is intending to proceed to order.

A. The Chapter 13 Trustees have deposited $13,532.00 of monies due Mr. Gillis in Chapter 13 Cases with the Clerk of the Bankruptcy Court as having been previously

ordered by the court. These monies are ordered to be disbursed to Mr. Gillis' Former Debtor Clients for economic loss for the fees for legal services paid to Mr. Gillis but which he could not provide due to the suspension.

B. There are four categories of Former Debtor Clients that have potentially suffered damage due to Mr. Gillis being unable to provide the legal services for which he had been paid fees:

1. **Group One** - Mr. Gillis' Former Debtor Clients whose Chapter 13 bankruptcy cases have been dismissed. These Former Debtor Clients are listed on Attachment One attached to this Order to Show Cause.

   a. These Group One Former Debtor Clients have suffered economic damage - paying legal fees for services not received and having their bankruptcy cases dismissed.

   b. These Group One Former Debtor Clients will receive a distribution estimated to be 33% of the amount of fees that Mr. Gillis has been ordered to repay them. These amounts are shown on Attachment One.

2. **Only Group One Former Clients will received a distribution from the monies held by the Clerk of the Bankruptcy Court.**

3. **Group Two** - Mr. Gillis' Former Debtor Clients who completed their bankruptcy plans and have been granted their bankruptcy discharges (or were not entitled to obtain a discharge) without paying any additional legal fees. These Group Two Former Debtor Clients are listed on Attachment Two attached to this Order to Show Cause.

   a. No distribution will be made to the Group Two Former Debtor Clients, the court identifying no significant economic loss suffered.

4. **Group Three** – Mr. Gillis' Former Debtor Clients who have completed their bankruptcy plans but have not yet had the discharge entered. These Group Three Former Debtor Clients are listed on Attachment Three attached to this Order to Show Cause.

   For half of Group Three, they have filed all of the post-plan Certifications and the Clerk of the Court should be processing their bankruptcy discharges. For the other half (14 cases), the Former Debtor Clients have not yet filed the required Certifications, but when they do, they can obtain their discharge.

   a. No distribution will be made to the Group Three Former Debtor Clients, the court identifying no significant economic loss suffered. The Former Debtor Clients who have not filed the Certifications may try contacting the attorneys who have taken over Mr. Gillis' former

law firm or if it is necessary to pay someone to have the Certifications prepared and filed, the services are administrative in nature and of nominal cost.

5. **Group Four** – Mr. Gillis' Former Debtor Clients who have not yet completed their Chapter 13 Plan but will do so in the next year (2024). These Group Four Former Debtor Clients are listed on Attachment Four attached to this Order to Show Cause. For these Group Four Former Debtor Clients, they are poised to complete their Plan and receive their bankruptcy discharges after making their final plan payment.

   a. No distribution will be made to the Group Four Former Debtor Clients, the court identifying no significant economic loss suffered. If the Group Four Former Debtor Clients default on their Plan and a Modified Plan was required, those fees would be in addition to the fee amounts that are subject to the Disgorgement Orders.

This Order to Show Cause is the legal process by which the judge notifies parties in interest of the order that is intended to be entered and affords parties in interest with the opportunity to file an opposition and bring issues or information to the court's attention.

As set forth in the Order below, the hearing on this Order to Show Cause will be conducted at **10:30 a.m. on April 13, 2023**. Opposition pleadings, if any, shall be filed with the court and served on or before April 3, 2023, on the Chapter 13 Trustees and the U.S. Trustee (addresses stated in the Order text at the end of this Order to Show Cause).

## SUSPENSION FROM THE PRACTICE OF LAW, REVIEW OF PRIOR PROCEEDINGS, AND MONIES DEPOSITED WITH THE CLERK OF THE BANKRUPTCY COURT

On November 1, 2019, the California Supreme Court issued its Decision suspending Mr. Gillis from the practice of law for two (2) years. Cal. State Bar Court; 16-O-10780, 17-O-02624, 17-O-04790. The suspension was delayed two times, with it becoming effective February 15, 2020. Order, filed February 7, 2020; State Bar Court, 16-O-10780.

At the time of suspension, Mr. Gillis had a significant number of Chapter 13 cases in progress, some with confirmed plans being performed and others which had only been recently filed and no plans confirmed. The issue was presented to the Bankruptcy Court by the Chapter 13 Trustees and the U.S. Trustee whether Mr. Gillis should be allowed to retain or receive any legal fees for services provided prior to the suspension in light of his inability to continue to represent his Former Debtor Clients in the ongoing cases. In these cases, Mr. Gillis and his Former Debtor Clients had elected for Mr. Gillis being allowed legal fees using the court's "no-look fee" schedule in which there is a lump sum fee allowed without requiring the attorney to maintain time and billing records.

After several hearings, the court established a "Fee Rubric" which created percentage amounts of the Chapter 13 bankruptcy case fee provided for Mr. Gillis depending on the status of the Chapter 13 case when he was suspended. The no-look fees for Mr. Gillis were $4,000.00 in non-business cases (consumer

debt) and $6,000.00 in business cases (such as where the Chapter 13 debtor had a sole proprietorship business).

The percentages of fees allowed Mr. Gillis are based on status of case when he could no longer practice law are as follows:

| Phase of Chapter 13 Case | Services Provided as of Time of Mr. Gillis' Suspension | Percentage of No-Look Fee Allowed Mr. Gillis |
|---|---|---|
| **Phase I** | Pre-petition through meeting of creditors | 30.00% |
| **Phase II** | Meeting of Creditors through initial confirmation | 60.00% |
| **Phase III** | Confirmation to 90 days after Notice of Filed Claims | 80.00% |
| **Phase IV** | Plan completed, certificates filed, discharge entered (unless no discharge to be granted in the case), necessary lien releases | 100.00% |

*In re Gillis* Misc. Fee Disgorgement File, 20-202, Dckt. 234.

In setting the Fee Rubric, the Order also provides that for any Chapter 13 cases of Mr. Gillis' Former Debtor Clients in which the Chapter 13 Trustees are to make disbursements for monies owed to Mr. Gillis under the Fee Rubric, such monies shall be deposited with the Clerk of the Bankruptcy Court for disbursement to Mr. Gillis' Former Debtor Clients for damages they suffered in paying monies for legal services that Mr. Gillis was not able to provide. 20-202; Orders, Dckts. 231, 232, 233 ("Disgorgement Orders"). These Disgorgement Orders further provide that they constitute judgments which the Chapter 13 Trustees and U.S. Trustee may enforce.

**Monies Recovered Pursuant to the Fee Rubric and Disgorgement Orders**

Thirteen thousand five hundred and thirty-two dollars ($13,532.00) of monies have been deposited with the Clerk of the Bankruptcy Court pursuant to this court's Disgorgement Orders. No other monies were recovered from other sources by the Chapter 13 Trustees or the U.S. Trustee for deposit with the Clerk of the Bankruptcy Court. A small amount of interest has accrued on the monies deposited with the Clerk of the Bankruptcy Court. The court does not include this small amount of interest (identified as $161.45 as of January 31, 2023) in estimating the *pro rata* distribution amount below.

**Review of Mr. Gillis' Former Debtor Clients' Cases Subject to Fee Rubric and Disgorgement of Fees**

Mr. Gillis' Former Debtor Clients whose Chapter 13 cases are subject to the Fee Rubric, repayment (disgorgement) by Mr. Gillis of fees he has received in excess of the Fee Rubric amounts, deposit of fees owed to Mr. Gillis disbursed by the Chapter 13 Trustees with the Clerk of the Bankruptcy Court, and enforcement of the Disgorgement Orders total three hundred and eighty two (382) cases. Of these, the court aligns them into the following groups:

**a.** **Group One - Cases Dismissed**. In forty-seven (47) of the cases Mr. Gillis' Former Debtor Clients have had their bankruptcy cases dismissed.

Attached hereto as Attachment One, are the cases of Mr. Gillis' Former Debtor Clients whose cases have been dismissed and will be receiving disbursements from the Clerk of the Bankruptcy Court from the monies deposited with the Clerk.

It is this group of Mr. Gillis' Former Debtor Clients who have suffered economic damages as a result of Mr. Gillis not being able to provide the legal representation that the Former Debtor Clients have paid Mr. Gillis.

The fees ordered to be disgorged for Mr. Gillis' Former Debtor Clients whose bankruptcy cases have been dismissed total $39,500.00. These Former Debtor Clients are identified by case number, name, and amount of fees to be repaid that Former Debtor Client on Attachment One.

The Clerk of the Court having $13,532.00 of monies deposited to be disbursed, this results in each of the Group One Former Debtor Clients whose cases have been dismissed receiving an estimated distribution of 33.5% of the amounts ordered to be disgorged to those Former Debtor Clients. These projected disbursement amounts are shown on Attachment One.

**b.** **Group Two - Plans Completed and Discharge Entered**. Two hundred and fifty-seven (257) are cases in which the Former Debtor Clients have already received their bankruptcy discharge, and in which the Former Debtor Clients did not pay any additional legal fees.

Attached hereto as Attachment Two, are the cases of Mr. Gillis' Former Debtor Clients whose Chapter 13 Plans have been completed and the bankruptcy discharge has been entered. For Group Two, these Former Debtor Clients have received the full benefit of the Chapter 13 case, their Plan being completed and discharge entered, without having to pay any additional legal fees.

These Group Two Former Debtor Clients have not suffered any identifiable economic damages and will not receive a distribution from the monies deposited with the Clerk of the Bankruptcy Court. This is without prejudice to these Former Debtor Clients pursuing any remedies that they have to recover the amounts ordered to be disgorged from Mr. Gillis directly.

**c.** **Group Three - Plans Completed but Discharge not Entered.** Thirty-three (33) are cases in which the Plans have been completed but the discharge has not been entered.

i. In seventeen (17) cases, all of the Certificates necessary for entry of discharge have been recently filed, but the discharge has not yet been entered.

ii. In one (1) case, the Former Debtor Client is not eligible for a discharge (having received one in a Chapter 7 case within four years of filing the case included in the Fee Rubric and Disgorgement Orders).

iii. In fifteen (15) cases, the Former Debtor Clients have not filed the required Certificates for the Clerk of the Bankruptcy Court to entry their discharges.

Attached hereto as Attachment Three, are the cases of Mr. Gillis' Former Debtor Clients whose Chapter 13 Plans have been completed but the bankruptcy discharge has not been entered. For Group Three, these Former Debtor Clients are positioned to receive the full benefit of the Chapter 13 case. Either the Former Debtor Clients are waiting to receive their discharge, the necessary Certificates having been filed, or need to have filed the necessary Certificates. If the Former Debtor Clients need to obtain further legal service to complete these final tasks, such are simple (at least to a lawyer), fairly administrative in nature, and not of significant cost. To date the court has not authorized the payment of any additional legal fees to another attorney.

These Group Three Former Debtor Clients have not suffered any identifiable economic damages and will not receive a distribution from the monies deposited with the Clerk of the Bankruptcy Court. This is without prejudice to these Former Debtor Clients pursuing any remedies that they have to recover the amounts ordered to be disgorged from Mr. Gillis directly.

**d. Group Four - Bankruptcy Plans to Be Completed in Next Year.** In forty-five (45) cases the Former Debtor Clients are performing their Chapter 13 Plans and are within a year of completion.

Attached hereto as Attachment Four, are the cases of Mr. Gillis' Group Four Former Debtor Clients whose Chapter 13 Plans have not yet been completed but are scheduled to be completed in the next year. In substance, the Group Four Former Debtor Clients have received the benefit of the legal services provided, are on the verge of completing their plans, and will soon be eligible to have their bankruptcy discharges entered (so long as they file the required post-plan completion Certifications). To date, the court has not authorized the payment of any additional legal fees to another attorney.

If some unexpected event were to occur that derailed the current Chapter 13 Plan (such as illness or loss of a job), the Former Debtor Clients would have to engage counsel to try and modify the Chapter 13 Plan. Such legal services and fees are in addition to the no-look fee. Thus, these Group Four Former Debtor Clients have essentially received the benefit of the no-look fees and have not suffered economic damages.

These Group Four Former Debtor Clients have not suffered any identifiable economic damages and will not receive a distribution from the monies deposited with the Clerk of the Bankruptcy Court. This is without prejudice to these Former Debtor Clients pursuing any remedies that they have to recover the amounts ordered to be disgorged from Mr. Gillis directly.

**No Additional Legal Fees Have Been Allowed in the Groups Two, Three, and Four Former Debtor Clients' Chapter 13 Cases (Cases in which no distribution is made to the Former Debtor Clients)**

For the Former Debtor Clients, the court notes that in cases where new attorneys substituted in, they agreed to be paid from the remaining no-look fee amounts originally agreed to by Mr. Gillis and would be paid through the future performance of the bankruptcy cases. In cases where no new attorney substituted in, the Former Debtor Clients went forward without counsel and no additional fees were paid. The court notes that two of the attorneys who substituted in as counsel also were substituted in as the responsible attorney for Mr. Gillis' former law firm. Mr. Gillis was identified as continuing to provide paralegal services for his former law firm.

In the one case where counsel substituted in and was to be paid additional fees, that Chapter 13 case was dismissed and is included in Group One.

**Success of Chapter 13 Cases**

It is interesting to note that of the three hundred and eighty-five (382) cases, Mr. Gillis' Former Debtor Clients have already received, are in the process of receiving, or are likely to receive their discharge in cases to be completed in the next year, total three hundred and thirty-five (335). That is eighty-seven and one-half percent (87.7%) of the total cases at issue for application of the Fee Rubric and Disgorgement Orders. While not being able to provide the legal representation, it appears that as high as eighty-seven and one-half percent (87.7%) of Mr. Gillis' Former Debtor Clients will obtain the full benefits available under Chapter 13 with no or little additional expense.

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| **4.** | **22-20975-E-7**<br>**DNL-2** | **LINDA MIZOGAMI**<br>**Eric Schwab** | **MOTION FOR ORDER APPROVING STIPULATION RE: SALE OF REAL PROPERTY**<br>**3-8-23 [74]** |

**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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on March 8, 2023. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

**The Motion for Approval of Compromise is xxxxxxxxxx**

Susan K. Smith, the Chapter 7 Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Linda Kaori Mizogami ("Settlor"). The claims and disputes

to be resolved by the proposed settlement are the sale of Debtor's property, 417 K Street, Davis, California 95616 ("K Street Property"), allocation of the proceeds from said property, general disposal of Debtor's personal property on the K Street Property, and Debtor's withdrawal of a claim of exemption.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit E in support of the Motion, Dckt. 74):

1. The Chapter 7 Trustee may sell the K Street Property, without need for further consent of the Debtor.

2. The bankruptcy estates share of the net proceeds shall be allocated as follows:

   a. 30% to the Debtor, accounting for the Homestead exemption, and

   b. 70% to the Trustee for the benefit of unsecured creditors.

3. The Trustee may dispose of any personal property remaining at the K Street Property after March 31, 2023, without need for further consent of the Debtor.

4. The Debtor irrevocably withdraws all claims of exemption that have been asserted or could be asserted against the Farmers Accounts, including the Retirement Exemption.

**Creditor's Non-Opposition**

Specialized Loan Servicing LLC ("Creditor"), with a secured claim of $153,526.78, filed a non opposition brief on March 30, 2023. (Dckt. 88). Creditor indicates that they do not oppose Trustee's proposed stipulation to sell the K Street Property, as long as Creditor is paid in full.

**Internal Revenue Service's Opposition**

The IRS, with a secured claim of $387,382.10 and an unsecured priority claim of $766,262.85, filed an opposition on March 30,2023. (Dckt. 90). The IRS indicates that the proposed stipulation by Trustee should be denied for the following reasons:

1. The stipulation fails to satisfy the fair and equitable test.

2. The stipulation improperly seeks to distribute exempt property encumbered by federal tax liens.

3. Trustee has not sought to avoid any portion of the IRS' secured claim. The Trustee must sue the IRS to avoid and avoidable tax lien.

4. The stipulation violates the absolute priority rule.

5. Zillow online valuation of the Property is $593,000.

6. Property that Debtor claims as exempt (here the dollar amount exemption) is not property of the Bankruptcy Estate. 11 U.S.C. § 522.

**Trustee's Response**

Trustee replies that the Stipulation is not one in which the Trustee is seeking authorization to sell the Property and not make distributions to the IRS. Reply,; Dckt. 91. Rather, the Stipulation determines the rights and resolves the disputes with the Debtor.

The Trustee asserts that the Stipulation and Motion contemplate the partial avoidability of the tax liens and the senior lien of Farmers.

In the Reply, the Trustee states:

> Moreover, the Trustee is well aware of her duties in the administration of the bankruptcy estate and understands that any modification to the rights of secured creditors would require further action; however, such action is not before the Court on this motion. Regarding the real property itself, the motion merely seeks approval of a stipulation securing the cooperation of the Debtor such that the Trustee ***may*** sell the K Street Property. Such prior agreement with the Debtor is necessary here to ensure that the trustee has an opportunity to effectively market and sell the K Street Property at all, which is in a severe state of disrepair and requires significant clean-up efforts to make it ready to market. See Doc. No. 76, Mot. Ex. E, Stipulation re: Sale of Real Property, at pp. 27–29; see also Doc. No. 74, Trustee's Mot. to Approve, 1:21–24, 3:14–27. If such efforts are successful, the Trustee anticipates net proceeds of approximately $240,000.00 after full payment of the mortgagee in first position.

Reply, p. 2:18-28; Dckt. 91 (emphasis in original).

**Review of the Plan Language of the Stipulation and the Motion**

Clearly the Internal Revenue Service and the Trustee have two very different readings of the plain language of the Stipulation and the Motion. The Internal Revenue Service views it as improperly taking away rights and interests of the Internal Revenue Service, while the Trustee asserts it merely resolves matters between the Debtor and the Trustee (include reducing the homestead exemption), and that a lawsuit with the Internal Revenue Service and a motion to sell property are necessary future proceedings.

What the Stipulation States

The court begins with the Stipulation and the terms provided therein. A copy of the executed Stipulation is filed as Exhibit E; Dckt. 76; in support of the Motion. The terms of the Stipulation are found on page 3 of the Stipulation and provide:

> A. The Trustee may sell the K Street Property, without need for further consent of the Debtor, subject to Bankruptcy Court approval.

On its face, this plain language merely states that if the Trustee pursues a sale of the property, then the Trustee may do so, with no consent of the Debtor (such as if a trustee were selling a property that would not generate sufficient monies to pay 100% of a homestead exemption) is required.

> B. The estate's share of the proceeds (net of commissions, selling costs, the Cleanup Costs, and lien claims paid from escrow) shall be allocated as follows: (1) 30% to the Debtor on account of the Homestead; and (2) 70% to the Trustee for the benefit of unsecured creditors.

On its face, this plain language states that the Debtor is modifying the homestead exemption and the portion of the Property and the proceeds from the sale of the Property that the Debtor claims a homestead exemption in. By this Stipulation, the Debtor asserts a homestead exemption in only 30% of the net proceeds from a sale of the Property. It does not say anything about any tax lien that is asserted by the Internal Revenue Service in that personal property, and does not purport to alter any Internal Revenue Service tax lien.

The court does note that in this section the Stipulation purports that 70% of the net proceeds (which are the proceeds "net of commissions, selling costs, the Cleanup Costs, and lien claims from escrow") will go to creditors holding unsecured claims. Because of the parenthetical which refers to lien claims after other amounts for which there are no liens, the Internal Revenue Service may have been confused that the Stipulation was purporting to say that the 70% was being determined by the Trustee, Debtor, and then the court, to be free and clear of any and all liens.

> C. The Trustee may dispose of any personal property remaining at the K Street Property after March 31, 2023, without need for further consent of the Debtor.

This language states that the Trustee may clean up the personal property left by Debtor at the K Street Property after March 31, 2023. It does not say anything about any tax lien that is asserted by the Internal Revenue Service in that personal property, and does not purport to alter any Internal Revenue Service tax lien.

> D. The Debtor irrevocably withdraws all claims of exemption that have been asserted or could be asserted against the Farmers Accounts, including the Retirement Exemption

This language states that Debtor also withdraws, and no longer claims any exemption amount in the Farmers Accounts, including any Retirement Exemption.

Stipulation, p. 3:8-17; Dckt. 76.

At this point, the plain language of the Stipulation says nothing about the rights and interests of the Internal Revenue Service, does not purport to authorize any sale of the Property, and does not purport to avoid any Internal Revenue Service tax liens.

In the recitals to the Stipulation, not the stipulated terms to be approved by this court, Trustee makes reference to the Internal Revenue Service tax lien and that portion the trustee contends are avoidable (using future tense language) and which liens may be presented for the benefit of the Bankruptcy Estate as unencumbered monies:

> 8. The Trustee **contends** that the penalty portion of the claim secured by the Tax Liens, which aggregate about $137,000 ("Avoidable Penalties"), **are (a) avoidable** in favor and preserved for the benefit of the estate **pursuant to 11 U.S.C. Sections 724 and 551**; and (b) senior to the Farmers Judgment for having been recorded prior in time.

Stipulation Recitals, ¶ 8; Dckt. 76 (emphasis **added**). The recital does not state that the liens have been avoided, that this stipulation between Debtor and the Trustee purport to bilaterally avoid liens of the Internal Revenue Service, or that the Stipulation determines the dollar amount of liens that may be avoided in the future.

Additionally,

What the Motion States

From the court's review of the Trustee's Motion; Dckt. 74; the following paragraphs (identified by the numbering used in the Motion or by page and line number) relate to the terms of the Stipulation and the relief sought by order of the court (emphasis **added**):

> 3. Property of the estate includes the Debtor's interest in: (a) the real property commonly known as 417 K Street, Davis, California 95616, Yolo County AP #070-331-09 ("K Street Property"); and (b) deferred compensation and agent profitability accounts (collectively "Farmers Accounts") maintained by Farmers Insurance Exchange ("FIE").
>
> 4. **The estate's interest in the K Street Property is subject to:** (a) a trust deed securing an approximate $160,000 obligation ("Home Loan") to U.S. Bank; **(b) tax lien notices (collectively "Tax Liens") securing approximately $475,000 collectively claimed by the Franchise Tax Board and Internal Revenue Service;** (c) an abstract securing an approximate $74,000 balance due on a money judgment in favor of FGI and (d) a $563,750.00 exemption ("Homestead") asserted by the Debtor pursuant to California Code of Civil Procedure Section 704.730.
>
> 7. By entering into the Stipulation, the **Debtor irrevocably consented to the Trustee's administration of the K Street Property** short of the Homestead for the purpose of salvaging the remaining equity for the mutual benefit of the Debtor and the estate.
>
> Subject to Bankruptcy Court approval, the Trustee has entered into a Stipulation with the Debtor. The essential terms of the Stipulation include the following:

> Sale of K Street Property. The **Trustee may sell the K Street Property**, without need for further consent of the Debtor, **subject to Bankruptcy Court approval.**
>
> Allocation of Proceeds. The **estate's share of the proceeds** (net of commissions, selling costs, the Cleanup Costs, **and lien claims paid from escrow**) shall be allocated as follows: (1) 30% to the Debtor on account of the Homestead; and (2) **70% to the Trustee for the benefit of unsecured creditors.**
>
> Disposal of Personal Property. The Trustee may dispose of any personal property remaining at the K Street Property after March 31, 2023, without need for further consent of the Debtor.
>
> Withdrawal of Claims of Exemption. The **Debtor** irrevocably **withdraws all claims of exemption** that have been asserted or could be asserted **against the Farmers Accounts, including the Retirement Exemption.**
>
> Motion, p. 3: 14-27.
>
> While the Motion could of had additional language stating something like:
>
> This Stipulation only effects the exemptions claimed by the Debtor and rights of control that Debtor could assert over personal property located on the K Street Property – and does not purport to avoid any liens or preauthorize the sale of the Property free and clear of any liens —

such language would be stating a negative for which there was no passive positive pregnant implication in the plain language of the Motion.

The Internal Revenue Service Opposition incorrectly assumes that the Stipulation is one in which the Debtor and the Trustee seek to adjudicate and terminate rights of the Internal Revenue Service. Opposition, p. 8:6-9; Dckt. 90.

The Stipulation and Motion both expressly state that from the sale of the K-Street Property all lien claims will be paid. To the extent that the Internal Revenue Service has a lien claim, which has not been avoided, it will be paid.

Additionally, the Stipulation says that the 70% of the proceeds the estate recovers (presumably based on the avoided Internal Revenue Service lien that is preserved for the benefit of the Bankruptcy Estate), it states that the monies will go to unsecured creditors, using a Commercial Code term rather than the Bankruptcy Code term - creditors holding unsecured claims.

It appears that this 70% of the proceeds will bypass administrative expenses (including Trustee's fees and Trustee's counsel's fees) and go immediately to the chain of distribution for unsecured claims in the priority established by the Bankruptcy Code. See 11 U.S.C. § 726(a), which incorporate the 11 U.S.C. § 507 priority of distribution for administrative expenses and priority unsecured claims. 11 U.S.C. § 726(a)(4) subordinates claims for penalties below general unsecured claims, and 11 U.S.C. § 724(a) which allows for the avoidance of the lien security a penalty claim.

In the Opposition the Internal Revenue Service asserts having an unsecured priority claim of ($764,049.95). Opposition, p. 2:4; Dckt. 90. In looking at Amended Proof of Claim 9-2 filed by the Internal Revenue Service, it states that the Penalty on unsecured priority claims total ($216,908). Subtracting that from the total amounts stated by the Internal Revenue Service, there would still be ($537,141), reducing for estimated interest on the penalty portion, as a priority unsecured claim.

The Stipulation and Motion do not indicate what other assets are to be administered in this Bankruptcy Case and what monies, in addition to the projected $240,000 in net proceeds for the Estate from the sale of the Property, will exist for payments to creditors (and administrative expenses). If there is only $240,000 and the result in that the Trustee pays the $240,000 to the Internal Revenue Service, one questions why the Trustee would be working only to pay the Internal Revenue Service money from assets in which the Internal Revenue Service has a lien? The Trustee has identified another $173,000 asset, the 403B account. Even taken at face value, this appears to still fall short of the Internal Revenue Service non-penalty priority claim.

Neither the Trustee nor the Internal Revenue Service provide the court with an economic analysis of the anticipated distributions in this case.

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

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because it reduces the amount of the homestead exemption in the K Street Property, is consistent with the Trustee in the future of exercising the powers granted by Congress to avoid certain Internal Revenue Service liens and preserve such liens for the benefit of the Bankruptcy Estate and creditors with unsecured claims (including the Internal Revenue Service).

The Motion is Granted.

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 to Approve Compromise filed by Susan K. Smith, the Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and Linda Kaori Mizogami ("Settlor") is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit E in support of the Motion (Dckt. 74).

In light of the concern of the Internal Revenue Service over its right to be sued for avoidance of its tax lien, payment on its secured claim, and that the Trustee follow the order for distribution required under the Bankruptcy Code for distributions of unencumbered monies, as stated in the Decision of the Court (the Civil Minutes for the April 13, 2023 hearing), this order does avoid any liens of the Internal Revenue Service or modify the order of distribution of monies in a Chapter 7 case as required under the Bankruptcy Code.

# FINAL RULINGS

**7. 20-25541-E-7 DNL-8**
**ANATOLY TKACHUK**
**Mark Shmorgon**
**MOTION FOR COMPENSATION FOR J. MICHAEL HOPPER, CHAPTER 7 TRUSTEE(S)**
**3-9-23 [89]**

**Final Ruling:** No appearance at the April 13, 2023 hearing is required.
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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient 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 parties in interest, parties requesting special notice, and Office of the United States Trustee on March 9, 2023. By the court's calculation, 35 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 been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion for Allowance of Professional Fees is granted.**

J. Michael Hopper, the Chapter 7 Trustee, ("Applicant") for the Estate of Anatoly Tkachuk ("Client"), makes a Request for the Allowance of Fees and Expenses in this case. Fees are requested for the period December 14, 2020 through and including March 3, 2023.

**STATUTORY BASIS FOR FEES**

11 U.S.C. § 330(a)

> (1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103 —
>
> > (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and
> >
> > (B) reimbursement for actual, necessary expenses.

In considering the allowance of fees for a professional employed by a trustee, the 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)).

In considering the compensation awarded to a bankruptcy trustee, the Bankruptcy Code further provides:

> (7) In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326.

11 U.S.C. § 330(a)(7). The fee percentages set in 11 U.S.C. § 326 expressly states that the percentages are the maximum fees that a trustee may received, and whatever compensation is allowed must be reasonable. 11 U.S.C. § 326(a).

**Benefit to the Estate**

Even if the court finds that the services billed by a trustee are "actual," meaning that the fee application reflects time entries properly charged for services, the trustee must demonstrate still that the work performed was necessary and reasonable. *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). A trustee must exercise good billing judgment with regard to the services provided because the court's authorization to employ a trustee to work in a bankruptcy case does not give that trustee "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 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 general case administration, abandoning estate property, selling estate property, and settling with Debtor's ex-spouse. The Estate has $91,831.69 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

**FEES REQUESTED**

**Applicant requests the following fees:**

| | |
|---|---|
| 25% of the first $5,000.00 | $1,250.00 |
| 10% of the next $45,000.00 | $4,500.00 |
| 5% of the next $950,000.00 | $14,467.50 |
| **Calculated Total Compensation** | **$20,217.50** |

The fees are computed on the total sales generated $339,350.00 of net monies (exclusive of these requested fees and costs), with an estimated gross value of $159,685.13 remaining in unsecured claims currently being pursued.

**FEES ALLOWED**

The court finds that the requested fees are reasonable pursuant to 11 U.S.C. § 326(a) and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $20,217.50 are approved pursuant to 11 U.S.C. § 330 are authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

In this case, the Chapter 7 Trustee currently has $91,831.69 of unencumbered monies to be administered. The Chapter 7 Trustee 's services included general case administration, abandoning estate property, selling estate property, and settling with Debtor's ex-spouse. Applicant's efforts have resulted in a realized gross of 339,350.00 recovered for the estate. Dckt. 89.

This case required significant work by the Chapter 7 Trustee, with full amounts permitted under 11 U.S.C. § 326(a), to represent the reasonable and necessary fees allowable as a commission to the Chapter 7 Trustee.

Applicant is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees $20,217.50

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 J. Michael Hopper, the Chapter 7 Trustee, ("Applicant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that J. Michael Hopper is allowed the following fees and expenses as trustee of the Estate:
>
> J. Michael Hopper, the Chapter 7 Trustee
>
> Fees in the amount of $20,217.50
>
> **IT IS FURTHER ORDERED** that the Chapter 7 Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

**8.** 20-25541-E-7 DNL-9

**ANATOLY TKACHUK**
**Mark Shmorgon**

**MOTION FOR COMPENSATION BY THE LAW OFFICE OF DESMOND, NOLAN, LIVAICH & CUNNINGHAM FOR J. RUSSELL CUNNINGHAM, TRUSTEES ATTORNEY(S)**
**3-9-23 [94]**

**Final Ruling:** No appearance at the April 13, 2023 hearing is required.
---

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

Sufficient 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 parties in interest, parties requesting special notice, and Office of the United States Trustee on March 9, 2023. By the court's calculation, 35 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 been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion for Allowance of Professional Fees is granted.**

J. Michael Hopper ("Applicant"), the Chapter 7 Trustee for the bankruptcy estate of Anatoly Tkachuk ("Debtor") applies for an order approving first and final compensation for their counsel Desmond, Nolan, Livaich & Cunningham ("DNLC").

Fees are requested for the period December 28, 2020, through March 2, 2023. The order of the court approving employment of DNLC was entered on December 28, 2020. Dckt. 20. Applicant requests fees in the amount of $42,392.00 and costs in the amount of $861.00.

**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 can 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 DNLC's services for the Estate include general services, efforts to abandon and sell estate property, and entering into a settlement with Debtor's ex-spouse. The Estate has $91,831.69 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

**FEES AND COSTS & EXPENSES REQUESTED**

**Fees**

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

General Case Administration: DNLC spent 1.40 hours in this category. DNLC performed general case administration on Debtor's chapter 7 case.

Asset Marketing & Sales: DNLC spent 46.10 hours in this category. DNLC communicated with Trustee and broker regarding administering Debtor's Real Property, researching community debts and property, and investigating on the estate's personal property assets.

Litigation & Contested Matters: DNLC spent 45.80 hours in this category. DNLC assisted with the abandonment motion, issues regarding the dissolution action, and discussed potential stay violations.

Asset Analysis & Recovery: DNLC spent 16.30 hours in this category. DNLC communicated with Trustee and broker regarding administering Debtor's Real Property, researching community debts and property, and investigating on the estate's personal property assets.

Asset Disposition: DNLC spent 7.20 hours in this category. DNLC communicated with Trustee and broker regarding administering Debtor's Real Property, researching community debts and property, and investigating on the estate's personal property assets.

Fee/Employment Applications: DNLC spent 13.00 hours in this category. DNLC worked on applications for their own application, as well as the estate's accountant and broker, and compensation for the Chapter 7 Trustee and DNLC.

Claims Administration & Objections: DNLC spent 2.00 hours in this category. DNLC communicated with Trustee and counsel regard Debtor and Debtor's ex-spouse and claims against the estate.

Settlement / Non-binding ADR: DNLC spent 9.50 hours in this category. DNLC negotiated settlement agreements with Creditors and Debtor. And communicated with Trustee.

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

| **Names of Professionals and Experience** | **Time** | **Hourly Rate** | **Total Fees Computed Based on Time and Hourly Rate** |
|---|---|---|---|
| J. Russell Cunningham, Attorney | 32.90 | $495.00 | $16,285.50 |
| J. Russell Cunningham, Attorney | 19.70 | $425.00 | $8,372.50 |
| Benjamin C. Tagert, Attorney | 14.40 | $225.00 | $3,240.00 |
| Mikayla E. Kutsuris, Attorney | 74.20 | $195.00 | $14,469.00 |
| Mikayla E. Kutsuris, Attorney | 0.20 | $150.00 | $30.00 |
| **Total Fees for Period of Application** | | | $42,397.00 |

**Costs & Expenses**

DNLC also seeks the allowance and recovery of costs and expenses in the amount of $376.65 pursuant to this application.

The costs requested in this Application are,

| **Description of Cost** | **Per Item Cost, If Applicable** | **Cost** |
|---|---|---|
| Photocopies | $0.10 | $62.80 |
| Postage | n/a | $140.13 |
| Court & Recorder Costs | n/a | $300.00 |
| Miscellaneous & Courier Fees | n/a | $358.07 |
| **Total Costs Requested in Application** | | $861.00 |

**FEES AND COSTS & EXPENSES ALLOWED**

**Fees**

**Hourly Fees**

The court finds that the hourly rates are reasonable and that DNLC effectively used appropriate rates for the services provided. First and Final Fees in the amount of $42,397.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

**Costs & Expenses**

First and Final Costs in the amount of $861.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

DNLC is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

| | |
|---|---|
| Fees | $42,397.00 |
| Costs and Expenses | $861.00 |

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by J. Michael Hopper ("Applicant"), the Chapter 7 Trustee for the bankruptcy estate of Anatoly Tkachuk ("Debtor"), for an order approving first and final compensation for their counsel Desmond, Nolan, Livaich & Cunningham ("DNLC") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that DNLC is allowed the following fees and expenses as a professional of the Estate:
>
> DNLC, Professional employed by the Chapter 7 Trustee
>
> Fees in the amount of $42,397.00
> Expenses in the amount of $861.00,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.
>
> **IT IS FURTHER ORDERED** that the Chapter 7 Trustee is authorized to pay 100% of the fees and 100% of the costs allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

**9. 22-22372-E-7 ANGELA WISE MOTION TO REDEEM**
**PGM-1 Peter Macaluso 2-24-23 [23]**

**Final Ruling:** No appearance at the April 13, 2023 hearing is required.
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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, parties requesting special notice, other parties in interest, and Office of the United States Trustee on February 24, 2023. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

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

**The Motion to Redeem is granted.**

Angela Wise ("Debtor") seeks to redeem a 2007 GMC Yukon ("Property") from the claim of Golden 1 Credit Union ("Creditor") pursuant to 11 U.S.C. § 722. Under that provision of the Bankruptcy Code, Debtor is permitted to redeem tangible personal property intended primarily for personal, family, or household use from a lien securing a dischargeable consumer debt, so long as the property is exempted under 11 U.S.C. § 522 or has been abandoned under 11 U.S.C. § 554. 11 U.S.C. § 722. The right to redeem extends to the whole of the Property, not just to Debtor's exempt interest in it. *See* H.R. Rep. No. 95-595, at 381 (1977). To redeem the Property, Debtor must pay the lien holder "the amount of the allowed secured claim of [the lien] holder that is secured by such lien in full at the time of redemption." 11 U.S.C. § 722. Payment must be made by a lump sum cash payment, not installment payments. *In re Carroll*, 11 B.R. 725 (B.A.P. 9th Cir. 1981). The court looks to 11 U.S.C. § 506 to determine the amount of the secured claim.

The Motion is accompanied by the declaration of Angela Wise. Dckt. 26. Debtor seeks to value the Property at a replacement value of $2,000.00 as of the petition filing date. Debtor attributes the low value to the need for a new transmission as well as other repairs. Debtor states they received a quote that maintenance would cost approximately $5,927.85. Dckt. 25. As the owner, Debtor's opinion of value is evidence of the Property'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).

In addition, a car repair estimate from Lynch's Automotive, an automobile repair shop, has been provided to support the Property's valuation. Dckt. 25. The estimate indicates that it would cost $5,927.85 to repair the vehicle, including replacing the transmission. The estimate has not been properly authenticated and Debtor has not provided the court with a basis for determining that this out of court statement is admissible hearsay. FED. R. EVID. 802, 803.

The lien perfected on the Property secures Creditor's claim with a balance of approximately $8,694.29. Therefore, Creditor's claim secured by the lien is under-collateralized, and pursuant to 11 U.S.C. § 506(a), the court determines Creditor's secured claim to be in the amount of $2,000.00.

Debtor has claimed an exemption in the amount of $2,000.00 in the Property pursuant to California Code of Civil Procedure § 704.010. Because Debtor claims an exemption in the Property, Debtor is permitted to redeem the Property by paying Creditor $2,000.00 at the time of redemption, which payment is in full satisfaction of the secured claim.

The Motion to Redeem pursuant to 11 U.S.C. § 722 and Federal Rule of Bankruptcy Procedure 6008 is granted.

The court shall issue an order in 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 Redeem filed by Angela Wise ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor is authorized and allowed pursuant to 11 U.S.C. § 722 to redeem the 2007 GMC Yukon ("Property") by paying Golden 1 Credit Union, the creditor holding the claim secured by the Property, the total amount of $2,000.00, in full at the time of redemption, which must be paid on or before May 30, 2023.