UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

May 1, 2014 at 10:30 a.m.

1.	**13-91701-E-7** **KMF-1**	**MARVAIS WADEN AND SHAIMA KAKAR** **David Foyil**	**MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGEABILITY OF A DEBT** **4-7-14 [75]**

APPEARANCE OF KENNETH FOLEY, ATTORNEY FOR MOVANT REQUIRED FOR MAY 1, 2014 HEARING Telephonic Appearance Permitted

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney and Office of the United States Trustee on April 7, 2014. By the court's calculation, 24 days' notice was provided. 14 days' notice is required.

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

The court's tentative decision is to grant the Motion to Extend Deadline to File a Complaint ----------. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Interested Party Payten Reed, a minor through her Guardians *Ad Litem*, Damon Reed and Audra Plowman ("Movant") moves the court for an order

extending the time within which they have to object to discharge. No reference is made as to which, or if both, Debtors are the subject of a potential objection to discharge. The motion expressly references Federal Rule of Bankruptcy Procedure 4004, with relates to denial of discharge commonly under 11 U.S.C. § 727. However, from reviewing the Points and Authorities, it appears that Movants are asserting that the debt at issue arises from a minor being attached by a dog. Reference is made to the Debtors willfully causing the injury to the minor. This sounds in the nature of a claim alleged to be nondischargeable pursuant to 11 U.S.C. § 523, which is subject to Federal Rule of Bankruptcy Procedure 4007 (Determination of Dischargeability of Debt).

SERVICE

However, Movant failed to serve the Chapter 7 Trustee, Irma C. Edmonds. Federal Rule of Bankruptcy Procedure 1017(e)(1) provides that the court may extend for cause the time for filing a motion pursuant to 11 U.S.C. § 707(b). The court may dismiss or, with the debtor's consent, convert an individual debtor's case for abuse under § 707(b) only on motion and after a hearing on notice to the debtor, the trustee, the United States trustee, and any other entity as the court directs. Fed. R. Bankr. P. 1017.

STATING GROUNDS WITH PARTICULARITY

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

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

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

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and

Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the short-and-plain-statement standard for a complaint.

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

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

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

ATTORNEY DECLARATION

Lastly, the Federal Rules of Evidence are clear and straight forward with respect to what constitutes proper and competent evidence. These Rules include the following.

> **Federal Rule of Evidence 602. Need for Personal Knowledge**
>
> A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703. FN.1.

FN.1. WEINSTEIN'S FEDERAL RULES OF EVIDENCE MANUAL 2ND EDITION, MATTHEW BENDER & COMPANY, INC., ARTICLE VI, § 602.02

§ 602.02 Purpose and Applicability of Rule

[1] Personal Knowledge as Most Reliable Evidence

A witness may testify only about matters on which he or she has first-hand knowledge. The witness's testimony must be based on events perceived by the witness through one of the five senses.

The Rule is an extension of the law's usual preference that decisions be based on the best evidence available, although this preference is not an actual rule of evidence. The Rule acknowledges that distortion increases with transfers of testimony, and that the most reliable testimony is obtained from a witness who has actually perceived the event.

Rule 602 permits evidence of the requisite personal knowledge to be provided either through the witness's own testimony or through extrinsic testimony. The Rule authorizes the judge to exercise some, although minimal, control

over the jury by empowering the judge to reject inherently incredible testimonial evidence, something that rarely occurs (see § 602.03).

> Federal Rule of Evidence 701. Opinion Testimony by Lay Witnesses
>
> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. FN.2.

FN.2. WEINSTEIN'S FEDERAL RULES OF EVIDENCE MANUAL 2ND EDITION, MATTHEW BENDER & COMPANY, INC., ARTICLE VII, § 701.03, 701.06

§ 701.03 Requirements for Admissibility

[1] Opinion Must Be Based on Personal Perception

To be admissible, lay opinion testimony must be based on the witness's personal perception. This requirement is no more than a restatement of the traditional requirement that most witness testimony be based on first-hand knowledge or observation.

In its purest form, lay opinion testimony is based on the witness's observations of the event or situation in question and amounts to little more than a shorthand rendition of facts that the witness personally perceived. Lay opinion testimony is also admissible when the opinion is a conclusion drawn from a series of personal observations over time. Most courts have also permitted lay witnesses to testify under Rule 701 to their opinions when those opinions are based on a combination of their personal observations of the incident in question and background information they acquired through earlier personal observations....

§ 701.06 Trial Judge Has Broad Discretion to Admit or Exclude Lay Opinion Testimony

Trial courts have broad discretion in determining whether to admit or to exclude lay opinion testimony. This discretion applies both to the general decision to admit or exclude the evidence and to the subsidiary questions included in that determination:

> Whether the opinion is based on the witness's personal perception.
>
> Whether the opinion is rationally connected to the witness's personal perceptions.

Whether the opinion will assist the trier of fact in understanding the witness's testimony or in determining a fact in issue. (cont.)

Whether the probative value of the testimony outweighed its potential prejudicial effect.

Federal Rule of Evidence 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Federal Rule of Evidence 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Personal Knowledge Testimony of Counsel

Mr. Foley provides his personal knowledge testimony relevant to the present Motion as to the following facts:

1. I am the attorney for DAMON REED and AUDRA PLOWMAN, parents of PAYTEN E. REED, a Minor, who was attacked by a dog owned by Debtors. In the Request for Judicial Notice being filed contemporaneously herewith which contains the action which was filed February 28, 2013, Interested Parties have filed an action on behalf of PAYTEN E. REED against the Debtors.

2. The Interested Parties believe PAYTEN E. REED has a legitimate cause of action against Debtors for willfully causing injury to her, as is more particularly set forth in the Complaint which the Court is being requested to take judicial notice of which was filed in Calaveras Superior Court.

3. I attempted to contact Debtors’ counsel on April 4, 2014 and

was unable to do so. Since then, we have sent emails and left telephone messages for Debtors' counsel to give us a call and Debtors' counsel has refused to do so.

4. On April 4, 2014, I was able to contact the attorney for ARIANA AVESTA, INC., being W. STEVEN SHUMWAY, who was gracious enough to agree to stipulate to set aside the automatic stay to allow Interested Parties on behalf of PAYTEN E. REED to proceed against ARIANA AVESTA, INC., to the extent of its insurance coverage.

5. As is set forth in the Motion, if your Declarant is able to reach Debtors' counsel and work out a Stipulation for Relief from the Automatic Stay, the Interested Parties would then drop this proceeding.

A witness is one who has personal knowledge (other than an expert witness) of the facts which are to be presented to the court. The court cannot determine what, if any, of what Mr. Foley is testifying to is of his personal knowledge and what is made up or hearsay testimony. Mr. Foley testifies as to basic grounds that need to be stated with particularity in the motion.

CONSIDERATION OF MOTION

However, to deny this motion based on the above procedural defects would terminate the rights of Counsel's client, Payten Reed, a minor. This would most likely spawn further litigation concerning the loss of such rights. On the totality of the circumstances, not withstanding the grossly defective pleadings, denial of MOvant's request would be unduly prejudicial to Movant. Therefore, the court will consider the motion in light of the issues raised above.

Federal Rule of Bankruptcy Procedure 1017(e)(1) provides that the court may extend for cause the time for filing a motion pursuant to 11 U.S.C. § 707(b). The court may, on motion and after a hearing on notice, extend the time for objecting to the entry of discharge for cause. Fed. R. Bankr. P. 4004(b).

Here, Movant seeks to extend the time to file an Objection to Discharge in order to obtain a stipulation setting aside the automatic stay. Movant attempted to contact counsel for the Debtor, but was unable to do so before the deadline to object to discharge passed, April 7, 2014.

The court finds Movant's need for more time to enter into a stipulation for relief from the stay, with the attempts to contact Counsel for Debtor is sufficient cause to grant the motion. The Motion is granted and the deadline for Movant to object to Debtor's discharge is extended to May 30, 2014.

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

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

The Motion to Extend Deadline to File a Complaint Objecting to Discharge filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the deadline for Interested Party Payten Reed, a minor through her Guardians Ad Litem, Damon Reed and Audra Plowman, or other authorized personal representative, to file a complaint to -------- pursuant to 11 U.S.C. § ---------- is extended to May 30, 2014.

No further extension of time shall be granted. It is incumbent on Movant and Movant's counsel to diligently prosecute any claims relating to ----------.

2. 10-94411-E-7 CAROLE CAMERON — MOTION TO DISMISS ADVERSARY PROCEEDING
14-9006 SKV-1 — 3-18-14 [8]
FERLMANN V. GARRETT

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff and Plaintiff's Attorney on March 17, 2014. By the court's calculation, 45 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to continue the hearing on the Motion to Dismiss Adversary Proceeding to June 26, 2014. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Defendant Karen J. Garrett moves for dismissal of this case pursuant to Federal Rule of Civil Procedure 12(b)(6) failure to state a claim. Defendant asserts the following grounds for dismissal:

A. The Complaint places an undue hardship on the Defendant due

to health issues.

B. The Adversary Proceeding was filed (on January 30, 2014) more than two years after the commencement of the bankruptcy case (November 8, 2010). It is asserted that the "two year statute of limitations period has expired, citing to 11 U.S.C. § 108. (Which addresses an extension of time for periods for the Debtor to act under applicable nonbankruptcy law, order in a nonbankruptcy proceeding, or agreement.)

C. The Trustee cannot "wait for years for real property to appreciate in value and then seek to recover."

D. The Defendant addresses medical and physical burdens created by a sale of the property.

However, the pleading titled "motion" is a combined motion and points and authorities in which the grounds upon which the motion is based are buried in detailed citations, quotations, legal arguments, and factual arguments (the pleading being a "Mothorities") in which the court and Plaintiff are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Defendant. The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party.

The court has also observed that the more complex the Mothorities in which the grounds are hidden, the more likely it is that no proper grounds exist. Rather, the moving party is attempting to beguile the court and other party.

In such situations, the court routinely denies the motion without prejudice and without hearing. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and uniformly applied.

Further, Defendant filed the motion and exhibits and declaration and exhibits in this matter as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." *Revised Guidelines for the Preparation of Documents*, ¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the *Revised Guidelines for the Preparation of Documents* in Appendix II of the Local

Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). This failure is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

TIMELINESS OF MOTION TO DISMISS

Defendant filed the answer to the complaint and this motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on the same day. Dckts. 8 & 12. Pursuant to Rule 12(b), a motion to dismiss for failure to state a claim upon which relief can be granted **must** be made before pleading if a further pleading is permitted. Fed. R. Civ. P. 12(b) (emphasis added). A motion to dismiss is timely only if filed before the answer. *Aetna Life Ins. Co. v. Alla Medical Services, Inc.*, 855 F.2d 1470, 1474 (9th Cir. 1988); *see also Hargrove & Costanzo v. United States*, 2007 U.S. Dist. LEXIS 65593 (E.D. Cal. 2007) (Defendants' motion to dismiss for failure to state claim filed under Fed. R. Civ. P. 12(b)(6) was considered as motion for judgment on pleadings under Fed. R. Civ. P. 12(c) because motion was filed simultaneously with answer and thus was not considered as timely).

When a Rule 12(b)6) motion to dismiss for failure to state a claim upon which relief can be granted is filed after an answer is filed, a court may deny the motion to dismiss as untimely, or the court may consider the Rule 12(b)(6) motion to dismiss as a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980). Federal Rule of Civil Procedure 12(h)(2) states that a motion to dismiss for failure to state a claim may be made in a motion for judgment on the pleadings pursuant to Rule 12(c). In *Aldabe*, the Ninth Circuit reasoned,

> Rule 12(h)(2) specifically authorizes use of the latter motion to raise the defense of failure to state a claim. Because it is only after the pleadings are closed that the motion for judgment on the pleadings is authorized Rule 12(c)Rule 12(h)(2) should be read as allowing a motion for judgment on the pleadings, raising the defense of failure to state a claim, even after an answer has been filed. Under that interpretation, Rules 12(c) and 12(h)(2) together constitute a qualification of Rule 12(b)(6).

Id. at 1093.

As the Defendant filed an answer simultaneously with the Motion to Dismiss, the court must consider the motion to dismiss as a motion for judgement on the pleadings pursuant to Federal Rule of Civil Procedure 12(c).

STIPULATION

The parties filed a stipulation to continue the hearing on the Motion to Dismiss Complaint to June 26, 2014. Dckt. 17.

CONCLUSION

As the parties have agreed to continue the hearing pursuant to their

stipulation, the court will continue the hearing and set the following briefing schedule for Movant to comply with Federal Rule of Civil Procedure 12(c), Federal Rule of Civil Procedure 7(b), Local Bankruptcy Rule 9004, and the Revised Guidelines for Preparation of Documents:

A. Defendant to file supplemental pleadings on or before May 29, 2014.

B. Plaintiff to file supplemental opposition, if any, on or before June 12, 2014.

C. Defendant to file reply, if any, on or before June 19, 2014.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss Complaint filed by Defendant 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 hearing on the Motion to Dismiss is continued to 10:30 a.m. June 26, 2014. This Motion is not resolved, an amended motion, with the hearing date of May 26, 2014, correctly stating the post-answer relief requested shall be filed and served on or before May 30, 2014, for which a response by Plaintiff shall be filed and served on or before June 13, 2014, and a Reply, if any, by Defendant, filed and served on or before May 19, 2014.

3. 13-91016-E-7 MIGUEL/JOANN VALENCIA — MOTION TO CONVERT CASE TO CHAPTER 13
PK-3 Peter Koulouris — 4-9-14 [68]

DISCHARGED 9-10-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on April 9, 2014. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Convert Case to Chapter 13 was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion to Convert Case to Chapter 13. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Debtors seek to convert this case from Chapter 7 to Chapter 13. Debtors contend that their financial situation has unexpectedly changed and they now desire to convert to a Chapter 13. This motion appear almost identical to the prior Motion to Convert Case filed on November 30, 2013, which the court held an opposed hearing on January 16, 2014.

The Motion states with particularity (Fed. R. Bankr. 9013) the following grounds upon which the requested relief is based:

A. Debtors commenced this Chapter 7 case on May 28, 2013.

B. The Debtors' "financial and/or legal situation has unexpectedly changed." Therefore, the Debtors now want to convert the case to one under Chapter 13.

C. The Internal Revenue Service has released tax liens for tax years 2005, 2006, and 2007 for tax debts totaling $54,588.45. This renders the tax claims unsecured.

D. The Debtors qualify as debtors for a Chapter 13 case.

Motion, Dckt. 68. The court accepts these well pleaded grounds as the baiss for the requested conversion to a case under Chapter 13.

The Debtors have provided their joint declaration in support of the Motion. In the Declaration the Debtors testify,

A. The Debtors' financial situation has changed, specifically,

1. They no longer have a $158 expenditure for their daughter's braces

2. A $258.00 "auto payment" is no longer being made, the debt having been paid in full;

3. The Debtors will now pay the claim of the Internal Revenue Service through a Chapter 13 Plan;

4. The Internal Revenue Service has released liens for tax debts totaling $54,257.13 for tax years 2005, 2006, 2007;

5. The Chapter 13 Plan will pay creditors more than they will receive through the Chapter 7 liquidation of the estate by the Trustee;

6. Property taxes and insurance (for an unidentified property) are included in the monthly mortgage payment.

7. The Debtors failure to identify these payments on Schedule J filed in this case was a mistake.

8. The Debtors' auto insurance has been reduced to $96.59 per month from the prior stated $120.00 a month.

9. The Debtors' monthly income $4,840.15 [stated to be $4,740.98 on Schedule I, Dckt. 1 at 36] and monthly expenses are ($3,843.59) [stated to be $4,740.98 on Schedule J, *Id.* at 38], yielding a net monthly income of $999.59 [($42.02) on Schedule J, *Id.*] which can be the projected disposable income to fund a Chapter 13 Plan.

Declaration, Dckt. 70.

The Debtors have provided a new expense statements in support of this Motion. Exhibit A attached to the Declaration. [Local Bankruptcy Rule 9004 and the Revised Guidelines for Preparation of Pleadings in this District requires that the motion, points and authorities, each declarations, and the exhibits (which may be combined into one exhibit document) be filed as separate pleadings. The court waives this failure to comply with the Local Rules and filing requirements, for this motion only.]

The court constructs the following comparison of the Debtors'

original statements of income and expenses made under penalty of perjury and the current statements of income and expenses made under penalty of perjury.

INCOME CHART

Income	Schedule I, Dckt. 1
Debtor	
Wages	$5,288.80
Debtor Taxes and Social Security	($888.10)
Debtor 401(k)	($370.22)
Medical Pretax UFCW	($297.26)
Delta Dental Pre-Tax	($25.44)
Garnishment - Tax Levy	($100.00)
Co-Debtor	
Co-Debtor Wages	$728.23
Taxes and Social Security	($74.20)
Unemployment Benefits	$479.17
Average Monthly Income	$4,740.98

EXPENSE CHART

Expense	Schedule I, Dckt. 1	Declaration and Exhibit A, Dckt. 70	(Less Than)/ Greater Than Original
Mortgage	($1,034.00)	($1,034.00)	$0.00
Electricity/Heating	($250.00)	($250.00)	$0.00
Water and Sewer	($100.00)	($100.00)	$0.00
Telephone, Cell Phone, Internet, Cable	$0.00	($413.00)	$413.00
Cellular Phone	($215.00)		($215.00)
Internet-Cable-Land Line	($198.00)		($198.00)

Other	$0.00		$0.00
Home Maintenance	($150.00)	($300.00)	$150.00
Food	($600.00)	($830.00)	$230.00
Clothing	($100.00)	($150.00)	$50.00
Laundry and Dry Cleaning	($50.00)	Included in Clothing	($50.00)
Medical and Dental Expenses	($50.00)	($50.00)	$0.00
Transportation	($350.00)	($350.00)	$0.00
Recreation	($75.00)	($95.00)	$20.00
Homeowner's Ins	$0.00	Included in Mortgage	$0.00
Property Taxes	$0.00	Included in Mortgage	$0.00
Automobile Payment	($259.00)		($259.00)
Automobile Insurance	($120.00)	($96.59)	($23.41)
Dental Payment - Braces	($158.00)		($158.00)
Internal Revenue Service - Back Taxes	($500.00)		($500.00)
Pet Care	($50.00)		($50.00)
Gym Membership	($20.00)		($20.00)
School Lunches	($180.00)		($180.00)
Pool Upkeep and Supplies	($150.00)		($150.00)
Supplemental Taxes	($100.00)	($100.00)	$0.00
Personal Care Items	($75.00)	($75.00)	$0.00
	---	---	---
Total Expenses	($4,784.00)	($3,843.59)	($940.41)

For some of the above expenses the change is described in the Declaration,

A. Auto Insurance reduced.....($ 23.41)
B. Car Payment Completed.....($259.00)
C. IRS Tax Payment.....($500.00)

However, there are some expenses which have increased, decreased, or just "disappeared" without explanation. Because Schedule J was filed under penalty of perjury, the court gives significance to the statements made therein by the Debtors. Unexplained changes in expenses are,

	Schedule J	Declaration and Exhibit A	Greater/(Lesser) Expense
Home Maintenance	($150.00)	($300.00)	$150.00
Food	($600.00)	($830.00)	$230.00
Recreation	($75.00)	($95.00)	$20.00
Gym Membership	($20.00)		($20.00)
School Lunches	($180.00)		($180.00)
Pet Care	($50.00)		($50.00)

The disappearing expenses and the increase in expenses are not explained by the Debtors.

Debtors' Liquidation Analysis

A liquidation analysis is provided by Kenneth Sanders, a former Chapter 7 Trustee in this District. The pleading is entitled "Liquidation Analysis" and it is signed by Mr. Sanders stating that he has read the analysis and certifies under penalty of perjury that "the contents thereof are true and correct." Dckt. 71 However, the document is not a declaration and the court cannot clearly identify whether this is testimony by Mr. Sanders or merely argument by counsel which Mr. Sanders "certifies." FN.1.

FN.1. In the Liquidation Analysis it states that if Mr. Sanders were called to testify he would certify to facts which are set forth in the Liquidation Analysis. This raises further questions as to whether the Liquidation Analysis is "testimony" or merely a statement what possible testimony could be if, at some later date, Mr. Sanders was called to testify.

The Liquidation Analysis first addressed the Debtors having previously paid the Estate $6,000.00 to purchase two vehicles from the Trustee.

The Liquidation Analysis then addresses the Torrey Pines Way Property which the Trustee has asserted has a value of $325,000.00. It is asserted that after the Debtors deduct a $100,000.00 homestead exemption from the sales proceeds there would be $68,039.00 in net sales proceeds (assuming an 8% cost of sale). When the $6,000.00 from the vehicles is added to the real property sales proceeds, the bankruptcy estate would have $74,033.00 to pay expenses and distribute for claims.

The Liquidation Analysis deducts the following amounts for administrative expenses and priority claims:

A. Chapter 7 Trustee Fees.....($15,000.00)
B. Trustee Attorneys' Fees.....($ 6,127.00)
C. Internal Revenue Service Priority Claim.....($ 1,685.95)
D. Franchise Tax Board Priority Claim.....($ 632.56)

After deducting these amounts, the Liquidation Analysis concludes that there would be $50,287.49 for disbursement for unsecured claims.

The Liquidation Analysis projects the Debtors' proposed Chapter 13 Plan not distributing less than $50,326.35. The Plan which is the subject of the Liquidation Analysis provides for a $996.00 monthly plan payment and a "nominal" $1,500.00 contribution from family members.

The Liquidation Analysis provides an analysis of a Chapter 13 plan for the Debtors. The Analysis first provide a legal conclusion that while the Chapter 13 Trustee's fees are set at 9.5%, the Chapter 7 Trustee fees to be paid through a Chapter 13 plan are set by statute to be $25.00 per month. In a footnote, the legal authority for this proposition is stated to be 11 U.S.C. § 1326(b)(3)(B). FN.2.

FN.2. That the Liquidation Analysis contains such legal arguments indicates that it is something prepared by counsel for the Debtors as "argument," and not factual testimony by a witness.

The court is not persuaded by this citation that a Chapter 7 Trustee is disallowed his or her fees for all amounts in excess of $25.00 a month based on 11 U.S.C. § 1326(b)(3). The language of that paragraph states in pertinent part,

> "(3) if a chapter 7 trustee has been allowed compensation **due to the conversion or dismissal of the debtor's prior case pursuant to section 707(b)**, and some portion of that compensation remains unpaid in a case converted to this chapter [11 U.S.C. §§ 1301 et seq.] **or in the case dismissed under section 707(b)** [11 U.S.C. § 707(b)] and refiled under this chapter [11 U.S.C. §§ 1301 et seq.], the amount of any such unpaid compensation, which shall be paid monthly--
>
> (A) by prorating such amount over the remaining duration of the plan; and
>
> (B) by monthly payments **not to exceed the greater of**-
>
> (i) $ 25; or
>
> (ii) the **amount payable to unsecured nonpriority creditors, as provided by the plan, multiplied by 5 percent**, and the result divided by the number of months in the plan.

11 U.S.C. § 1326(b)(3) [emphasis added].

The first requirement is that the case was either converted to one under Chapter 7 pursuant to 11 U.S.C. § 707(b) or had been dismissed pursuant to 11 U.S.C. § 707(b) and a new Chapter 13 case filed. The court

has not ordered this case to be converted to Chapter 13 pursuant to 11 U.S.C. § 707(b). Instead, the Debtors are attempting to convert the case to one under Chapter 13 and remove the Chapter 7 Trustee from control over the estate.

The Bankruptcy Code expressly provides that conversion of a bankruptcy case from one chapter to another does not constitute a "new" bankruptcy case.

> "§ 348. Effect of conversion
>
> (a) Conversion of a case from a case under one chapter of this title [11 USCS §§ 101 et seq.] to a case under another chapter of this title [11 USCS §§ 101 et seq.] constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief." [11 U.S.C. § 348(b) providing that upon conversion to Chapter 13, the "order for relief under Chapter 13" as used in 11 U.S.C. §§ 1301 (stay against co-debtor) and 1305 (post-petition claims) means the date of conversion.]

11 U.S.C. § 348(a).

For the trustee fee limits to be met all of the requirements of 11 U.S.C. § 1326(b)(3) must be met. COLLIER ON BANKRUPTCY SIXTEENTH EDITION, ¶ 1326.03[4]. As further stated in COLLIER,

> [4] Compensation to Chapter 7 Trustee in Prior Case; § 1326(b)(3) & (d)
>
> Section 1326(b)(3) provides for limited payments by the chapter 13 trustee to a person who was **a chapter trustee in a prior case** under certain circumstances. In order to qualify for such payments all of the following conditions must be met:
>
> -- The debtor filed a prior case under chapter 7. The **references to a prior case makes clear that a trustee in a case that is converted to chapter 13 does not qualify under this provision because that case is the same case and not a prior case....**

Id.

The provisions of 11 U.S.C. § 1326(b)(3)(B) do not apply in the current bankruptcy case. (This does not mean that a Chapter 7 trustee is entitled to be paid the maximum fees which could be computed under 11 U.S.C. § 326(a), as such is the maximum amount which the court may allow as a "commission" for the trustee.")

Even if 11 U.S.C. § 1326(b) applied, the conclusion in the

Liquidation Analysis that there would only be $25 a month in Chapter 7 Trustee fees for a period of 60 months – total Chapter 7 Trustee fees of $1,500.00. The provisions of 11 U.S.C. § 1326(b)(3)(B) provide that the payments shall not exceed **the greater of** the $25.00 a month or 5% of the distribution to be made to creditors holding general unsecured claims. Since the Liquidation Analysis projects no less than $50,326.35. If the case were once converted pursuant to 11 U.S.C. § 707(b) and the Trustee fee limit applied, then there would have been a $2,516.30 maximum in fees. Spread over 60 months, that would be $41.94 a month. Almost double the maximum presumed in the Liquidation Analysis.

Additionally, the Liquidation Analysis assumes that an attorney representing a Chapter 7 Trustee would be denied his or her reasonable legal fees for the services provided. No provision is made in the Liquidation Analysis for the payment of the Chapter 7 administrative expenses for counsel.

Review of Draft Chapter 13 Plan

No exhibit has been filed for the Chapter 13 plan referenced in the Liquidation Analysis. The court will not presume that it is the same as the prior draft Chapter 13 Plan (Exhibit D, Dckt. 42) which required $919.01 monthly payment from the Debtors, the $6,000.00 paid to the estate for the vehicles, and an $11,516.98 gift from unidentified family members.

TRUSTEE'S OBJECTION

The present Motion was filed pursuant to Local Bankruptcy Rule 9014-1(f)(2), for which opposition may be stated orally at the hearing. In reviewing this Motion the court reviewed the Civil Minutes of the court in connection with the prior motion. Civil Minutes, Dckt. 54. Mr. Robert Brazeal of PMZ Real Estate in Modesto, stated his opinion that the Debtors' real property residence has a current market value of $330,000 to $335,000 as opposed to Debtors' stated value of $257,600 in their Amended Schedule "A" filed on October 23, 2013 (Dckt. 33). Mr. Brazeal was employed by the Trustee to appraise the real Torrey Pines Way Property. Mr. Brazeal testified that due to the low inventory in the Modesto market, that it would take perhaps 30 days for an offer to be made and accepted, and 45 days for a customary time in which to close escrow.

The Trustee and his counsel testified have worked with the Internal Revenue Service ("IRS") and has spoken with Thomas Rohall, Esq., District Counsel for the IRS and agreed to a "carve out" from the IRS lien for payment of administrative expenses, priority claims, and general unsecured claims that significantly exceeds Debtors' proposed plan distribution to unsecured creditors. The "carve out" for the estate is stated to be approximately $30,715.87. The Trustee also challenged the good faith of the Debtors and the significantly understated value (in the opinion of Robert Brazeal) for the real property. The court denied the prior motion to convert without prejudice to allow the Debtors the opportunity to regroup and, if proper, to seek to convert the case to Chapter 13 and properly provide for creditors and administrative expenses.

RESPONSE OF THE UNITED STATES OF AMERICA

(Internal Revenue Service Claim)

On April 25, 2014, the United States filed a Response to the Motion in the form of a declaration of Aixia Kassim, a bankruptcy specialist employed by the Internal Revenue Service. In it she states that the total Internal Revenue Service Claim is $78,919.26. This consists of a $77,233.31 secured claim (2005, 2006, and 2007 tax years) and an $1,685.95 priority claim for 2012.

For the Internal Revenue Service, Kassim states that she concluded that the Torrey Pines Way Property had $93,000.00 in equity. In her Declaration, Kassim recounts having been contacted by counsel for the Chapter 7 Trustee and presented with the proposal to "carve out" a portion of the proceeds subject to the Internal Revenue Service lien from the sale of the Property for creditors holding general unsecured claims. Since the proposal for a "carve out" was new to Kassim, she communicated with her counsel. She states that an agreement was reached with the Trustee for a "carve out." Though the Internal Revenue Service records were noted that the lien was not to be released, a release of lien was processed and recorded due to "inadvertent error." The parties have not addressed the effect of this asserted inadvertent release of the, the legal principles which may apply, and if the release is effective and cannot be reversed, to whose benefit the "error" accrues – the Debtors or the Bankruptcy Estate. FN.3.

FN.3. In her declaration Kassim states that there was, by her analysis, $93,000.00 of "equity" in the Property. She further states that "In a typical chapter 7 case where there are no assets to collect from after the debtor receives a discharge, the Service would file a Release of Federal Tax Lien after discharge is entered." What the court does not understand is if there was $93,000.00 in "equity" and the Internal Revenue Service had a lien for a $77,233.31 secured claim, why the tax lien would be released. The parties have not addressed the issue of whether a debtor's claim of homestead exemption comes ahead of an Internal Revenue Service tax lien. If so, then why would that not apply in the bankruptcy case? If not, then why or how was this a "typical no asset case" in which the tax lien would be released for dischargeable debts to prevent the appearance that the lien attached to post-bankruptcy discharge properties?

DISCUSSION

The Bankruptcy Code authorizes a one-time, near absolute right of conversion from Chapter 7 to Chapter 13. 11 U.S.C. § 706(a). A "bankruptcy judge may override a Chapter 7 debtor's conversion right based on a finding of bad faith." *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 379 (2007). The authority to convert is left to the discretion of the bankruptcy court. *Id.* at 377. In determining whether the debtor's conversion involved bad faith, "a bankruptcy judge must review the totality of the circumstances." *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994). Under the "totality of the circumstances" test, the court examines whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or filed his Chapter 13 petition or plan in an inequitable manner. *Id.* Debtor's history of filings and dismissals is relevant in

determination of "bad faith." *Id.*

As addressed by the Supreme Court the rights of a debtor to convert or dismiss a Chapter 13 case are almost absolute. However, the overriding factor goes to the core of bankruptcy proceedings. With the ability to get great benefits from bankruptcy, debtors must proceed in good faith, providing candid, honest information. The Ninth Circuit Court of Appeals most recently review this concept in *Danielson v. Flores (In re Flores)*, 735 F.4th 855, 2013 U.S. App. LEXIS 18413 (9th Cir. 2013), stating,

> "Finally, our interpretation of § 1325(b)(1)(B) is consistent with the policies that underlie the Bankruptcy Code and the BAPCPA amendments. "The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama v. Citizens Bank*, 549 U.S. 365, 367, 127 S. Ct. 1105, 166 L. Ed. 2d 956 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286, 287, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991))."

The Collier on Bankruptcy discussion of Marrama notes there being a simple, practical reason for the conversion right to 13 being "almost absolute," if converted it is the bankruptcy judge who will consider whether it should be reconverted to a Chapter 7 due to the debtor's conduct. 6 COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 706.02.

Here, the Debtors' case has not previously been converted, the Trustee has raised some serious issues regarding the conduct of the Debtors. The conduct of Debtors raises significant credibility issues. The court has to question the value of the subject property (the only evidence being the real estate appraiser of the Trustee, how the Debtors going to fund a plan with less income, what are the explanations for the several different changes in expenses, and whether the plan passes the Chapter 7 Liquidation analysis. Possibly bona fide, good faith answers exist to these questions, but the Debtors have mutely failed to provide them.

Civil Minutes, Dckt. 54.

Here, the does not appear to be a change in circumstances form the January 16, 2014 discussion. The Debtors have proceeded on some faulty assumptions. First, the application of 11 U.S.C. § 1326(b)(3)(B) to deny the Chapter 7 Trustee fees except for minimal amount permitted for fees relating to getting a prior bankruptcy case converted or dismissed pursuant to 11 U.S.C. § 707(b). Secondly, even if it applied, the Debtors ignore the computation of what a proper fee would be and represent to the court that it would be only $25.00, not the greater 5% amount.

Second, the Debtors' Liquidation Analysis ignores other administrative expenses in the case – the Chapter 7 Trustee's counsel. While deducting that amount from the sales proceeds for a Chapter 7 liquidation, the Debtors ignore paying those administrative expenses if the case is converted to one under Chapter 13.

Third, the Debtors provide the court with new expenses under penalty of perjury. These differ from those previously stated under penalty

of perjury on Schedule J. While the Debtors provide the explanation for some, such as the braces, car loan payment, and lower auto insurance, other just "disappear." One example is that school lunches for their two children are no longer an expense. Presumably the children still need to eat during the school day. Also, a "pet expense" of $50.00 has disappeared. No testimony is provided that the pet no longer exists. The gym membership expense disappears.

Equally concerning is the Debtors have unexplained increases in expenses. These include increasing their home maintenance expense 100% from ($150.00) a month to ($300.00) a month. Additionally, the Debtors' food expense jumps 38% from ($600) a month to ($830.00) a month. While there may be some bona fide, good faith reasons for such increases, no explanation is given. This causes the court to infer that these increases are "necessary" to depress projected disposable income to the predetermined amount "necessary" to improperly minimize the payments to creditors holding general unsecured claims.

Fourth, the Debtors improperly compute what they would be required to pay under a Chapter 13 Plan (ignoring Chapter 7 trustee fees and attorneys' fees). Taking the Debtors most recent statement of expenses under penalty of perjury as true and correct, they do not have the ability to pay any additional amounts to fund a plan. The Debtors demonstrate that conversion is not in good faith as they cannot fund a plan.

Fifth, the Debtors have not addressed the effect of the purported "release" of a lien post-petition and whether it inures to their benefit or the owner of the Property, the bankruptcy estate.

Sixth, the Chapter 7 Trustee has filed a motion for the Debtors to turn over the Torrey Pines Way Property to the Trustee. DCN: THA-2. That motion was filed pursuant to Local Bankruptcy Rule 9014-1(f)(1), for which a written opposition was required to be filed at least fourteen days prior to the hearing. Local Bankruptcy Rule 8914(f)(1)(B). Here no opposition has been filed. It may well be that after reading the Trustee's motion, reflecting on the statements made in connection with the present Motion to Convert, and additional information that the Debtors and their counsel has obtained concerning the Internal Revenue Service lien, they have chosen to not try and retain the property through a Chapter 13 conversion.

Based on the evidence provided, the court determines that conversion to Chapter 13 is not proper, has not been sought in good faith, and cannot be prosecuted by these Debtors. The Debtors chose to file a Chapter 7 case originally because they could not prosecute a Chapter 13 case. The Motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Convert Case to Chapter 13 filed by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel,

and good cause appearing,

IT IS ORDERED that the Motion is denied.

4. 13-91016-E-7 MIGUEL/JOANN VALENCIA — MOTION FOR TURNOVER OF PROPERTY
THA-2 Peter Koulouris — 3-24-14 [63]

DISCHARGED 9-10-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on March 24, 2014. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion for Turnover of Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered
The Motion for Turnover of Property is granted. The court has issued this as a tentative ruling to allow the parties to present the court with any stipulations or information not appearing on the record which would require different relief to be granted.

Michael D. McGranahan, the Chapter 7 Trustee ("Trustee") in the above entitled case and moving party herein, seeks an order for turnover as to the real property commonly known as 2709 Torrey Pines Way, Modesto, California.

DISCUSSION

11 U.S.C. § 542 and Federal Rule of Bankruptcy Procedure 7001(1) permit a motion to obtain an order for turnover of property of the estate if the debtor fails and refuses to turnover an asset voluntarily. Federal Rule of Bankruptcy Procedure 7001(1) defines an adversary proceeding as,

> (1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002.

In this case, Trustee has initiated this proceeding to compel

Debtors deliver property to the Trustee. Federal Rule of Bankruptcy Procedure permits the trustee to obtain turnover from the Debtor without filing an adversary proceeding. This Motion for the injunctive relief, in the form of a court order requiring that Debtors turnover specific items of property, is therefore appropriate under Federal Rule of Bankruptcy Procedure 7001(1).

The filing of a bankruptcy petition under 11 U.S.C. §§ 301, 302 or 303 creates a bankruptcy estate. 11 U.S.C. § 541(a). Bankruptcy Code Section 541(a)(1) defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." If the debtor has an equitable or legal interest in property from the filing date, then that property falls within the debtor's bankruptcy estate and is subject to turnover. 11 U.S.C. § 542(a).

A bankruptcy court may order turnover of property to debtor's estate if, among other things, such property is considered to be property of the estate. *In re Hernandez*, 483 B.R. 713 (B.A.P. 9th Cir. 2012); *See also* 11 U.S.C.A. §§ 541(a), 542(a). Section 542(a) requires one in possession of property of the estate to deliver such property to the Trustee. Pursuant to 11 U.S.C. § 542, a Trustee is entitled to turnover of all property of estate from Debtors. Most notably, pursuant to 11 U.S.C. § 521(a)(4), the Debtor is required to deliver all of the property of the estate and documentation related to the property of the estate to the Chapter 7 Trustee.

Here, the Trustee asserts that Debtors filed a voluntary petition for relief under Chapter 7 on May 28, 2013 and received their discharge on September 10, 2013. Trustee asserts that among the assets of the estate is the subject property, whcih the Debtors scheduled as having a value of $233,438.04. The Trustee through the estate's broker, Robert Brazeal of PMZ Real Estate, has determined that the Property has a value of $330,000.00 to $335,000.00. Trustee states the Property is encumbered by a consensual first position note secured by a deed of trust in the scheduled amount of approximately $140,000.00 and the Internal Revenue Service ("IRS") holds a perfected statutory tax lien in the amount of $77,233.31. Debtors have claimed an exemption in the Property in the amount of $93,271.28. Trustee argues that while the Debtors may be able to protect their homestead proceeds from other judgment lien creditors, Debtors may not do so as against federal tax liens.

Trustee asserts that he has attempted to work with the Debtors to resolve the non-exempt equity issue relative to the subject property without success. Being unable to resolve the issue with the Debtors, Trustee and his counsel have worked with the IRS regarding its tax lien. The undersigned has spoken with Thomas Rohall, Esq., District Counsel for the IRS, and agreed to a "carve out" from the IRS lien for payment of administrative expenses, priority claims, and general unsecured claims.

Trustee states that by court order entered March 17, 2014 (Docket 62), Robert Brazeal of PMZ Real Estate is now employed to sell the subject property and needs access to the subject property to post "For Sale" signs, place a key lock box so he may show the Property, and perform all ordinary and necessary acts in order to sell the Property in the furtherance of the Trustee's statutory duties as referenced above. He or the Trustee may also

need documents, records and/or papers regarding the Property in order to sell the same. The Trustee is not asking at this juncture that the Debtors vacate the Property, but rather that they remain in the Property, maintain house payments, insurance and otherwise protect and maintain the Property.

No opposition has been filed to this motion by the Debtors or other parties in interest.

Based on the foregoing, the court grants the Motion for Turnover and Debtors shall cooperate with the Trustee and his broker so that the subject property can be marked and sold.

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 Turnover of Property filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and that Debtors shall cooperate with the Trustee and his broker so that the property commonly known as 2709 Torrey Pines Way, Modesto, California, (APN #077-043-049), may be marketed and sold. Debtors shall provide all documents, records and papers regarding the subject property as the Trustee requires.

5. 11-92631-E-7 MAILE STEWART MOTION TO SELL
CWC-3 Ann Marie Friend 4-2-14 [38]

DISCHARGED 11-7-11

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

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on April 2, 2014. By the court's calculation, 29 days' notice was provided.

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

Proper service requires compliance with both the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules. Under Federal Rule of Bankruptcy Procedure 6004(b) states that an objection to proposed sale, lease or use of property shall be filed and served not less than seven days prior to the date set for the proposed action or such other time period provided by the court. Additionally, Federal Rule of Bankruptcy Procedure 2002(a)(2) provides that at least 21-days' notice be given of any proposed use, sale or lease of property. Reading these two Rules together, the Rules Committee and Supreme Court envision providing at least 14 days for parties in interest to formulate, draft, file, and serve an opposition to the proposed use, sale, or lease of the property.

Though not routinely discussed, Federal Rule of Bankruptcy Procedure 9006(f) further provides that when notice is given by mail, an additional 3 days must be added to the notice period. The court does not express an opinion, at this time, whether this requires there to be 31-days' notice under Local Bankruptcy Rule 9014-1(f)(1) or 17-days' notice under Local Bankruptcy Rule 9014-1(f)(2). The court waives the requirement, if it

exists, under the facts and circumstances of this Motion and service made by Movant.

Local Bankruptcy Rule 9014-1(f)(1)(A) requires that at least 28 days' notice of the hearing on a motion be provided. A written opposition must be filed at least 14 days prior to the hearing. When the timing is perfect and exactly 28-days' notice is given, the opposition must be filed 14 days after service of the motion. This corresponds to the 14-day period established by Federal Rule of Bankruptcy Procedure 6004(a) and (b), and 2002(a)(2).

When there has been improper notice under Local Bankruptcy Rule 9014-1(f)(1), some courts will convert the notice to one under Local Bankruptcy Rule 9014-1(f)(2), which requires only 14-days notice of the hearing and allows oral opposition to be presented. This court does not so apply the rules as it can lead to confusion or create the "opportunity" for a less than scrupulous party to try and chill opposition by giving inadequate notice and misrepresenting that written opposition must be filed. This is clearly not the situation for the present Movant, but the court does not believe in selectively applying the law or rules. This court does not so convert a defective Rule 9014-1(f)(1) notice into a 9014(f)(2) notice.

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

The Bankruptcy Code permits the Trustee ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363. Here Movant proposes to sell the "Property" described as follows:

A. Debtor's joint tenancy with right of survivorship in the property commonly known as: 1373 Tata Lane, South Lake Tahoe, California

The proposed purchaser of the Property is Scott Butcher and the terms of the sale are: the Debtor's interest is being sold together with the joint tenancy with right of survivorship interests of the Debtor's daughter, Stacey L. Stewart (who is also a Chapter 7 Debtor, Case No. 11-92632, a separate Motion has been brought to sell Stacey L. Stewart's interest in the property), the buyer will purchase the property (the interests of both Maile Stewart and Stacey L. Stewart) for $50,000, the sale will fully pay all liens, encumbrances, and taxes on the property, the property is sold "as is," Buyer's and seller's real estate agents will equally split a 6% brokerage fee.

At the time of the hearing the court announced the proposed sale an requested that all other persons interested in submitting overbids present them in open court. At the hearing the following overbids were presented in open court: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

Based on the evidence before the court, the court determines that

the proposed sale is in the best interest of the Estate.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Stephen C. Ferlmann the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Stephen C. Ferlmann, the Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Scott Butcher or nominee ("Buyer"), the Property commonly known as Maile Corrine Stewart's joint tenancy with right of survivorship in the real property commonly known as 1373 Tata Lane, South Lake Tahoe, California ("Property"), on the following terms:
>
> 1. The Property shall be sold along with the joint tenancy with right of survivorship interest's held by the Debtor, Stacey L. Stewart, (Case No. 11-92632) to Buyer for $50,000, on the terms and conditions set forth in the Purchase Agreement, Exhibit 2, Dckt. 41, and as further provided in this Order.
>
> 2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
>
> 3. The Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.
>
> 4. The Trustee be and hereby is authorized to pay a real estate broker's commission in an amount equal to six percent (6%) of the actual purchase price upon consummation of the sale. The six percent (6%) commission shall be evenly divided and paid to the Trustee's broker, Pinnacle Real Estate Group of Lake Tahoe, and the Buyer's real estate broker.

6. 11-92632-E-7 STACEY STEWART MOTION TO SELL
CWC-3 Ann Marie Friend 4-2-14 [27]

DISCHARGED 11-7-11

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

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on April 2, 2014. By the court's calculation, 29 days' notice was provided.

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

Proper service requires compliance with both the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules. Under Federal Rule of Bankruptcy Procedure 6004(b) states that an objection to proposed sale, lease or use of property shall be filed and served not less than seven days prior to the date set for the proposed action or such other time period provided by the court. Additionally, Federal Rule of Bankruptcy Procedure 2002(a)(2) provides that at least 21-days' notice be given of any proposed use, sale or lease of property. Reading these two Rules together, the Rules Committee and Supreme Court envision providing at least 14 days for parties in interest to formulate, draft, file, and serve an opposition to the proposed use, sale, or lease of the property.

Though not routinely discussed, Federal Rule of Bankruptcy Procedure 9006(f) further provides that when notice is given by mail, an additional 3 days must be added to the notice period. The court does not express an opinion, at this time, whether this requires there to be 31-days' notice under Local Bankruptcy Rule 9014-1(f)(1) or 17-days' notice under Local Bankruptcy Rule 9014-1(f)(2). The court waives the requirement, if it exists, under the facts and circumstances of this Motion and service made by

Movant.

Local Bankruptcy Rule 9014-1(f)(1)(A) requires that at least 28 days' notice of the hearing on a motion be provided. A written opposition must be filed at least 14 days prior to the hearing. When the timing is perfect and exactly 28-days' notice is given, the opposition must be filed 14 days after service of the motion. This corresponds to the 14-day period established by Federal Rule of Bankruptcy Procedure 6004(a) and (b), and 2002(a)(2).

When there has been improper notice under Local Bankruptcy Rule 9014-1(f)(1), some courts will convert the notice to one under Local Bankruptcy Rule 9014-1(f)(2), which requires only 14-days notice of the hearing and allows oral opposition to be presented. This court does not so apply the rules as it can lead to confusion or create the "opportunity" for a less than scrupulous party to try and chill opposition by giving inadequate notice and misrepresenting that written opposition must be filed. This is clearly not the situation for the present Movant, but the court does not believe in selectively applying the law or rules. This court does not so convert a defective Rule 9014-1(f)(1) notice into a 9014(f)(2) notice.

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

The Bankruptcy Code permits the Trustee ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363. Here Movant proposes to sell the "Property" described as follows:

A. Debtor's joint tenancy with right of survivorship in the property commonly known as: 1373 Tata Lane, South Lake Tahoe, California

The proposed purchaser of the Property is Scott Butcher and the terms of the sale are: the Debtor's interest is being sold together with the joint tenancy with right of survivorship interests of the Debtor's mother, Maile C. Stewart (who is also a Chapter 7 Debtor, Case No. 11-92631, a separate Motion has been brought to sell Maile C. Stewart's interest in the property), the buyer will purchase the property (the interests of both Maile Stewart and Stacey L. Stewart) for $50,000, the sale will fully pay all liens, encumbrances, and taxes on the property, the property is sold "as is," Buyer's and seller's real estate agents will equally split a 6% brokerage fee.

At the time of the hearing the court announced the proposed sale an requested that all other persons interested in submitting overbids present them in open court. At the hearing the following overbids were presented in open court: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Stephen C. Ferlmann the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Stephen C. Ferlmann, the Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Scott Butcher or nominee ("Buyer"), the Property commonly known as Stacey L. Stewart's joint tenancy with right of survivorship in the real property commonly known as 1373 Tata Lane, South Lake Tahoe, California ("Property"), on the following terms:
>
> 1. The Property shall be sold along with the joint tenancy with right of survivorship interest's held by the Debtor, Maile C. Stewart, (Case No. 11-92632) to Buyer for $50,000, on the terms and conditions set forth in the Purchase Agreement, Exhibit 2, Dckt. 30, and as further provided in this Order.
>
> 2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
>
> 3. The Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.
>
> 4. The Trustee be and hereby is authorized to pay a real estate broker's commission in an amount equal to six percent (6%) of the actual purchase price upon consummation of the sale. The six percent (6%) commission shall be evenly divided and paid to the Trustee's broker, Pinnacle Real Estate Group of Lake Tahoe, and the Buyer's real estate broker.

7. 13-92243-E-7 JUSTIN BURBANK **MOTION TO AVOID LIEN OF UNIFUND**
SAD-1 Shawn A. Doan **CCR, LLC**
4-2-14 [18]

DISCHARGED 3-31-14

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee and respondent creditors on April 2, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to deny the Motion to Avoid a Judicial Lien. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

A judgment was entered against the Debtor in favor of Unifund CCR, LLC for the sum of $18,718.32.

However, it does not appear Creditor Unifund CCR, LLC was provided sufficient service. First, Federal Rule of Bankruptcy Procedure 7004(b) requires that a partnership or other unincorporated association must be served to the attention of an officer, a managing or general agent or to any other agent authorized by appointment of law. Second, Unifund CCR, LLC was not served at the address listed on the California Secretary of State's website.

Movant not having provided the court with documentation that the Motion and supporting pleadings have not been properly service, the court will not presume to issue an order which may, or may not, be effective.

Therefore, the motion is denied without prejudice.

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the motion is denied without prejudice.

8.	14-90343-E-7	**SHARON DE LEON** **Eleanor Tumaneng Angeles**	**ORDER TO SHOW CAUSE - FAILURE TO PAY FEES** **4-9-14 [18]**

Final Ruling: The court issued an order to show cause based on Debtor's failure to pay the required fees in this case ($30.00 due on March 26, 2014). The court docket reflects that on April 11, 2014, the Debtor paid the fees upon which the Order to Show Cause was based.

The Order to Show Cause is discharged. No appearance required.

The fees having been paid, the Order to Show Cause is discharged.

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 Order to Show Cause 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 Order to Show Cause is discharged, no sanctions are ordered, and the case shall proceed.

9. 12-92645-E-7 JOHN/JAN PIEL — MOTION FOR COMPENSATION FOR
SSA-6 Cheryl L. Sommers — STEVEN S. ALTMAN, TRUSTEE'S ATTORNEY
3-14-14 [156]

DISCHARGED 3-12-13

Final Ruling: No appearance at the May 1, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on March 14, 2014. By the court's calculation, 48 days' notice was provided. 35 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6) 21 day notice and L.B.R. 9014-1(f)(1) 14-day opposition filing requirements.)

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties 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.

FEES REQUESTED

Steven S. Altman, Law Offices of Steven Altman, PC, the "Attorney" ("Applicant") for Michael D. McGranahan the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period November 26, 2012 through March 11, 2014. The order of the court approving employment of Applicant was entered on December 20, 2012, Dckt. 27.

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

General Case Administration: Applicant spent 4.8 hours in this category. Applicant reviewed correspondence and met with Trustee to discuss nature and scope of assignment in case, assisted Trustee in challenging Debtors' claim of exemptions, turnover of funds with Merrill Lynch, monitoring abandonment and motions for relief from stay, preparing global compromise with Debtors and their counsel Ms. Sommers, in involving turnover

of estate assets (identified in the amount of $14,984.72, as well as other monies), waiver of Debtors' exemption claims. Applicant prepared application which was granted which extended Trustee's time to object to Debtors' discharge. Also assisted the Trustee to evaluate his related abandonment motion (concerning 4 real properties), stay relief (concerning the Darrington Hotel), and prepared sale documents, court motion and appeared at hearing for sale of Lot 800 located at Blue Lake Springs in Calaveras County, to purchaser James Lykins, for the sum of$4,500 "as is" and "without warranty." Assisted the Trustee in reviewing all claims of the estate, preparing first and final fee applications for firm and CPA, Maria Stokman of firm Atherton & Associates.

Fee Applications: Applicant spent 4.7 hours in this category. Applicant prepared initial application to appoint counsel; reviewed petition and statement of affairs; performed conflict check; prepared supporting documents for appointment, including Order and transmittal to US Trustee's Office. Applicant also prepared First and Final Fee Application and supporting documents in case; prepared Application in support of First and Final Fee Application of CPA Maria Stokman of Atherton & Associates and review of time records for incorporation into motion and supporting documents.

Litigation: Applicant spent 7.8 hours in this category. Applicant analyzed, on behalf of Trustee, objections to Debtors' exemption claims and also surcharge against Debtors due to their use of a Bank of America account pre, at the date of bankruptcy filing and post-petition without court authorization. Ultimately, through informal discovery posed to the Debtors, review of extensive bank and credit card records and review of bank deposits and withdraws, office and Trustee were able to "net" out sum owing to bankruptcy estate which resulted in Debtors' waiving their homestead claims and allowing office and Trustee to collect monies in various financial institutions, including Bank of America and Merrill Lynch. Additionally, Based upon Debtors' use of a Bank of America checking account and credit card records, both before and after case filing, the Trustee and his counsel identified a series of transactions between the Debtors and one of their credit card providers, Capital One Bank and Trustee entered a compromise with Creditor.

Claims Administration: Applicant spent 27.7 hours in this category. Applicant analyzed and reviewed extensive documents (Debtors' schedules, bank records, credit card statements, etc.) on behalf of the Trustee concerning Debtors' claimed wage exemptions, which the Trustee objected to and successfully secured waiver of in a global settlement. Initially Debtors' claim of wages was in the principal amount of $6,578.76. Counsel for the Trustee required and exchanged financial information with Debtors' counsel and appeared at two status conference hearings in this matter. It was joined with a global compromise which inured to the benefit of the bankruptcy estate as referenced above. In the interim, an application extending deadline to object to Debtors' discharge was prepared at the request of the Chapter 7 Trustee and ultimately approved by this Court.

Asset Analysis and Recovery: Applicant spent 6.9 hours in this category. Applicant assisted Trustee in the demand and recoupment of property of the estate held by Merrill Lynch; Prepared but did not file

Turnover Motion; Recovered the sum of $7,395.00. Multiple exchanges between office and counsel Summers for Debtors, requesting follow-up banking and credit card information and payment history of accounts. Prepared Motion for Compromise and supporting documents, on behalf of Trustee, which provided funds into estate as referenced above. Researched and prepared draft summons and complaint for preference litigation against Capital One for Trustee's review and comment. Preparation of draft turnover letter with copy of proposed complaint to Capital One.

Asset Disposition: Applicant spent 6 hours in this category. Applicant reviewed schedules and statement of affairs of Debtors. Discussed with Trustee McGranahan and reviewed Trustee's Notice of Abandonment of Real Property with Court. Reviewed letters and other correspondence between estate and Mr. Lykins relative to purchase of estate's interest in property at 2077 Colleen Court in Arnold, California. Preparation of formal buy/sell agreement between bankruptcy estate and Lykins concerning sale and disposition of real property lot. Preparation of Motion for Sale and supplemental pleadings, including points and authorities and Trustee Declaration for sale of lot for $4,500. Preparation and review of proposed escrow instructions for lot sale with Lykins. Court hearing re: approval of same and review of Court's Minute Order. Follow-up transmittal of the Court order and email to Mr. Lykins of successful sale to him of property.

Relief from Stay Proceedings: Applicant spent 2.7 hours in this category. Review of Relief From Stay Motion from movant Bonnie Saville concerning property and lot in Calaveras county and case discussion with Trustee. Review of Court's Tentative decision denying relief in question due to notice issues. Court hearing on relief from stay/abandonment motions brought and memo to file. Opposition to relief from stay as counsel for Trustee. Review of Trustee's companion motion for abandonment on multiple properties. Review of supplemental pleadings filed by movant Saville's counsel for stay relief.

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).

Benefit to the Estate

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

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

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including obtaining assets of the bankruptcy estate for the benefit of creditors. The estate has $53,559.75 of unencumbered monies to be

administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES ALLOWED

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Steven S. Altman	55.2	$250.00	$13,800.00
Steven S. Altman	5.4	$300.00	$1,620.00
Total Fees For Period of Application			$15,420.00

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate counsel and rates for the services provided. Final Fees in the amount of $15,420.00 pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $177.85 pursuant to this applicant for copies and postage.

The Final Costs in the amount of $177.85 pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

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

Fees $15,420.00
Costs and Expenses $ 177.85

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

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

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

The Motion for Allowance of Fees and Expenses filed by Steven S. Altman, Law Offices of Steven Altman, PC

("Applicant"), Attorney for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Steven S. Altman, Law Offices of Steven Altman, PC is allowed the following fees and expenses as a professional of the Estate:

Steven S. Altman, Law Offices of Steven Altman, PC, Professional Employed by Trustee

Fees in the amount of $ 15,420.00
Expenses in the amount of $ 177.85.

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

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

MOTION FOR COMPENSATION FOR ATHERTON AND ASSOCIATES, LLP, ACCOUNTANT(S)
3-14-14 [150]

DISCHARGED 3-12-13

Final Ruling: No appearance at the May 1, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on March 14, 2014. By the court's calculation, 48 days' notice was provided. 35 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6) 21 day notice and L.B.R. 9014-1(f)(1) 14-day opposition filing requirements.)

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties 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.

FEES REQUESTED

Maria Stokman CPA, Atherton & Associates, LLP, the "Accountant" ("Applicant") for Michael D. McGranahan the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period January 23, 2013 through February 25, 2014. The order of the court approving employment of Applicant was entered on March 12, 2013.

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

Tax Analysis and Preparation of Returns: Applicant spent 1.8 hours in this category. Applicant discussed, corresponded and analyzed requirements of tax returns for 2013 and 2014.

Fee/Employment Application: Applicant spent .3 hours in this category. Applicant reviewed bankruptcy application, performed conflict check and prepared time records for application.

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).

Benefit to the Estate

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including preparing tax returns for the estate. The estate has $53,559.75 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES ALLOWED

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

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Marla Stokman	2.1	$230.00	$483.00
Total Fees For Period of Application			$483.00

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. Final Fees in the amount of $483.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

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

Fees $483.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Maria Stokman CPA, Atherton & Associates, LLP ("Applicant"), Accountant for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Maria Stokman CPA, Atherton & Associates, LLP is allowed the following fees and expenses as a professional of the Estate:
>
> Maria Stokman CPA, Atherton & Associates, LLP, Professional Employed by Trustee
>
> Fees in the amount of $ 483.
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

11. 12-93049-E-11 MARK/ANGELA GARCIA
MLM-5 Mark J. Hannon

MOTION TO SELL AND/OR MOTION FOR COMPENSATION FOR KATZAKIAN REAL ESTATE, REALTOR(S)
4-2-14 [331]

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

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.

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on April 2, 2014. By the court's calculation, 29 days' notice was provided.

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

Proper service requires compliance with both the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules. Under Federal Rule of Bankruptcy Procedure 6004(b) states that an objection to proposed sale, lease or use of property shall be filed and served not less than seven days prior to the date set for the proposed action or such other time period provided by the court. Additionally, Federal Rule of Bankruptcy Procedure 2002(a)(2) provides that at least 21-days' notice be given of any proposed use, sale or lease of property. Reading these two Rules together, the Rules Committee and Supreme Court envision providing at least 14 days for parties in interest to formulate, draft, file, and serve an opposition to the proposed use, sale, or lease of the property.

Though not routinely discussed, Federal Rule of Bankruptcy Procedure 9006(f) further provides that when notice is given by mail, an additional 3 days must be added to the notice period. The court does not express an opinion, at this time, whether this requires there to be 31-days' notice under Local Bankruptcy Rule 9014-1(f)(1) or 17-days' notice under

Local Bankruptcy Rule 9014-1(f)(2). The court waives the requirement, if it exists, under the facts and circumstances of this Motion and service made by Movant.

Local Bankruptcy Rule 9014-1(f)(1)(A) requires that at least 28 days' notice of the hearing on a motion be provided. A written opposition must be filed at least 14 days prior to the hearing. When the timing is perfect and exactly 28-days' notice is given, the opposition must be filed 14 days after service of the motion. This corresponds to the 14-day period established by Federal Rule of Bankruptcy Procedure 6004(a) and (b), and 2002(a)(2).

When there has been improper notice under Local Bankruptcy Rule 9014-1(f)(1), some courts will convert the notice to one under Local Bankruptcy Rule 9014-1(f)(2), which requires only 14-days notice of the hearing and allows oral opposition to be presented. This court does not so apply the rules as it can lead to confusion or create the "opportunity" for a less than scrupulous party to try and chill opposition by giving inadequate notice and misrepresenting that written opposition must be filed. This is clearly not the situation for the present Movant, but the court does not believe in selectively applying the law or rules. This court does not so convert a defective Rule 9014-1(f)(1) notice into a 9014(f)(2) notice.

The court's decision is to deny the Motion to Sell Property without prejudice. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

SERVICE ISSUES

The Proof of Service does not show that the moving papers were served on the creditors holding the 20 largest unsecured claims, or the parties requesting special notice. The Proof of Service does direct the court to "See [the] Attached Mailing Matrix," however, no such mailing matrix is attached. The service issue appears to be a clerical error in filing a complete Proof of Service, as opposed to an actual defective service.

If the parties agree to waive the defects in service, or the court grants a motion shortening time for service of the motion, the following alternative ruling will be issued:

ALTERNATIVE RULING

The Bankruptcy Code permits the Trustee ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363. Here Movant proposes to sell the "Property" described as follows:

A. 821 Inyo Avenue, Modesto, California

The proposed purchaser of the Property is Fahmi Al-Sumeri and the terms of the sale are: the purchase price is for $50,100 in cash, the property is sold “as is,” escrow and title fees will be split evenly between the Buyer and the seller, the Trustee’s real estate broker will receive a 6% commission on the sale.

At the time of the hearing the court announced the proposed sale an requested that all other persons interested in submitting overbids present them in open court. At the hearing the following overbids were presented in open court: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by John Bell the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the John Bell, the Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Fahmi Al-Sumeri or nominee (“Buyer”), the Property commonly known as 821 Inyo Avenue, Modesto, California (“Property”), on the following terms:
>
> 1. The Property shall be sold to Buyer for $50,100.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 333, and as further provided in this Order.
>
> 2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
>
> 3. The Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.
>
> 4. The Trustee be and hereby is authorized to pay a real estate broker's commission in an amount equal to six percent (6%) of the actual purchase price upon consummation of the sale. The six percent (6%) commission shall be paid to the Trustee’s broker, Christine Katzakian.

12. 12-93049-E-11 MARK/ANGELA GARCIA — MOTION TO SELL
MLM-6 Mark H. Hannon — 4-7-14 [342]

THE PARTIES TO THE PROPOSED SALE SHALL ADDRESS AT THE HEARING WHETHER THE SO2 LEVEL FOR THE BARRELED WINE IS TO BE MORE THAN 2PPM (AS STATED IN THE CONTRACT) OR 20PPM (AS STATED IN THE MOTION AND DECLARATION)

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

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 whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 11 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on April 7, 2014. By the court's calculation, 24 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(2), 21 day notice.)

The Motion to Sell Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The court's decision to grant the Motion to Sell Property, contingent on the parties addressing and clarifying the issues discussed herein.

The Bankruptcy Code permits the Trustee ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363. Here Movant proposes to sell the "Property" described as follows:

A. The name and label of "Most Wanted Wine, Co." and its two associated domains/websites, mostwantedwine.com and garciafamilyestate.com. ("Most Wanted Assets")

B. 21 French oak barrels of 2010 and 2011 Cabernet Sauvignon, not including the physical barrels which shall remain part of the estate. ("Barreled Wine")

C. Approximately 738 cases of 2008 and 2009 Cabernet Sauvignon. ("Bottled Wine")

TERMS OF SALE

The proposed purchaser of the Property is Amourvino Winery ("Amourvino"). The sale will have two phases, discussed below:

Phase One

Amourvino will purchase the Most Wanted Assets and the Bottled Wine from the estate for the price of $21,600, which shall be paid to the Trustee by cashier's check within three (3) days of the court approving the sale.

Phase Two

Amourvino will purchase the Barreled Wine (not including the physical barrels) for the price fo $7 per gallon, the barrels include an estimated 1,207.5 gallons. The exact number of gallons will be determined when the barrels are weighed upon transfer to Amourvino, as is the industry standard.

However, sale of the Barreled Wine is contingent on the following conditions being met within thirty (30) days:

A. the volatile acidity ("VA") levels of the Barreled Wine dropping below 1 g/L, and

B. the Sulphur Dioxide ("SO2") levels of the wine being above XXX ppm, as tested by the MyEnologist testing facility in Napa, California, or another facility agreed to by the parties. FN.1.

FN.1. There exists an inconsistency between the Contract filed as Exhibit It appears as that there may be a typographical error in the purchase agreement, which is inconsistent with the Motion and the Declaration of the Trustee (Dckt. 334). Both the Motion and Declaration state that the SO2 levels should be above 20-25 ppm. At the hearing the Trustee addressed the inconsistency and confirmed that it is to be XXX ppm.

The Trustee will use the proceeds from phase one of the sale, to have the Barreled wine treated so that it may be sold in phase two.

DISCUSSION

The court has a number of concerns with the proposed sale as it is currently written; however, these concerns are mostly technical and may be able to be clarified by the parties at the hearing.

First, the Motion purports to seek to sell Property "free and clear" of all liens. Bell Declaration, ¶¶ 15-16, Dckt. No. 344. However, the motion makes no reference to 11 U.S.C. § 363(f), or any of the grounds discussed therein. It appears, based on the evidence presented to the court, that the Trustee does not seek to sell the property "free and clear" of all liens, as that term is used in the Bankruptcy Code, but rather, that the assets are unencumbered. As such, the property does not have any debt attached to it, and this is simply a sale pursuant to 11 U.S.C. § 363(b). The only debt referenced in the motion is the $2,239.65 owed to Alexander Valley Cellars for storage of the wine; however, the Trustee testifies that this amount is not a lien on the wine, and that the Trustee knows of no other debts related to the wine. Bell Declaration, ¶ 5, Dckt. No. 344. At the hearing, the Trustee shall clarify whether or not this agreement proposes to pay any debts related to the wine.

Second, the court is concerned about the phrasing of the contingency in phase two. Specifically, the purchase agreement, motion, and declaration all state that the "payment of the Barreled Purchase Price is contingent on the Trustee meeting the following conditions," referencing the wine meeting the above discussed VA and SO2 levels. As it is currently phrased, it appears as though the transfer of the wine from the estate to Amourvino will take place regardless of whether the wine has the requisite VA and SO2 levels, and that it is only *payment of the purchase price* that is contingent on the VA and SO2 levels. In other words, if the wine's VA or SO2 levels were not within the specifications set by the agreement, the estate would still have to transfer the wine to Amourvino at no cost, causing an forfeiture of the wine by the estate. The parties shall clarify what will happen with the wine should it fail to meet the VA or SO2 contingency, as it is currently phrased, the sale appears to present an unacceptable risk of forfeiture by the estate.

At the time of the hearing the court announced the proposed sale an requested that all other persons interested in submitting overbids present them in open court. At the hearing the following overbids were presented in open court: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate.

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

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

The Motion to Sell Property filed by John Bell the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the John Bell, the Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Amourvino Winery or nominee ("Buyer"), the following property:

1. The name and label of "Most Wanted Wine, Co." and its two associated domains/websites, mostwantedwine.com and garciafamilyestate.com;

2. 21 French oak barrels of 2010 and 2011 Cabernet Sauvignon, not including the physical barrels; and

3. Approximately 738 cases of 2008 and 2009 Cabernet Sauvignon,

on the terms and conditions set forth in the Purchase Agreement, Exhibit E, Dckt. 345.

13. 12-93049-E-11 MARK/ANGELA GARCIA **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 11-30-12 [1]**

STATUS CONFERENCE MOVED FROM 3:30 P.M. CALENDAR TO BE HEARD WITH THE MOTIONS TO SELL BY THE CHAPTER 11 TRUSTEE

Debtors' Atty: Mark J. Hannon

Notes:

Continued from 3/6/14

Operating Reports filed: 3/9/14, 4/14/14

[MLM-3] Civil Minute Order granting Chapter 11 Trustee's Motion to Employ Katzakian Real Estate as Realtor filed 3/10/14 [Dckt 326]

[MLM-4] Civil Minute Order allowing fees as a professional of the estate: Kristin L. Kirchner, CPA, CFE filed 4/14/14 [Dckt 351]

[MLM-5] Chapter 11 Trustee's Motion for Authorization to Sell Real Property and Compensate Realtor filed 4/2/14 [Dckt 331], set for hearing 5/1/14 at 10:30 a.m.

[MJH-12] Civil Minute Order not approving Debtors' Motion for Approval of Disclosure Statement filed 4/4/14 [Dckt 339]

[MLM-6] Chapter 11 Trustee's Motion for Authorization to Sell Estate Property filed 4/7/14 [Dckt 342], set for hearing 5/1/14 at 10:30 a.m.

14. 14-90249-E-7 SCOTT MYERS
JY-1 Thomas J. Polis
AMENDED MOTION FOR EXAMINATION AND FOR PRODUCTION OF DOCUMENTS
4-15-14 [23]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on April 15, 2014. By the court's calculation, 14 days' notice was provided. 14 days' notice is required. That requirement was met.

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

The court's tentative decision is to grant the Motion for Examination and for Production of Documents. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

IMH Financial Corporation (or "Movant") submits an Amended Motion for Order Pursuant to Federal Rule of Bankruptcy Procedure 2004 for the Production of Documents by and the Examination of the Debtor, originally filed on April 14, 2014, Dckt. No 19, to change the requested date and time of Debtor's FRBP 2004 Examination from May 2, 2014 at 1:00 p.m. at the offices of Renee Brush & Associates Court Reporter at 1230 13th Street, Suite C, Modesto, California 95354 to May 1, 2014 at 10:30 a.m., at the United States Bankruptcy Court for the Eastern District of California – Modesto Division, located at 1200 I Street, Suite 4, Modesto, California.

The Debtor's continued 341(a) Meeting of Creditors is scheduled for May 2, 2014 at 3:00 p.m. IMH Financial Corporation states that it intends

to take the examination in a conference room in the courthouse after the Motion is called for hearing, and after the parties check in with the Court.

IMH Financial Corporation reiterates from its originally filed motion that it moves this Court for an order directing the examination of Scott Myers (the "Debtor") and the production of documents by the Debtor pursuant to Federal Rule of Bankruptcy Procedure 2004 ("FRBP 2004"). IMH Financial Corporation requests that the Court direct:

> (1) the Debtor sit for his FRBP 2004 examination on May 1, 2014 at 10:30 a.m., and continued from time to time until completed, at the United States Bankruptcy Court for the Eastern District of California – Modesto Division, located at 1200 I Street, Suite 4, Modesto, California;
>
> (2) that the Debtor produce the documents listed on Exhibit A in the Appendix of Exhibits to this Motion at his examination; and
>
> (3) that service of the order and any subpoena pursuant to the order permitted to be made upon Debtor by delivering or mailing a copy of the order and subpoena to the address listed on Debtor's bankruptcy petition and by delivering or mailing a copy of the order and subpoena to Debtor's counsel.

Based on a review of IMH Financial Corporation's original Motion for Order Pursuant to Federal Rule of Bankruptcy Procedure 2004, Dckt. No. 19, IMH Financal Corporation holds a judgment against the Debtor in the principal amount of $271,639,119.70. The Motion is made on the basis that the information sought concerns the nature and extent of the Debtor's assets and liabilities and the administration of the Debtor's bankruptcy estate.

IMH Financial Corporation requests that Debtor producing the following documents at his examination (Exhibit "A", Dckt. No. 22):

1. DEBTOR's federal and state tax returns for the past five years.

2. Federal and state tax returns RELATED to DEBTOR for the past five years.

3. DEBTOR's financial account statements for all banking, checking, saving, mutual fund, stock, certificate of deposit, savings and loan, thrift, credit union, brokerage accounts for the past five years.

4. DOCUMENTS evidencing DEBTOR's employment, wages or income, including, but not limited to, W-9 forms and 1099 forms.

5. All DOCUMENTS evidencing DEBTOR's residence, including but not limited to, mortgage statements or invoices, utility bills, and property tax statements.

6. All DOCUMENTS evidencing real property holdings in which DEBTOR, either individually, through his family trust, or through entities, has an interest.

7. All DOCUMENTS evidencing any rents generated by any real property in which DEBTOR has an interest.

8. All ledgers, statements, and documents reflecting and the amount and date of receipt of rents generated by real property in which DEBTOR has an interest.

9. All DOCUMENTS evidencing income and revenue generated by Milagros Mexican Restaurant.

10. All bank statements for Milagros Mexican Restaurant.

11. All DOCUMENTS evidencing DEBTOR's interest in the Jim D. Myers 1990 Trust.

12. All DOCUMENTS evidencing the Jim D. Myers 1990 Trust.

13. All DOCUMENTS evidencing DEBTOR's ownership of any automobiles, boats, or other motor vehicles, including, but not limited to car title and registration documents and boat title and registration documents.

14. All DOCUMENTS related to any safe deposit box in DEBTOR's name or to which DEBTOR has access.

15. All DOCUMENTS related to any power of attorney DEBTOR holds on behalf of any entities or other persons aside from himself.

16. All DOCUMENTS reflecting DEBTOR's interest in any joint ventures, partnerships, limited liability companies, or other business enterprises.

17. All DOCUMENTS reflecting any judgments DEBTOR holds against anyone else or in which DEBTOR has an interest.

18. All DOCUMENTS evidencing any patents, inventions, trademarks, tradenames, or copyrights in DEBTOR's name or in which DEBTOR has an interest.

19. All DOCUMENTS evidencing DEBTOR's interest in any will.

20. All DOCUMENTS evidencing DEBTOR's interest in any insurance policy, judgment, or cause of action.

21. All DOCUMENTS evidencing DEBTOR's transfer of real property within the past four years.

22. All DOCUMENTS evidencing DEBTOR's gifts of cash, stock, or funds to relatives within the past four years.

23. All DOCUMENTS evidencing DEBTOR's interest in any license, franchise, or permit.

24. All DOCUMENTS evidencing DEBTOR's interest in any stocks, bonds, or other securities.

25. All DOCUMENTS evidencing DEBTOR's interest in any promissory notes, commercial paper, or other financial instruments.

26. All loan applications and financial statement DEBTOR has submitted within the past four years.

MEMORANDUM OF POINTS AND AUTHORITIES

It appears that there are additional grounds stated in Movant's Memorandum of Points and Authorities, filed as Dckt. No. 21, supporting its request for an order pursuant to Federal Rule of Bankruptcy Procedure 2004, to attend a Rule 2004 examination and for Debtor to produce a list of documents during the examination. This does not comply with the rules of this court. FN.1.

The Movant is essentially asking that the court accept a combined motion and points and authorities ("Mothorities") in which the court and Debtor are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Bankr. P. 9013), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Movant.

The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and uniformly applied.

The court has also observed that the more complex the Mothorities in which the grounds are hidden, the more likely it is that no proper grounds exist. Rather, the moving party is attempting to beguile the court and other party.

The court finds no reason why the factual contentions and statements of law included in Movant's Memorandum of Points and Authorities, Dckt. No. Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements

enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled. Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007.

GROUNDS STATED FOR RELIEF

In its Memorandum of Points and Authorities, IMH Financial Corporation provides a more comprehensive overview of the facts of the case. Movant states the following grounds, pursuant to the Federal Rule of Bankruptcy Procedure 9013 (which is similar to Federal Rule of Civil Procedure 7(b)), for relief with particularity:

A. On February 25, 2014, the United States District Court for the District of Arizona entered a Stipulated Final Judgment against Scott Myers and Heike Myers, individually, on behalf of their marital community, and in their capacity as trustees of the Myers Family Trust dated September 25, 2004.

B. The judgment awarded Movant the principal amount of $271,639,119.70, with pre-judgment and post-judgment interest accruing at 24% per annum on the principal amount of $83,630,686.38.

C. Debtor Scott Myers filed his bankruptcy petition on February 24, 2014. The Debtor's schedules list Movant as a creditor on Schedule F, for a debt owed in the amount of $252,448,383.

D. As the Debtor's schedules do not list the Movant's claim on Schedule F as being contingent, unliquidated, or disputed, the Debtor's schedules acknowledges the existence and validity of the Movant's claim.

E. Movant states that it is seeking the Debtor's production of documents and attendance of an examination related to the nature and

extent of the Debtor's assets and the Debtor's estate's ability to satisfy its creditor's claims.

F. The information and documents requested relate to the nature and extent of the Debtor's assets and liabilities and financial condition.

G. Movant specifically seeks, among other things, documents concerning the location and disposition of income Debtor collected prior to the petition date, information regarding the Debtor's accounting practices, the commingling of funds between the Debtor and non-Debtor entities, and the Debtor's ability to repay creditors.

H. This Motion is being made pursuant to Federal Rule of Bankruptcy Procedure 2004, which provides that upon request by any party in interest, the court may order the examination of the debtor or any other entity regarding "the acts, conduct, or property or to the liabilities and financial conditions of the debtor, or to any other matter which may affect the administration of the debtor's estate or the debtor's right to a discharge." Fed.R.Bank.P. 2004.

I. Movant is seeking the information and documents identified in Exhibit "A" regarding the location and disposition of income the Debtor collected prior to the petition date, the Debtor's accounting practices, the disposition of funds between the Debtor and non-Debtor entities, and the Debtor's ability to repay creditors.

J. Movant also requests that it be permitted to serve the examination order and any subpoena thereon via mail or delivery to the Debtor's address in his bankruptcy petition with a copy of the same to be delivered to Debtor's counsel.

DISCUSSION

Federal Rule of Bankruptcy Procedure 2004 states, in relevant part:

(a) Examination on Motion. On motion of any party in interest, the court may order the examination of any entity.

(b) Scope of Examination. The examination of an entity under this rule or of the debtor under §343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In a family farmer's debt adjustment case under chapter 12, an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given

> or offered therefor, and any other matter relevant to the case or to the formulation of a plan.
>
> (c) Compelling Attendance and Production of Documents. The attendance of an entity for examination and for the production of documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held if the attorney is admitted to practice in that court or in the court in which the case is pending.

Federal Rule of Bankruptcy Procedure 2004(c) specifically provides that in a request to compel the attendance and production of documents of an entity, the issue of whether the examination is to be conducted may be compelled as provided in Federal Rule of Bankruptcy Procedure 9016.

The court reviews the requirements set forth by Federal Rule of Bankruptcy Procedure 9016. Federal Rule of Bankruptcy Procedure 9016, which applies the strictures of Federal Rule of Civil Procedure 45 to matters arising under the Bankruptcy Code, contains an especially lengthy list of requirements for the court and parties in interest seeking to issue a subpoena.

Federal Rule of Civil Procedure 45, as incorporated by Federal Rule of Bankruptcy Procedure 9016, is compromised of a checklist requirements that dictates the form and contents of a subpoena, establishes procedures to properly effect service, provides for protections for persons subjected to subpoenas, presents rules regarding the responsibilities of those who respond to a subpoena, and includes provisions regarding claims of privilege and protection and governing when a party may be held in contempt for failing to comply with the subpoena. F. R. Civ. P. Rule 45, as made applicable by Fed. R. Bankr. P. 9016.

In reviewing the current motion, the court has a number of concerns relating to whether Creditor IMH Financial Corporation's Motion for an Order Pursuant to Federal Rule of Bankruptcy Procedure 2004 and for the Production of Documents was prepared and filed in accordance with Federal Rule of Civil Procedure 45, and more generally, whether the Debtor has been given an opportunity for due process in responding to the request for a court order.

SERVICE OF MOTION NOT EFFECTED ON DEBTOR

First, the Motion requesting an order for examination and production of documents was not been served on the Debtor. The Certificate of Service indicates that Movant served the Chapter 7 Trustee in Debtor's bankruptcy proceeding, the Office of the United States Trustee, an attorney from the Movant's firm of Snell & Wilmer, LLP, and Counsel for Debtor a copy of the Motion, the Notice of Hearing, the Memorandum of Points and Authorities, the Appendix of Exhibits filed in support of the Motion, the Amended Motion, and

the Proof of Service for the Motion and Supporting Papers on April 15, 2014. Dckt. No. 24.

The Movant offers no reason as to why Debtor was not served copies of Movant's pleadings and supporting evidence of a request for an order by the court, which would command the Judgment Debtor to testify and produce documents regarding his own finances. Federal Rule of Bankruptcy Procedure 9014, governing contested matters, requires that reasonable notice and an opportunity for hearing be afforded by the party against whom relief is sought. Fed. R. Bankr. P. 9014.(a). Debtor has not been served the Motion and has not been given the opportunity to respond to Movant's request for an examination and production of documents. Debtor was not served the Motion and has not been given the opportunity to respond to Movant's request.

Moreover, no notice of hearing was filed with the Motion. Local Bankruptcy Rule 9014-1(d)(2) requires that every motion shall be accompanied by a separate notice of hearing stating the Docket Control Number, the date and time of the hearing, the location of the courthouse, the name of the judge hearing the motion, and the courtroom in which the hearing will be held. Local Bankruptcy Rule 9014-1(d)(3) further provides that the he notice of hearing shall advise potential respondents whether and when written opposition must be filed, the deadline for filing and serving it, and the names and addresses of the persons who must be served with any opposition. Since a Notice of Hearing was not filed, none of these requirements were met.

IMPROPER REQUEST FOR DELIVERY OF SUBPOENA ON DEBTOR

Second, as Movant states in its Memorandum of Points and Authorities,

> IMH also requests that it be permitted to serve the examination order and any subpoena thereon via mail or delivery to the Debtor's address in his bankruptcy petition with a copy of the same to be delivered to Debtor's counsel.

Memorandum of Points and Authorities, Lines 12-14, Dckt. No 21 at 4.

The court does not understand why Movant believes it is necessary to first seek permission from the court before serving the Debtor a copy of a subpoena. Perhaps Movant's counsel is operating under the erroneous assumption that the Rules of Professional Conduct bar Counsel from engaging in prohibited communications with a represented Debtor. However, the opposite is true. Federal Rule of Civil Procedure 45(b)(1), as made applicable by Federal Rule of Bankruptcy Procedure 9016, states the inverse, requiring that,

> (b)(1) *By Whom and How*; Tendering Fees. Any person who is at least 18 years old and not a party may serve a subpoena. **Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law.** Fees and mileage need not be

> tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. (Emphasis added.)

F. R. Civ. P. Rule 45. A plain language reading of this section of Federal Rule of Civil Procedure 45 can only indicate that a subpoena must be delivered to the named person, and that the fees for one day's attendance and mileage are tendered to the individual subpoenaed. Movant is required, and not merely free to seek authorization by the court (as Movant's Motion suggests), to serve any subpoena on Debtor's address. This request is unnecessary. Issuing and serving a subpoena on the named entity under Federal Rule of Civil Procedure 45(b)(1) is required.

Quite possibly because the Motion indicates that Debtor and his wife's principal residence is in Germany, and that Debtor spends a substantial amount of time in Germany, that the reason why Movant is requesting that service be effected on Debtor's domestic address (as listed in his bankruptcy petition) in the instant Motion, is because Movant is concerned that it will be difficult for Movant to personally serve the Debtor while Debtor is residing in a foreign country. Federal Rule of Civil Procedure 45(b)(2)(3), however, specifically addresses this set of circumstances, where a United States national or resident who is in a foreign country is the entity upon which the movant wishes to serve a summons and subpoena. That subpart states:

> (3) Service in a Foreign Country. 28 U.S.C. §1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

F. R. Civ. P. Rule 45(b)(2)(3). Federal Rule of Civil Procedure 45(b)(2)(3) cites to 28 U.S. Code § 1783, which implicates a whole new set of requirements and restrictions on how a court may order the issuance of a subpoena, requiring the appearance of a witness residing outside of the United States. The Movant does not appear to have contemplated the consequences of serving a subpoena on Debtor that Movant has acknowledged to believing resides outside of the United States.

SAME DAY ORDER NOT FEASIBLE

Third, it appears that Movant is praying that the court order the Federal Rule of Bankruptcy Procedure 2004 examination of the Debtor, **on the same day on which Debtor is expected to attend this examination.** This is impracticable. Movant admits to making the request for an order to appear, so that the timing of the Federal Rule of Bankruptcy Procedure 2004 examination aligns with the date and time Debtor is expected to appear for his continued 11 U.S.C. § 341 meeting. FN.2.

FN.2. When precisely the continued Meeting of Creditors was supposed to occur is unclear. The confusion stems from Movant's conflicting statements made in its original Motion, in which Movant states that the continued 341 meeting was scheduled to May 1, 2014 at 3:00 pm, Dckt. No. 21 at 3, lines 5011), with Movant's Amended Motion, which states that Debtor's continued 341(a) meeting "is scheduled for May 2, 2014 at 3:00 pm. Dckt. No. 23 at 2, line 5.

In both Motions, however, Movant states that Movant would like the FRBP 2004 examination to be held almost immediately before or after Debtor's continued 11 U.S.C. § 341 Meeting.

This Motion, which was improperly noticed and not served on the Debtor, was filed and purportedly served on April 15, 2014. Dckt. No. 24. This gave Debtor's counsel, and not Debtor, notice that Movant intended to seek an order compelling Debtor to show up at the Modesto Division of the United States Bankruptcy Court, and attend a hearing and produce documents regarding his liabilities and financial conditions. The court cannot understand how Movant believes that this request is logical. **The Motion is requesting that Debtor sit in a FRBP 2004 examination hearing and produce documents, *on the same day* that the court issues its order commanding Debtor to attend. Movant has also requested that Debtor produce 26 different types of documents** related to his assets, ownership of property, taxes, and other liabilities that will show whether Debtor is able to afford to satisfy the monetary judgment held by Movant.

This request is simply untenable; the court questions whether Movant actually believed that it would be possible to rope Debtor into an examination, and compel Debtor to produce the specified documents, on the same day on which this court issues an order. Or, whether Movant was hoping that the court issue a narrowly crafted order that involves a near absolute certain risk that Debtor would violate, and that the court would turn around and order that Debtor is in contempt under Federal Rule of Civil Procedure 45(e), and other federal discovery rules and case law that authorizes the imposition of sanctions of parties failing to comply with discovery orders and requests.

Debtor has not received notice of the Motion for an order authorizing the FRBP 2004 examination and production of documents. Arguing that the Motion itself, which was served to Debtor's counsel, imputes actual notice of the examination and order to produce to Debtor is also unfeasible. If the court premised an order on this position, the Movant would surely be left vulnerable to possible Motions to Quash or Modify the Subpoena under Federal Rule of Civil Procedure 45(3)(A). The court would not have a difficult time ruling in favor of Debtor, who would have a multiplicity of arguments under this subpart, such as the Movant failing to allow a reasonable time to comply, requiring a person to travel to a location more than 100 miles from where he resides, forcing Debtor to disclose privileged or protected matter that Movant expects to be produced in the span of less than 2 weeks, and subjecting Debtor to an undue burden, as grounds to quash or modify a subpoena.

Authorization to Conduct 2004 Examination

Rather than denying the Motion, the court elects to treat it as a motion pursuant to Federal Rule of Bankruptcy Procedure 2004(a) for the court to order that a 2004 examination of the Debtor may be conducted. Movant may select the time and location, which commonly is not done at the courthouse but in the manner of a deposition or document production. As with a deposition, counsel for Movant should confer with Debtor's counsel for a mutually agreeable time and place, but concurrence of the Debtor and Debtor's counsel to the 2004 examination is not required.

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 Order Pursuant to Federal Rule of Bankruptcy Procedure 2004 and for the Production of Documents filed by the Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Order Pursuant to Federal Rule of Bankruptcy Procedure 2004 and for the Production of Documents is granted. Movant shall provide at least 30 days notice of the 2004 examination and require attendance as provided in Federal Rules of Bankruptcy Procedure 2004(c) and 9016, and Federal Rule of Civil Procedure 45 denied. Documents which may be required for the 2004 examination authorized by this order are limited to those listed in Exhibit A, Dckt. 22, filed in support of the Motion. All objections and privileges which could be asserted by the Debtor are preserved.

15. 14-90150-E-11 MIGUEL/SILVIA TOSCANO — OBJECTION TO DEBTORS' CLAIM OF EXEMPTIONS
WTL-2 Thomas O. Gillis — 3-21-14 [47]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and the Office of the United States Trustee on March 21, 2014. By the court's calculation, 41 days' notice was provided. 28 days' notice is required. That requirement was met.

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

The court's tentative decision is to overrule the Objection to Debtor's Claim of Exemptions. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Creditor Focus Business Bank ("Creditor") objects to certain exemptions claimed by Debtors and listed in Debtors' Schedule C. Dckt. No. 22.

Creditor states that it is a holder of a secured claim against Debtors. Creditor and Debtors were parties to a loan transaction in the amount of $1,092,000, which are evidenced by a U.S. Small Business Administration Note in the amount of the Loan (as modified by Change in Terms Agreements dated January 11, 2010 and May 11, 2011 and as otherwise modified); a Commercial Security Agreement (the "Security Agreement"); a Deed of Trust (the "6th Street Trust Deed"), an Assignment of Rents (the "6th Street Rents Assignment"), and a Hazardous Substances Certificate and Indemnity Agreement (the "6th Street Environmental Indemnity"), each recorded on July 9, 2008 and encumbering the real property commonly known as 1200 6th Street, Modesto, CA (the "6th Street Property"); a Deed of Trust (the "Sierra Street Trust Deed"), an Assignment of Rents (the "Sierra Street Rents Assignment"), and a Hazardous Substances Certificate and Indemnity Agreement (the "Sierra Street Environmental Indemnity"), each recorded on July 9, 2008 and encumbering the real property commonly known as 3200 Sierra Street, Riverbank, CA (the "Sierra Street Property").

Creditor states that it perfected security interest in the personal property claimed exempt by Debtors by filing a Financing Statement with the California Secretary of State on July 12, 2008 (Filing No. 087163722864), which "filing was timely continued and by the recordation of same as a fixture filing by recording same" with the Stanislaus County Recorder's office on July 8, 2008. The following loan documents and financing statements/fixture filings were filed in support of the Objection (Dckt. Nos. 50-54):

A. Exhibit A - US Small Business Administration Note and Change in Terms Agreements

B. Exhibit B - Commercial Security Agreement

C. Exhibit C - UCC-1 Financing Statement

D. Exhibit D - Sierra Street Deed of Trust, Assignment of Rents and a Hazardous Substances Certificate and Indemnity Agreement

Creditor states that the loan documents granted Creditor a blanket security interest in substantially all of Borrower's personal property assets and a lien on the Sierra Street Property, which includes an assignment of all rents, issues and profits. Creditor purports to have conducted a California UCC Search on or around December 13, 2013. As of that date, Creditor had a valid UCC-1 filing on Debtor's personal property assets. Creditor files a copy of the UCC Summary Report is attached to the Bank Declaration as Exhibit E. Dckt. No. 54.

Debtor's Schedule C claims as exempt the "Duplex" identified in Debtor's Schedule B as 3200 Sierra Street, #B, Riverbank, California. According to Exhibit D attached to the Bank Declaration, the Sierra Street Property secures the Bank's Loan by means of the Sierra Street deed of

trust. Since the Sierra Street Property secures the Bank's Loan, it may not be claimed as exempt by Debtor. Debtor's Schedule C also claims as exempt "Accounts Receivable," "Office Equipment, Misc.," "Business Fixtures," and "Store Inventory & Gasoline."

In accordance with Creditor's Security Agreement, Creditor states that it has a security interest in all the following collateral:

> "Beer & Wine Licenses, All Deposit Accounts, Machinery, Equipment and Furniture, Inventory, Chattel Paper and Documents, Accounts, Instruments, Fixtures and General Intangibles, and all business assets including but not limited to the items of the attached Exhibit "A", wherever located.
>
> In addition, the word "Collateral" also includes all of the following, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located:
>
> (A) All accessions, attachments, accessories, tools, parts, supplies, replacements of and additions to any of the collateral described herein, whether added now or later.
>
> (B) All products and produce of any of the property described in this Collateral section.
>
> (C) All accounts, general intangibles, instruments, rents, monies, payments, and all other rights, arising out of a sale, lease, consignment or other disposition of any of the property described in this Collateral Section.
>
> (D) All proceeds (including insurance proceeds) from the sale, destruction, loss, or other disposition of any of the property described in this Collateral section, and sums due from a third party who was damaged or destroyed the Collateral or from that party's insurer, whether due to judgment, settlement or other process.
>
> (E) All records and data relating to any of the property described in this Collateral section, whether in the form of a writing, photograph, microfilm, microfiche, or electronic media, together with all of Grantor's right, title, and interest in and to all computer software required to utilize, create, maintain, and process any such records or data on electronic media."

Commercial Security Agreement, Dckt. No. 51.

Additionally, Creditor states that Debtors' Schedule C is vague regarding what is claimed as exempt. In Debtor's Schedule C, Debtor claims as exempt "Office Equipment, Misc.," "Business Fixtures," and "Store Inventory & Gasoline." Creditor asserts that Debtors' Schedules are inadequate, and discuss the need to be clear in claiming exemptions in debtor schedules. Ambiguities in matters of claims of exemption will be construed against the debtor because "it is important that trustees and creditors be able to determine precisely whether a listed asset is validly exempt simply by reading a debtor's schedules." *Payne v. Wood*, 775 F.2d 202, 205 (7th Cir.1985); *In re Mohring*, 142 B.R. at 395 n.16. Creditor claims that the terms"Duplex," "Accounts Receivable," "Office Equipment, Misc.," "Business Fixtures," and "Store Inventory & Gasoline," which Creditor states is secured by its lien on business collateral, are unclear and should be removed from Debtor's Schedule C.

DISCUSSION

Creditor's Objection argues that because it has a valid security interest and lien on Debtors' duplex, Accounts Receivable, Office Equipment, Business Fixtures, and Store Inventory and Gasoline to secure the Debtors' repayment of a U.S. Small Business Administration Note for a loan in the amount of $1,092,000.00, the exemption is improper. It is further asserted that until "such lien is validly stripped or otherwise judicially determined to be invalid, the assets remain subject to Creditor's lien. Creditor has not filed a Points and Authorities in support of the Objection to Claim of Exemption and has not provided the court with any basis for it's lien being effected by a claim of exemption. FN.1.

FN.1. Local Bankruptcy Rule 9004-1 and the *Revised Guidelines for the Preparation of Documents*, ¶(3)(a) require that an Objection, points and authorities, each declaration, and the exhibits (which may be combined into one exhibit documents) are each filed as separate pleadings. The court has addressed such violation of the Local Rules in the context of a motion, where the motion and points and authorities are blended together into one document – referred to as a "Mothorities." This discussion is equally applicable to objections to claims of exemptions.

The pleading title motion is a combined motion and points and authorities in which the grounds upon which the motion is based are buried in detailed citations, quotations, legal arguments, and factual arguments (the pleading being a "Mothorities") in which the court and Plaintiff are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Defendant. The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party.

The court has also observed that the more complex the Mothorities in which the grounds are hidden, the more likely it is that no proper grounds

exist. Rather, the moving party is attempting to beguile the court and other party.

In such situations, the court routinely denies the motion without prejudice and without hearing. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and uniformly applied.

Possibly, if the Objection had been drafted to clearly state the grounds with particularity upon which relief was sought to protect the lien from being effected by the claim of exemption, Creditor may have well realized that no relief was possible. However, it was not and Creditor proceeded down the rabbit hole of arguing that the exemption should be denied because of Creditor's lien and then the lack of specificity of description.

California Civil Code of Procedure § 704.060(a) allows debtors to exempt tools, implements, instruments, materials, uniforms, furnishings, books, and other business equipment and tools of trade for up to the amount of $6,075.00, if the property is "reasonably necessary to and actually used by the judgment debtor" or the spouse in earning a livelihood. Creditor has not argued that the Debtors do not meet the standard set out by California Civil Code of Procedure § 704.060.

Creditor challenges the Debtors' claim of exemptions on the basis that Debtors have pledged their business assets as collateral for a loan, pursuant to a Commercial Security Agreement entered between the Debtors and Focus Business Bank. California law does not bar Debtors from claiming exemptions in property which is subject to liens of creditors. This happens all of the time. In fact, 11 U.S.C. § 522(f) is the federal statutory basis by which a debtor may avoid certain judicial and other non-purchase money liens in certain nonpossessory, nonpurchase-money security interests in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments or jewelry that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor; 11 U.S.C. § 522(f)(1)(A), (B)(I).

There being no showing by Creditor that the claiming of an exemption in assets invalidates or impairs Creditor's liens, the Objection on this grounds is overruled without prejudice.

Describing Exempt Property with Particularity

Creditor additionally objects to Debtors' claim of exemptions on the basis that the items property in which Debtors are claiming exemptions are not described with particularity. Federal Rule of Bankruptcy Procedure

4003(a) directs the debtor to list exempt property on the schedule of assets required to be filed by Bankruptcy Rule 1007. Rule 1007 requires the debtor to file a schedule of assets in the appropriate form. Schedule C requires the debtor to,

- describe the property;
- specify the law authorizing the exemption; and
- give the value of the exemption along with the current market value of the property, without deduction for the exemption.

4-522 COLLIER ON BANKRUPTCY P 522.05

The property claimed as exempt must be sufficiently described so that the trustee and parties in interest can reasonably be expected to know what property the debtor claims as exempt. *In re Clark*, 266 B.R. 163 (B.A.P. 9th Cir. 2001) (exemption claim which described exempt asset as "five lots listed in qualified retirement plan", when no plan existed and property actually owned by other entity, was ambiguous and construed against debtor). Schedule C requires not only a description of the property claimed as exempt, but also reference to the law providing for the exemption, an estimate by the debtor of the current market value of the property claimed as exempt, and the value of the exemption taken. *In re Yonikus*, 996 F.2d 866 (7th Cir. 1993).

If Debtors have not correctly listed claims of exemptions under the correct statute authorizing the exemption, have not sufficiently described the property exempted, or given an accurate value of the exemption, Debtors may make amendments to their filed schedules. Federal Rule of Bankruptcy Procedure 1009 permits an amendment as a matter of course, an inadvertent failure to claim property exempt or make reference to the appropriate statute providing for the exemption may be corrected by an amendment. Rule 1009(a) further requires that a copy of the amendment should be served upon the trustee and affected entities. While this arguably includes all creditors, it requires that an amendment to Schedule C be served upon any creditor holding an interest in property affected by the amendment. *In re Govoni*, 289 B.R. 500 (Bankr. D. Mass. 2002).

Upon a review of Debtors' Schedule C, the court notes that four of the exemptions listed on Debtors' Schedule C, Dckt. No. 22, are not described with particularity. Debtors claim an exemption in a "Duplex" under California Civil Code of Procedure § 704.730(a)(2) for $85,000.00; an exemption in "Office Equipment, Misc" under California Civil Code of Procedure § 704.060(a); an exemption of $1,000 in "Business Fixtures" claimed under California Civil Code of Procedure § 704.060(a); and an exemption of $5,475 in "Store Inventory and Gasoline" under California Civil Code of Procedure § 704.060(a).

Beginning with the "Duplex," Creditor is correct that from reading just Schedule C one would not know which "Duplex, Debtor lives in Unit #B" is being referenced. Schedule C, Dckt. 22 at 9. However, Schedule C is not filed in isolation. There is also a Petition which has been filed, Dckt. 1,

and Schedule A listing all of the Debtors' interests in real property, Dckt. 22 at 4. On Schedule A the Debtors list interests in two pieces of real property:

a. Duplex, Debtor lives in Unit #B, 3200 Siera Street #B, Riverbank, CA 95367;

b. Gasoline Station, 1200 6th Street, Modesto, Ca 95354.

On the Bankruptcy Petition the Debtors list their Street Address to be, 3200 Sierra Street #B, Riverbank, CA. Dckt. 1. It appears that the address listed on Schedule A contains a typographical error, with the word "Sierra" misspelled as "Siera." On the Statement of Financial Affairs, the Debtors state that inventory records are held by "Miguel and Sylvia Toscano, 3200 Sierra Street #B, Riverbank, CA 95367." Question 28b., Dckt. 22 at 37.

Creditor filed an omnibus motion seeking relief in the form of an order preventing the use of cash collateral and requiring it to be segregated, an accounting of the cash collateral used, adequate protection, relief from the automatic stay, and the conversion or dismissal of the bankruptcy case. Dckt. 25. In the Motion Creditor states that is has a deed of trust recorded against 3200 Sierra Street, Riverbank CA as part of the collateral to secure its claim.

There appears to be little confusion that the "Duplex, Debtor lives in Unit #B" is a reference to 3200 Sierra Street #B, Riverbank, CA."

Creditor objects to the specificity of the following:

Property	Value Claimed as Exempt	Value of Property
Office Equipment, Misc.	$200.00	$200.00
Accounts Receivable	$762.00	$762.00
Business Fixtures	$1,000.00	$1,000.00
Store Inventory & Gasoline	$5,475.00	$12,500.00

Most of these items are of de minimis value. The terms used are those common to commercial transactions, including the identification of assets in personal property security agreements and financial statements to be filed with the Secretary of State.

As far as store inventory, Creditor is not clear as to whether it believes that each Twinkie, Ho Ho, and Snickers bar must be individually identifies. Further, Creditor does not make it clear that if the use of the term inventory is insufficient for Schedule C, does that also render it insufficient for a security agreement and financial statement. The same is true for gasoline. FN.2.

FN.2. Creditor's Commercial Security Agreement describes its collateral to be,

> "COLLATERAL DESCRIPTION. The word 'Collateral' as used in this Agreement means the following described property, whether now owned or hereinafter acquired, whether now existing or hereafter arising, and wherever located, In which Grantor is giving to Lender a security interest for the payment of the Indebtedness and performance of all other obligations under the Note and this Agreement:
>
> > Beer & Wine License, All Deposit Accounts, Machinery, Equipment and Furniture, Inventory, Chattel Paper and Documents, Accounts, Instruments, Fixtures and General Intangibles, and all business assets including but not limited to the terms on the attached Exhibit 'A', wherever located...."

The court would be shocked if Creditor and other creditors were advising the court that such descriptions were not sufficient to put a sophisticated lender, or a less sophisticated individual doing business with a sophisticated lender, of the identity of the collateral subject to the creditor's lien.

The Objection to Claim of Exemption is overruled. FN.3.

FN.3. In reviewing this file, it appears that there may well be serious fiduciary issues for the Debtors in Possession. This bankruptcy case was filed on February 6, 2014. The court on March 17, 2014, issued an order not granting the Debtors' in Possession Ex Parte Motion to employ Thomas Gillis as counsel. Order, Dckt. 41. That order required the Debtors in Possession to set a noticed hearing for a motion to approve the employment of said counsel. No new motion has been filed and no authorization has been given to employ said counsel.

Creditor asserts a lien on various assets, which appear to include cash collateral. 11 U.S.C. § 362(c) prohibits the use of cash collateral unless consented to by the creditor or authorized by the court. No order authorizing the use of cash collateral has been issued by the court. From the pleadings filed by Focus Business Bank, it appears clear that it has not consented to the use of cash collateral.

Two untimely Monthly Operating Reports have been filed for the estate. They are not signed by the Debtors in Possession. Both are instead signed by Thomas O. Gillis, as the "responsible party." Dckts. 56, 66.

February 2014 Monthly Operating Report

For the February 2014 Monthly Operating Report, Filed on March 24, 2014, Dckt. 56, Thomas Gillis provides the following information under penalty of perjury,

Income during the period	$13,406.00
Professional Fees paid during the period	($5,000.00)

Total Professional Fees paid during case	($17,500.00)
Non-Bankruptcy Professional Fees paid this Reporting Period	($7,500.00)
Non-Bankruptcy Professional Fees paid during case	($7,500.00)
Income for February 2014 Reporting Period	
Gasoline	$120,960.78
Diesel	$19,982.86
Sales Tax	($4,508.08)
Lottery Net Commissions	$2,009.94
Admin Fees	($90.00)
Merchandise Sales	
Non Taxable Sales	$8,044.62
Taxable Sales	$12,934.94
Expenses for February 2014 Reporting Period	
Fuel	($130,078.81)
Merchandise	($11,953.12)
Advertising	($5.00)
Automobile Expenses (DMV)	($120.00)
Bank Service Charges	($102.00)
Equipment Rental	($211.17)
Insurance-Property	($412.33)
Interest Expense	($6.00)
Legal Fees	($12,500.00)
Licenses and Permits	($690.80)
Management Fees	($90.00)
Merchant Fees	($1,837.13)
Payroll Service Fees	($67.75)
Postage and Delivery	($3.30)
Payroll Taxes	($208.08)

Environmental Fee	($114.00)
Utilities	($884.28)
Wages	($1,440.00)
ATM Fee Income	$270.85
"Ask My Accountant"	($1,297.28)

Net income for February 2014 is reported by Thomas Gillis to have been a negative ($3,396.06).

In looking at the attachments, the check register lists check no. 20733 (which appears to be a number grossly out of sequence with other checks, for $12,500.00 with a date of February 4, 2014. That would be two days prior to the commencement of this case. The court could not find this $12,500.00 payment to counsel on the various bank statements attached to the February 2014 Monthly Operating Report.

In viewing the bank statements attached to the February 2014 Monthly Operation Report, the court notes that on February 2, 2014, the Debtors withdrew $406.00 from the MOCSE Credit Union Account at the Black Oak Casino, North Side Cage. Dckt. 56 at 16.

March 2014 Monthly Operating Report

For the February 2014 Monthly Operating Report, Filed on March 24, 2014, Dckt. 56, Thomas Gillis provides the following information under penalty of perjury,

Income during the period	$98,079.95
Professional Fees paid during the period	($5,000.00)
Total Professional Fees paid during case	($17,500.00)
Non-Bankruptcy Professional Fees paid this Reporting Period	($7,500.00)
Non-Bankruptcy Professional Fees paid during case	($7,500.00)
Income for February 2014 Reporting Period	
Gasoline	$146,106.14
Diesel	$20,032.00
Sales Tax	($6,096.50)
Lottery Net Commissions	$1,636.50
Merchandise Sales	

Non Taxable Sales	$9,382.90
Taxable Sales	$15,323.22
Expenses for February 2014 Reporting Period	
Fuel	($153,353.51)
Merchandise	($15,798.13)
Accounting	($450.00)
Automobile Expenses (DMV)	($295.40)
Bank Service Charges	($173.90)
Equipment Maintenance	($58.00)
Dues and Subscriptions	($165.00)
Equipment Rental	($213.44)
Insurance-Property	($412.33)
Internet	($34.00)
Management Fees	($90.00)
Meals and Entertainment	($30.97)
Merchant Fees	($2,244.33)
Office Supplies	($147.20)
Parking	($5.00)
Payroll Service Fees	($73.15)
Postage and Delivery	($1.79)
Repairs and Maintenance	($55.00)
Supplies	($100.00)
Payroll Taxes	($400.74)
Environmental Fee	($181.84)
Telephone	($241.82)
Utilities	($154.93)
Wages	($2,773.28)
ATM Fee Income	$345.00

Net income for March 2014 is reported by Thomas Gillis to have been $6,476.90.

In viewing the bank statements attached to the March 2014 Monthly Operation Report, the court notes that on March 17, 2014, the Debtors withdrew $406.00 from the Wells Fargo Bank Account at the Black Oak Casino, South Side Cage. Dckt. 66 at 21.

From reviewing these Monthly Operating Reports it appears that the Debtors in Possession have engaged Thomas Gillis not to be the Debtor in Possession attorney, but to be the personal business manager and business fiduciary representative of the estate. The court has not authorized the employment of Thomas Gillis as a professional to serve as the business fiduciary of the estate.

At this juncture, the court awaits input from the U.S. Trustee and creditors, as well as the Debtors in Possession as to how the estate is being operated without counsel authorized to be employed, Mr. Gillis acting as the business fiduciary representative of the estate and signing Monthly Operating Reports, and whether cash collateral is being used in violation of 11 U.S.C. § 363(c)(2).

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Debtor's Claim of Exemptions filed by Focus Business Bank ("Creditor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled. The overruling of this Objection is without prejudice to any lien rights of Creditor in any assets in which an exemption has been claimed by the Debtors.

16. 13-91459-E-11 KDG-6 | LIMA BROTHERS DAIRY
Hagop T. Bedoyan | **MOTION FOR COMPENSATION BY THE LAW OFFICE OF KLEIN, DENATALE, GOLDNER, COOPER, ROSENLIEB AND KIMBALL, LLP DEBTOR'S ATTORNEY(S)**
4-10-14 [214]

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

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)(iii).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 12 Trustee, parties requesting special notice, and Office of the United States Trustee on April 10, 2014. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6), 21 day notice requirement.)

The Motion for Allowance of Professional Fees was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

At the hearing ----------.

The Motion for Allowance of Professional Fees is granted, with Counsel allowed $39,961.00 in fees and $1,189.54 as First Interim Fees.

FEES REQUESTED

Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, LLP, the Attorneys ("Applicant") for Debtor-in-Possession Lima Brothers Dairy, makes

a Second Interim Request for the Allowance of Fees and Expenses in this case. Applicant moves the court for approval and payment of interim compensation for services rendered to the Debtor-in-Possession, Lima Brothers Dairy, and the bankruptcy estate in the sum of $29,961.00 and reimbursement of costs advanced in the sum of $1,189.54 for the period of November 26, 2013 through March 19, 2014, as a Chapter 11 expense of administration. The order of the court approving employment of Applicant was entered on June 10, 2013, Dckt. 22.

Applicant entered into a written legal services agreement with the Debtor-in-Possession dated December 2, 2013, which was signed by the partners of Debtor-In-Possession on December 3, 2013, and received a $25,000 retainer from the partners in Debtor-In-Possession. Applicant has filed on prior application for interim compensation and reimbursement of costs on January 15, 2014, Dckt. NO. 107. On February 18, 2014, the court denied the First Interim Application without prejudice. Dckt. No. 150.

The court denied Applicant's First Application on several grounds. First, the Applicant sought fees as Counsel for the Debtor, failing to make the distinction between the terms "Debtor" and "Debtor in Possession." Second, the Applicant did not provide a meaningful summary of what had been accomplished in the case.

Instead, Applicant detailed "significant events" that had happened during the service period, and instructed the court to sift through the attached billing statements, declarations, and chronological list of tasks to discern the work that had been performed. The court requested that Applicant, in filing a revised motion, provide the court with a Motion to Allow Fees which states with particularity the grounds upon which the relief is based, and describe the services rendered with specificity in the body of the Application for Fees and Costs. Civil Minutes, Dckt. No. 146.

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

General Case Administration: Applicant spent 36.10 hours for a total of $8,239.00 in fees in this category. Applicant prepared, filed, and served substitution of attorneys; reviewed schedules and pleadings filed by prior counsel for Debtor-in-Possession to determine the status of the case; communicated with secured creditor and business consultants regarding additional time for the Debtor-In-Possession to reorganize; reviewed monthly operating reports for period ending August 31, 2013, and unfiled reports for September and October, 2013; performed lien search of Philip Lima regarding third party collateral pledged against the Debtor-in-Possession's loan with American AgCredit; prepared for and appeared at two Chapter 11 Status Conferences; worked with business consultants and the UST to correct and file monthly operating reports; and communicated with partners in Debtor-In-Possession regarding insurance certificate and payment of quarterly fees.

Efforts to Assess and Recover Property of the Estate: Applicant spent .80 hours for total of $225.00 in fees for this case. Applicant researched potential 549 claims and effect of the assignment of milk

proceeds, and communicated with the secured creditor regarding payment of dividends.

Relief from Stay and Adequate Protection: Applicant communicated extensively with counsel for secured creditor and negotiated four stipulations for orders continuing motion for relief from the automatic stay filed by American AgCredit. Applicant spent 11.80 hours for $3,505.00 in fees on this task.

Asset Disposition: Applicant spent .60 hours for $197.00 in fees on reviewing settlement statement regarding sale of pool quota, communicating with creditor regarding application of sale proceeds, and communicating with potential buyer for Debtor-in-Possession's dairy operation.

Meeting of and Communications with Creditors: Applicant spent .70 hours for a total of $142.50 in fees communicating with creditors regarding the case.

Fee and Employment Applications: Applicant spent 46.40 hours in preparing fee applications for $4,957.50 in fees, and did not charge for 22.60 hours of work in preparation of said applications. Applicant communicated with Debtor-In-Possession and former counsel for Debtor-In-Possession, regarding substitution of attorneys as general bankruptcy counsel for Debtor-In-Possession. Application prepared and filed application for their firm, communicated with GlassRatner regarding employment as business consultants for Debtor-In-Possession, prepared and filed application for employment of GlassRatner as counsel for Debtor-In-Possession, prepared and filed interim application for allowance of attorneys' fees and expenses, prepared and filed amended application for employment of firm, and prepared and filed amended application for employment of GlassRatner as business consultants.

Non-working Travel at Half-rate: Applicant spent 3.80 hours for fees of $541.50 for traveling to and from Modesto for hearings on motion for use of cash collateral and client meetings.

Business Operations: Applicant spent 3.70 hours for $1,026.50 for communicating with Debtor-In-Possession regarding culling practices, communicating with business consultants and secured creditor regarding action plan for reorganization of Debtor-In-Possession, and communicating with Debtor-In-Possession and secured creditor regarding feed needs.

Financing and Cash Collections: Applicant spent 47.00 hours for a total of $12,884.00 fees on this task category. Applicant communicated with counsel for American AgCredit and representative of secured creditor regarding use of cash collateral, worked with Debtor-In-Possession and business consulants regarding cash collateral budgets, prepared motion for authority to use cash collateral, which was approved through July 13, 2014, and conducted research regarding effect of assignment made to Cargill on use of cash collateral.

Tax Issues: Applicant spent .30 hours for fees of $85.00, communicating with business consultants regarding taxes and status of tax returns.

Plan and Disclosure Statement: Applicant spent 28.30 hours for $7,787.00 in fees for this category. Applicant communicated with business consultants and Debtor-In-Possession regarding plan or reorganization and preparation of long term budgets, communicated with secured creditor regarding acceptable treatment of claim, began drafting a plan of reorganization, and began preparing draft of disclosure statement.

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).

Benefit to the Estate

Even if the court finds that the services billed by a professional are "actual," meaning that the fee application reflects time entries

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including taking steps to reach a confirmable plan. The Debtor-In-Possession is current on their Monthly Operating reports, and obtained authorization to use cash collateral through July 13, 2014. Dckt. No. 202.

Applicant is in communication with Counsel for American AgCredit and Cargill to work through a consensual plan of reorganization. Applicant and business consultants have been collaborating on long term budgets for use with a plan and disclosure statement, and Applicant has begun to draft a plan of reorganization and disclosure statement for Debtor-In-Possession to be finalized upon conclusion of negotiations with secured creditors. The court finds the services were beneficial to the Debtor-In-Possession and bankruptcy estate and reasonable.

FEES ALLOWED

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Hagop T. Bedoyan (27 years)	10.00	$0.00	$0.00

Hagop T. Bedoyan (27 years)	28.40	$350.00	$9,940.00
Jacob L. Eaton (8 years)	10.90	$0.00	$0.00
Jacob L. Eaton (8 years)	3.80	$145.20	$541.50
Jacob L. Eaton (8 years)	80.90	$285.00	$23,056.50
Kaleb Judy (5 years)	1.50	$0.00	$0.00
Kaleb Judy (5 years)	12.40	$245.00	$3,038.00
Karen Clemans, CBA (Paralegal)	5.90	$0.00	$0.00
Karen Clemans, CBA (Paralegal)	11.40	$150.00	$1,710.00
Sissy Rucker (Paralegal)	4.20	$0.00	$0.00
Sissy Rucker (Paralegal)	1.40	$125.00	$175.00
Claudine Lalonde (Paralegal)	10.00	$150.00	$1,500.00
Total Fees For Period of Application			$39,961.00

The court finds that the hourly rates are reasonable and that Applicant generally effectively used appropriate counsel and rates for the services provided. The court is uncertain, however, of one of the claims made by applicant in its Motion, regarding a reduction of fees made by Applicant for tasks related to the preparation of fee and employment applications in this case.

The Motion states that Applicant did not charge for 22.60 hours that the Applicant firm spent on fee and employment applications, coded as B160 in its time sheets. Upon a review of the time sheets, it appears that Applicant did charge $0.00 for a total of 22.60 hours of time spent on preparing, drafting, analyzing, revising, and finalizing the applications for authorization to employ the attorneys for Debtor-in-Possession, as well as fee and employment applications for the GlassRatner Advisory & Capital Group LLC, which serves as business consultants for the Debtor-in-Possession. Dckt. No. 218. Those hours were billed at "$0.00" in Applicant's Chronological Billing Statements, and thus these fees were excluded from the request for compensation in this present Motion.

Applicant also acknowledges in its Motion that the first application Applicant filed to request fees was denied by this court. Interestingly, the following entries appear to be related to the Applicant's preparation and filing of the First Interim Fee Application, which was denied by this court on February 18, 2013 without prejudice. Civil Minutes, Dckt. 150.

Date	Task Code	Description	Time	Biller	Amount
1/10/14	B160	Begin preparing Notice of Hearing on First Interim Application for Fees and Costs by Counsel for Debtor	.50	CJL	75.00
1/13/14	B160	Begin preparing First Interim Application for Fees and Costs by Counsel for Debtor	1.80	CJL	$270.00
1/13/14	B160	Begin preparing Declaration of H. Bedoyan in Support of First Interim Application for Fees and Costs by Counsel for Debtor	.50	CJL	$75.00
1/13/14	B160	Begin preparing exhibits in support of First Interim Application for Fees and costs by Counsel for Debtor; prepared Exhibit B in support of First Interim Application for Fees and Costs	1.20	CJL	$180.00

1/14/14	B160	Continued preparing Declaration of H. Bedoyan in Support of First Interim Application for Fees and Costs by Counsel for Debtor	.80	CJL	$120.00
1/14/14	B160	Reviewed and Revised First Interim Fee Application	.70	HTB	$245.00
1/15/14	B160	Finalized Exhibits in Support of First Interim Application for Fees and Costs by Counsel for Debtor; Prepared Services Lists	.50	CJL	$75.00
		Totals	**6 hours**		**$1,040.00**

These tasks were also billed using the task code of "B160," Applicant's designation for Fee and Employment Application Preparation responsibilities. The above tasks, relating to the preparation and filing of the Applicant's First Interim Fee Application, were all charged at the rate of the attorney who handled the task, multiplied by that particular attorney's billing rate.

Although the court would be inclined to deny the awarding of this portion of the fees to Applicant, as the First Application for Fees was denied by court on the basis of Applicant's initial failure to provide a meaningful and detailed summary of the work performed on this case (as well as Applicant's failure to explain the relationship between the GlassRatner Advisory & Capital Group LLC and Applicant and whether Applicant had a ongoing profit sharing arrangement with the GlassRatner Advisory & Capital Group, LLC at the time) the court will allow the above-listed tasks to be compensated. Applicant has reduced half of the fees that could have been potentially charged to the Client for the preparation of the work performed on preparing fee and employment applications in this case. The court finds this discounted calculation of fees to be reasonable.

Thus, the Interim Costs in the amount of $1,189.54 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 and authorized to be paid by the Plan Administrator under the confirmed plan from the available funds of the Plan Funds in a manner consistent with the order of distribution under the confirmed Plan. The court is authorizing

that Debtor-in-Possession pay 70% of the fees and costs allowed by the court.

COSTS ALLOWED

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $1,189.54 in overnight charges, mileage, postage, and photocopying fees pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Overnight Charges		$12.85
Mileage		$140.56
Postage		$378.43
Photocopies		$657.70
Total Costs Requested in Application		$1,189.54

The Interim Costs in the amount of $1,189.54 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 and authorized to be paid by the Plan Administrator under the confirmed plan from the available funds of the Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

Applicant is allowed $39,961.00 in fees and $1,189.54 in costs. The Plan Administrator under the confirmed plan is authorized to pay the following amounts as compensation to this professional in this case:

Interim Fees $39,961.00
Costs and Expenses $1,189.54

pursuant to this Application as interim fees pursuant to 11 U.S.C. § 331 in this case. The court is authorizing the Debtor-in-Possession to pay 70% of the fees and costs granted by this court.

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 Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, LLP (“Applicant”), Attorneys for Debtor-in-Possession Lima Brothers Dairy having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, LLP is allowed the following fees and expenses as a professional of the Estate:

Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, LLP, Professional Employed by -Possession, Lima Brothers Dairy

Interim Fees	$39,961.00
Costs and Expenses in the amount of	$1,189.54

The fees and costs are allowed pursuant to 11 U.S.C. § 331 as interim fees and costs, subject to final review and allowance pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that this is a interim allowance of fees and the Debtor -in-Possession is authorized to pay $27,972.70 (70% of the fees) and $1,189.54 (100%) of the costs allowed from funds of the Estate as they are able to be paid in the ordinary course of business and from such funds that are unencumbered or are cash collateral authorized to be used pursuant to a cash collateral stipulation or order.

17. 13-91459-E-11 LIMA BROTHERS DAIRY
KDG-7

MOTION FOR COMPENSATION FOR GLASSRATNER ADVISORY AND CAPITAL GROUP LLC, CONSULTANT(S)
4-10-14 [206]

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

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)(iii).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor-in-Possession, Office of the United States Trustee and all creditors on March 10, 2014. By the court's calculation, 42 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6), 21 day notice requirement.)

The Motion for Allowance of Professional Fees was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion for Allowance of Professional Fees is granted in the amount of $44,899.50 in fees and $598.24 in expenses.

FEES REQUESTED

GlassRatner Advisory & Capital Group, LLC (or "Applicant"), business consultants for Lima Brothers Dairy, the Debtor-in-Possession, makes a First Interim Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period of December 3, 2013 to March 31, 2014. The court entered an order granting the application to employ GlassRatner Advisory & Capital Group, LLC on December 24, 2013. On March 31, 2014, the court issued its civil minute order, which amended the GlassRatner employment order.

Applicant entered into a written legal services agreement with the Debtor-in-Possession dated December 2, 2013, which was signed by the partners of Debtor-In-Possession on December 3, 2013, and received a $25,000 retainer from the partners in Debtor-In-Possession. Applicant has filed on prior application for interim compensation and reimbursement of costs on January 15, 2014, Dckt. No. 107. On February 18, 2014, the court denied the First Interim Application without prejudice. Dckt. No. 150. In the ruling rendered by the court denying the First Interim Application for Fees without prejudice, the court stated,

> The Applicant can go back and provide the court with a Motion to Allow Fees which states with particularity the grounds upon which the relief is based. The Motion can provide a billing summary, breaking up the task billing in a meaningful and clear way.
>
> The declarant can provide testimony to substantiate the billing summary and providing a discussion of the actual services provided within each task area. The declaration can explain why and how the services were staff and why the billing rates for the services were appropriate. The staffing for these services, which include what appears to be basic work, is all performed by professionals with 25+ years of experience and billing $275 to $395.00 an hour. No explanation is provided as to why and how all of the services provided are no less than $275.00 an hour services. These appear to include some basic bookkeeping services.

Civil Minutes, Dckt. No. 150.

With this Motion, Applicant seeks compensation for services rendered during the application period December 3, 2013 to March 31, 2014. for $61,518.00, based on 203.60 hours of work performed. Applicant has organized the entries in the time sheets that Applicant filed as Exhibit "D" in support of the Motion on Dckt. No. 210 by task code.

In the present Motion, Applicant provides a task billing analysis and supporting evidence for the services provided, which are summarized under the below categories.

Business Analysis: Applicant spent 149.10 hours, for a total of $45,050.50 in fees, on this task category. The Applicant prepared QuickBooks files for the Debtor-in-Possession and set up a chart of accounts, reviewed previously filed and prepared Monthly Operating Reports for the Debtor-in-Possession, amended the Monthly Operating Reports through February 2014, completed automatic accounting for Debtor-in-Possession on a weekly basis, reviewed historical information regarding the business operations of Debtor-in-Possession, prepared multiple cash flow projections for use with obtaining authorization for use of cash collateral, communicated with counsel for Debtor-in-Possession, the partners of Debtor-in-Possession, and secured creditors as needed and in response to financial information requests, performed analysis of cow sales from the commencement of case for use in negotiations with American AgCredit, conferenced in person and telephonically with partners of Debtor-in-Possession to gather financial documents required to prepare the Monthly Operating Reports and cash budgets, reviewed the stipulations regarding cash collateral, and reviewed payroll tax records and reconciled payments made.

Case Administration: Applicant spent 14.90 hours in this category. Applicant traveled to Merced, California three times for meetings with partners of Debtor-in-Possession (billed at half rate, each trip actually took 6 hours round trip from the Applicant's Bakersfield office), and regularly reviewed case correspondence to keep abreast of developments.

Employment/Fee Application: Applicant spent 3.80 hours in this category. Applicant reviewed, approved, and signed the employment applications prepared on its behalf, and reviewed, revised, approved, and signed the First Application.

Creditor Meeting: Applicant spent 2.20 hours in this category. Applicant communicated extensively with American AgCredit regarding cash flow and operations.

Plan and Disclosure Statement: Applicant spent 33.6 hours in this category. Applicant communicated with Counsel for Debtor-in-Possession and Debtor-in-Possession's partners regarding the plan of reorganization, communicated with secured creditor regarding acceptable treatment of claims, reviewed historical pricing on quota and milk prices without quota, and began to develop the plan.

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).

Benefit to the Estate

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

working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including the authorization of use of cash collateral, based on the budgets prepared by Applicant (according to Applicant's Motion and time entries). Applicant has helped prepare cash flow projections related to the Debtor-in-Possession's Motions for the Use of Cash Collateral, prepared analyses of cow sales for use in negotiations with creditor American AgCredit, gather financial information and documents to prepare the Debtor-in-Possession's Monthly Operating Reports and cash budgets, and are helping counsel develop a Chapter 11 Plan.

FEES REQUESTED

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
George Demos, CPA, Senior Managing Director of Applicant, and certified turnaround professional with over 30 years' experience in public accounting and private industry experience	86.80	$295.00	$25,606.00

Kerry Krishner, CPA and Certified Forensic Accountant with over 25 years' experience in bankruptcy consulting, with MBA and BA.	31.60	$395.00	$12,482.00
Brad Smith, Managing Director of Applicant and CPA, who holds a MBA and BS, with over 25 years' experience in advising and assisting businesses	82.50	$275.00	$22,687.50 (which Applicant erroneosly calculates as $23,430.00)
Total Fees For Period of Application			$60,775.50

The court notes that the total fees requested by Applicant appears to have been miscalculated (the mistaken figure being the computation of Brad Smith's total fees for services performed). The court's computation of the figures above result in a total of $60,775.50.

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $598.24 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Pacer Charges		$8.20
Mileage		$580.82
Conference Calls		$9.22
Total Costs Requested in Application		$598.24

OPPOSITION BY UNITED STATES TRUSTEE

The United States Trustee (or alternatively, "UST"), opposes the Second Interim Application For Allowance Of Business Consultants' Fees And Costs filed By GlassRatner Advisory & Capital Group, LLC, wherein the Applicant requests $61,518 in fees and $598.24 in costs. Dckt. No. 221.

The United States Trustee states that Applicant's time records (Dckt. No. 210) show significant charges for bookkeeping, clerical, and monthly operating report ("MOR") preparation services. While Applicant's third bullet point in their engagement letter (at Exhibit A, Dckt. No. 87) includes,

> Assisting with and/or preparing reports to be filed by the Client with the U.S. Trustee's office, including Monthly Operating Reports,

there is no mention of performing bookkeeping services. Additionally, the first numbered paragraph of the engagement letter states:

> The services will be rendered by George Demos, Kerry Krisher, Brad Smith, and various other consultants or professionals, as appropriate. GR reserves the right to utilize other GR professionals not named here, as appropriate.

The Applicant's bookkeeping, clerical, and Monthly Operating Report preparation services are being billed, for the most part, at $275 per hour. The United States Trustee argues that, although such an hourly rate may be appropriate for higher-level consulting services, it is inappropriate to use individuals billing at such a rate, and more, for lower-level bookkeeping-type and clerical services. As the February 2014 Monthly Operating (Dckt. No. 188) illustrates, the Monthly Operating Reports are prepared on a cash basis, and a bookkeeper can accomplish these.

In comparison, Trustee argues that the Baudler & Flanders more appropriately charged $75 per hour for similar bookkeeping and MOR services in *in re Edward & Rosie Lopes Esmaili, dba CrimeTek Security*, Case No. 11-94224-E-11 (see Exhibits filed in support of the Motion, that include Baudler & Flanders' Exhibits in Support of Application of Debtors in Possession for Allowance of Compensation of Certified Public Accountants, Dckt. No. 221).

Based on Applicant time entries, the Applicant has charged $10,953 for bookkeeping, $1,419 for clerical, and $9,346.50 for Monthly Operating Report services. Additionally, Trustee argues that $4,067 in fees claimed by Applicant for certain tasks appear too vague on Applicant's timesheets to assess whether the Applicant rendered reasonable or necessary services. On this basis, the United States Trustee requests that the Applicant's granted fees be reduced.

DISCUSSION

The US Trustee's objection is well taken, and echos the court's comments when denying the prior application for fees. The court noted,

> Kerry Krisher, a "Principal" has billed 19.50 hours of work at $395.00 an hour. The Motion gives no hit as to what $400 an hour services were provided. The court is only told that the estate is to pay $7,702.50.
>
> Brad Smith, a "Managing Director" has billed 37.10 hours of time at $275.00 an hour. It is asked that the estate pay $10,202.50 for these "Managing Director" services.

> George Demos, a "Senior Managing Director" has billed $295.00 an hour for 13.50. These Senior services are to cost the estate $3,982.50.
>
> From the Motion, the court has no idea as to what and how this Principal, Senior Managing Director, and Managing Director provided any beneficial services to the estate.

Civil Minutes, Dckt. 148.

The court does not typically allow professionals to charge the full rate for services that do not require the skill of a professional, but rather services of a bookkeeper or clerk. A review of the raw billing data provided reveals that several tasks billed at $275.00 or $295.00 are services that would require the skill of a bookkeeper or clerk, including preparation of Monthly Operating Reports.

Bookkeeping Services					
Timekeeper	Date	Description of Services	Rate	Time	Charge
Brad Smith, CPA	12/11/2013	Prepare QuickBooks file and set up charge of accounts	$275	1.1	$302.50
Brad Smith, CPA	12/11/2013	Process August deposits and disbursements for DIP account	$275	1.7	$467.50
Brad Smith, CPA	12/12/2013	Process October deposits and disbursements for DIP account	$275	1.6	$440.00
Brad Smith, CPA	12/12/2013	Reconcile DIP account - November	$275	0.7	$192.50
Brad Smith, CPA	12/12/2013	Reconcile DIP account - October	$275	0.6	$165.00
Brad Smith, CPA	12/12/2013	Reconcile DIP account - September	$275	0.5	$137.50
Brad Smith, CPA	12/12/2013	Reconcile DIP account - August	$275	0.7	$192.50
Brad Smith, CPA	12/12/2013	Process November deposits and disbursements for DIP Account	$275	1.3	$357.50
Brad Smith, CPA	12/12/2013	Process September deposits and disbursements for DIP Account	$275	1.4	$385.00
Brad Smith, CPA	12/12/2013	Call w/ Lima to review receipts and disbursements from petition date to curren	$275	2.4	$660.00
Brad Smith, CPA	12/13/2013	Draft memo to Krisher re accounting treatment for American AgCredit Stipulation	$275	0.4	$110.00

Brad Smith, CPA	12/13/2013	Reconcile pre petition account	$275	0.9	$247.50
Brad Smith, CPA	12/13/2013	Process August - October deposits and disbursements for pre petition account	$275	2.1	$577.50
Brad Smith, CPA	12/18/2013	Update accounting records w/ new information	$275	0.5	$137.50
George Demos	12/19/2013	Telephone conference with Smith regarding payroll disbursement issues and follow-up telephone conference with Lima regarding same.	$295	0.3	$88.50
Brad Smith, CPA	12/24/2013	Reconcile Delta bank account	$275	0.7	$192.50
Brad Smith, CPA	12/26/2013	Update Accounting records	$275	1.5	$412.50
Brad Smith, CPA	12/27/2013	Update Accounting records	$275	0.7	$192.50
Brad Smith, CPA	1/6/2014	Process December disbursements	$275	1.3	$357.50
Brad Smith, CPA	1/7/2014	Update Quickbooks with additional disbursements information	$275	1.6	$440.00
Brad Smith, CPA	1/8/2014	Reconcile cow sales workbook to MORs	$275	0.9	$247.50
Brad Smith, CPA	1/8/2014	Email to Demos re variances on cow sales workbook	$275	0.1	$27.50
George Demos	1/8/2014	Telephone conference with BS regarding accounting data discrepancies	$295	0.1	$29.50
Brad Smith, CPA	1/9/2014	Call with Lima re December receipts and disbursements	$275	0.5	$137.50
Brad Smith, CPA	1/14/2014	Update Quickbooks from banking detail received from LBD for 2nd week of Jan	$275	0.4	$110.00
Brad Smith, CPA	1/17/2014	Reconcile cow sales per MORs to detail list	$275	1.2	$330.00
Brad Smith, CPA	1/17/2014	Update quickbooks from banking detail received from LBD for 1st week of Jan	$275	0.7	$192.50
Brad Smith, CPA	1/23/2014	Update Quickbooks w/ weekly transaction data	$275	0.7	$192.50
Brad Smith, CPA	1/24/2014	update bank transactions with EFT items received from bank	$275	0.4	$110.00
Brad Smith, CPA	1/24/2014	Reconcile DIP account	$275	0.6	$165.00

Brad Smith, CPA	1/27/2014	Update Quickbooks records for weekly disbursements	$275	0.5	$137.50
Brad Smith, CPA	1/27/2014	Call with Lima re missing check numbers	$275	0.2	$55.00
Brad Smith, CPA	1/27/2014	Draft memo to Lima re missing check numbers	$275	0.2	$55.00
Brad Smith, CPA	1/28/2014	Review cleared bank transactions	$275	0.4	$110.00
Brad Smith, CPA	1/28/2014	Update Quickbooks records with cleared bank transactions	$275	0.3	$82.50
Brad Smith, CPA	1/28/2014	Draft memo to Lima re deposits to DIP account	$275	0.2	$55.00
Brad Smith, CPA	1/29/2014	Review cleared bank transactions	$275	0.2	$55.00
Brad Smith, CPA	1/31/2014	Review cleared bank transactions	$275	0.2	$55.00
Brad Smith, CPA	2/3/2014	draft email to Lima re disbursements	$275	0.3	$82.50
Brad Smith, CPA	2/3/2014	Update accounting records	$275	0.7	$192.50
Brad Smith, CPA	2/4/2013	Update accounting records	$275	0.2	$55.00
Brad Smith, CPA	2/10/2014	Update accounting records	$275	0.7	$192.50
Brad Smith, CPA	2/17/2014	Update accounting records	$275	0.9	$247.50
Brad Smith, CPA	2/21/2014	Reconcile held funds balance	$275	0.4	$110.00
Brad Smith, CPA	2/25/2014	Update accounting records	$275	0.9	$247.50
Brad Smith, CPA	3/4/2014	Update accounting records	$275	0.8	$220.00
Brad Smith, CPA	3/5/2014	Draft fax memo to Lima re bank transactions	$275	0.2	$55.00
Brad Smith, CPA	3/5/2014	Update accounting records	$275	1.1	$302.50
Brad Smith, CPA	3/6/2014	Update accounting records	$275	0.2	$55.00
Brad Smith, CPA	3/11/2014	draft email to Lima re disbursements	$275	0.2	$55.00
Brad Smith, CPA	3/11/2014	Update accounting records	$275	1.3	$357.50
Brad Smith, CPA	3/17/2014	Update accounting records	$275	1.2	$330.00
Brad Smith, CPA	3/24/2017	Update accounting records	$275	0.9	$247.50
		TOTAL BOOKKEEPING		**39.8**	**$10,953.00**

Clerical Services					
Timekeeper	Date	Description of Services	Rate	Time	Charge
Brad Smith, CPA	12/18/2013	Call w/ Lima re status of information request	$275.00	0.1	$27.50

George Demos	12/26/2013	Correspondence to/from attorney regarding follow-up information needed from client	$295.00	0.2	$59.00
Brad Smith, CPA	1/3/2014	distribute draft of MOR 4	$275.00	0.2	$55.00
Brad Smith, CPA	1/10/2014	distribute revised MOR	$275.00	0.4	$110.00
Brad Smith, CPA	1/13/2014	Call w/ Demos re MOR signature pages	$275.00	0.2	$55.00
Brad Smith, CPA	1/13/2014	Distribute revised MORs for review	$275.00	0.3	$82.50
Brad Smith, CPA	1/14/2014	Prepare application for online access to WestAmerica Bank account	$275.00	0.3	$82.50
Brad Smith, CPA	1/14/2014	Assemble revised MORs and distribute	$275.00	0.3	$82.50
Brad Smith, CPA	1/17/2014	Transmit StarConnect application to WestAmerica	$275.00	0.1	$27.50
Brad Smith, CPA	1/21/2014	Call to Lima re WestAmerica bank access	$275.00	0.2	$55.00
Brad Smith, CPA	1/21/2014	Call to WestAmerica re online access	$275.00	0.4	$110.00
Brad Smith, CPA	2/21/2014	Assemble Jan MOR and distribute	$275.00	0.3	$82.50
George Demos	12/10/2013	Document intake meeting with client at client site	$295.00	2	$590.00
		TOTAL CLERICAL		**5**	**$1,419.00**

Preparation of Monthly Operating Reports					
Timekeeper	Date	Description of Services	Rate	Time	Charge
Kerry Krisher	12/11/2013	Teleconference with Smith re MORS	$395.00	0.3	$118.50
George Demos	12/11/2013	Telephone conference with KK and BS regarding data needed for accurate and timely report preparation	$295.00	0.3	$88.50
George Demos	12/11/2013	Telephone conference with Lima regardin datat needs for filing accurate and timely reports	$295.00	0.1	$29.50
Kerry Krisher	12/18/2013	Teleconference with Smith re MORS	$395.00	0.3	$118.50
Kerry Krisher	12/19/2013	Teleconference with Smith re MORS and cash disbursements	$395.00	0.4	$158.00

Brad Smith	12/23/2013	Prepare August MOR	$275.00	1.2	$330.00
Brad Smith	12/26/2013	Prepare MOR1 - August	$275.00	1.1	$302.50
Brad Smith	12/27/2013	Prepare MOR2 - September	$275.00	1.8	$495.00
Brad Smith	12/27/2013	Finalize MOR1 and distribute for review	$275.00	0.5	$137.50
Brad Smith	12/27/2013	Revise MOR1 - August	$275.00	1.2	$330.00
Brad Smith	12/27/2013	Update summary of cash disbursements and receipts	$275.00	0.5	$137.50
Brad Smith	12/27/2013	Prepare MOR1 - August	$275.00	1.4	$385.00
George Demos	12/27/2013	Preparation and deliver of correspondece to Debtor's counsel regarding MOR reports	$295.00	0.2	$59.00
Brad Smith	12/28/2013	Prepare MOR2 - September	$275.00	0.9	$247.50
Brad Smith	12/28/2013	Prepare MOR3 - October	$275.00	1.3	$357.50
George Demos	12/30/2013	Correspondence to/from Debtor's counsel regarding Amended August MOR	$295.00	0.2	$59.00
George Demos	12/30/2013	Preparation an delivery to client of MOR reports for August, September, and October and subsequent telephone conference with Cleint	$295.00	0.4	$118.00
George Demos	12/30/2013	Recipt of client approvals for Amended MORS, subsequent preparation and delivery of reports and delivery of reports and correspondence to Debtor's counsel	$295.00	0.3	$88.50
Brad Smith	12/30/2013	Finalize MOR2 - September	$275.00	0.4	$110.00
Brad Smith	12/30/2013	Revise MOR1 with counsel comments to distribute	$275.00	0.3	$82.50
Brad Smith	12/30/2013	Finalize MOR3 - October and distribute	$275.00	0.5	$137.50
Brad Smith	1/3/2014	Finalize MOR4 and distribute	$275.00	0.3	$82.50
Brad Smith	1/3/2014	Prepare worksheet for MOR5	$275.00	0.2	$55.00
Brad Smith	1/3/2014	Revise MOR4	$275.00	0.7	$192.50
George Demos	1/3/2014	Preparation and transmission of document request regarding Nov MOR to Debtor, call to Debtor	$295.00	0.4	$118.00

George Demos	1/3/2014	Telephone conference with Debtor regarding review draft of Nov MOR; preparation of final MOR correspondence and report to counsel	$295.00	0.6	$177.00
Brad Smith	1/7/2014	Revise MOR4	$275.00	0.2	$55.00
Brad Smith	1/8/2014	Prepare list of questions for Lima re December MOR	$275.00	0.3	$82.50
Brad Smith	1/8/2014	Prepare MOR5	$275.00	1.1	$302.50
Brad Smith	1/9/2014	Prepare roll forward schedule of excess funds held for inclusion in MOR workbooks	$275.00	0.5	$137.50
Brad Smith	1/9/2014	Update MOR5	$275.00	0.7	$192.50
George Demos	1/9/2014	Telephone conference with Debtor regarding December milk production and end of month accounts recievable balance for MOR	$295.00	0.2	$59.00
George Demos	1/9/2014	Telephone conference with Debtor's counsel regarding Amended Nov MOR, Dec MOR and revised cash budget	$295.00	0.3	$88.50
Brad Smith	1/10/2014	Revise Aug through Dec MORs to reflect ACC and Cargil transactions and ACC excess funds held	$275.00	3.4	$935.00
George Demos	1/10/2014	Correspondence to/from Debtor regarding Amended Nov and Dec MORs	$295.00	0.4	$118.00
George Demos	1/12/2014	Review amended Aug, Sept, Oct, and Nov MORs, prepare and send correspondence to Debtor and Counsel	$295.00	0.3	$88.50
Brad Smith	1/13/2014	Revise Aug through Dec MORs Schedule D to show payments on loan guarantees	$275.00	1.3	$357.50
George Demos	1/13/2014	conference call with Smith regarding MOR presentation issues; call to Debtor	$295.00	0.4	$118.00
Brad Smith	1/20/2014	Draft email to Demos reconciling items between cow sales workbook and MORs	$275.00	0.7	$192.50
Brad Smith	1/21/2014	Call to Demos re cow sales and MORs	$275.00	0.2	$55.00

Brad Smith	2/4/2014	Prepare Jan MOR	$275.00	0.6	$165.00
Brad Smith	2/14/2014	Prepare Jan MOR	$275.00	1.8	$495.00
Brad Smith	2/18/2014	Call with Lima re MOR	$275.00	0.2	$55.00
Brad Smith	3/5/2014	Prepare Feb MOR	$275.00	1.8	$495.00
Brad Smith	3/6/2014	Revise MOR	$275.00	0.3	$82.50
Brad Smith	3/18/2014	Finalize MOR7	$275.00	0.4	$110.00
George Demos	3/19/2014	Review draft MOR and prepare correspondence to Debtor's counsel	$295.00	0.3	$88.50
Brad Smith	3/27/2014	Email exchange with Ghazi re MOR copies	$275.00	0.1	$27.50
George Demos	12/11/2013	Review and analysis of documents received for the purpose of preparing delinquent MORS	$295.00	1.8	$531.00
		TOTAL MOR SERVICES		**33.1**	**$9,346.50**

To summarize, these three categories of services, time billed at the professional rates, and the related dollar amounts are:

Category	Hours	Dollars Billed
Bookkeeping Services	39.8 Hours	$10,953.00
Clerical Services	5 Hours	$1,419.00
Monthly Operating Reports	33.1 Hours (Not including time allowed for professional review of monthly operating reports)	$9,346.50
	----------	-------
	77.9 Hours	$21,718.50

The court subtracts the $21,718.50 billed for the non-professional services at professional hourly rates from the $60,775.50 in professional fees requested. The court then adds back the non-professional bookkeeping work and what appears to be clerical (giving applicant the benefit of the doubt). This calculation is,

Fees Requested.....$60,775.50
Reduction for Non-Professional Fees.....($21,718.50)
Add Back Bookkeeping and "Clerical" at $75.00 an hour.....$ 5,842.50

Total Corrected First Interim Fees.....$44,899.50

Reviewing the raw billing data and the entries in which the court can assess the reasonable and necessary services, the court is satisfied that adjusting the first interim fees to $44,899.50, and disallowing all amounts in excess thereof is appropriate. Applicant can focus on going forward in properly maintaining his time records, reducing the hourly rate for clerical service, and only billing for reasonable services provided.

The court commonly authorizes the payment of 50% of the fees on an interim basis. Because the court has adjusted both the time allowed and hourly rate, the court authorizes the Debtors in Possession to pay 70% of the allowed fees, which amount is $31,429.65, from the available funds of the Estate as permitted by any stipulation or order authorizing the use of cash collateral or from unencumbered funds in a manner consistent with the order of distribution in this Chapter 11 case.

The First Interim Costs in the amount of $598.24 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 and authorized to be paid by the Debtor in Possession from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11.

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

Fees	$44,899.50
Costs and Expenses	$ 598.24

pursuant to this Application as interim fees pursuant to 11 U.S.C. § 331 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 GlassRatner Advisory & Capital Group, LLC ("Applicant"), Business Consultant and Accountants for the 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 GlassRatner Advisory & Capital Group, LLC is allowed as First Interim Fees (the prior application for fees having been denied without prejudice in its entirety) the following fees and expenses as a professional of the Estate:
>
> GlassRatner Advisory & Capital Group, LLC, Professional Employed by Debtor in Possession
>
> Fees in the amount of $44,899.50

Expenses in the amount of $ 598.24,

IT IS FURTHER ORDERED that the remaining fees requested are not allowed.

The fees and costs are allowed pursuant to 11 U.S.C. § 331 as interim fees and costs, subject to final review and allowance pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that this is a interim allowance of fees and the Debtor-in-Possession is authorized to pay $31,429.65 (70%) of the allowed fees and $598.24 (100%) of the allowed expenses from funds of the Estate as permitted by a cash collateral stipulation or order, or from unencumbered monies of the estate as they are able to be paid in the ordinary course of business and from such funds that are unencumbered or are cash collateral authorized to be used pursuant to a cash collateral stipulation or order in a manner consistent with the order of distribution in this Chapter 11 case.

18. 14-90060-E-7 CJY-1 STEVEN GOOLSBY AND TERRI CANTRELL MOTION TO COMPEL ABANDONMENT 3-24-14 [25]

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

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on March 24, 2014. By the court's calculation, 38 notice was provided. 28 days' notice is required.

The Motion to Abandon Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Trustee having filed an opposition, the court will address the merits of the motion. If it appears at the hearing that disputed material factual issues remain to be

resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court grants the Motion as to the abandonment of the bankruptcy estate's interest in the real property located at 506 N. Eucalyptus Avenue in Waterford, California, and Debtors' Individual Retirement Account with Wells Fargo Bank (not to exceed the value of $21,000.00). The court denies all other relief, without prejudice, requested in the Motion.

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000). Here the

Debtors Steven W. Goolsby and Terri L. Cantrell ("Debtors"), seek an order granting Debtors' Motion to Compel the Chapter 7 Trustee to Abandon Property of the Estate.

Debtors filed a Chapter 7 bankruptcy case, on January 15, 2014, but state that the case is being "held open" while the Trustee attempts to recover a preferential payment made to one of the Debtors' creditors. Debtors own real property located at 506 N. Eucalyptus Avenue in Waterford, California, which is their primary residence. Debtors also own a rental property located at 1809 Larkspur Lane in Ceres, California. Both properties are included in Debtors' Schedule A. Debtors also have an IRA with Wells Fargo Bank valued at $21,000.00, which is listed on their Schedule B.

Debtors ask that the following assets be abandoned:

1. Their primary residence located at 506 N. Eucalyptus Avenue in Waterford, California. Debtors' residence is valued at approximately $325,000.00 and has two mortgages with Wells Fargo Home Mortgage in the amount totaling $293,041.34.

2. Their rental property located at 1809 Larkspur Lane in Ceres, California. This rental property is valued at approximately $100,000.00 with a mortgage in the amount of $95,167.89 and after cost of sale there is no equity.

3. Debtors also ask that their IRA with Wells Fargo Bank be abandoned. Debtors state that the IRA is worth approximately $21,000.00. Debtors have claimed an exemption in their account under California Civil Code of Procedure 703.140(b)(10)(E) for $21,000.

Debtors argue that their residence and the IRA are exempted, and there is no equity in their rental property to protect. Debtors claim that the above-listed assets are of inconsequential value to the bankruptcy estate, and there is nothing for the Trustee to administer to unsecured creditors.

OPPOSITION BY TRUSTEE

The Chapter 7 Trustee in this case, Irma Edmonds, files an opposition only as to the real property located at 1809 Larkspur Lane, Ceres, California (the "Ceres Property"). The Trustee opposes Debtors' request to compel the Trustee to abandon the Ceres Property because the Ceres Property has nonexempt equity for the estate. Trustee intends to sell the Ceres Property, and is concurrently filing with this motion, an application to employ Bob Brazeal of PMZ Real Estate to assist her in listing and marketing it for sale. Dckt. No. 35.

Trustee does not oppose the motion as to the other items of property Debtors seek to compel the Trustee to abandon.

The Debtors filed this case on January 15, 2014. Debtors disclosed an interest in the Ceres Property at $100,000, but did not claim the Ceres property exempt. In their Schedule D, Debtors listed a lien on the Ceres Property held by Wells Fargo Home Mortgage in the amount of $95,167.89.

Trustee has contacted Bob Brazeal to assist her in valuing the Ceres Property and possibly marketing it and listing it for sale. Brazeal believes that the Ceres Property is worth between $135,00 and $145,000. Edmonds Declaration and Brazeal Declaration, Dckt. Nos. 36 and 37. This is in excess of the Wells Fargo Lien by approximately $39,832.11 to $49,832.11.

DISCUSSION

Property of the estate may be abandoned under § 554 of the Bankruptcy Code if property of the estate is "burdensome to the estate or of inconsequential value and benefit to the estate." See 11 U.S.C. §554(a)-(b). The party seeking abandonment of property of estate has burden of proof, or must show a *prima facie* case that, to demonstrate such property is "burdensome to the estate, or that it is of inconsequential value and benefit to the estate" under 11 U.S.C. § 554. A trustee cannot be compelled to abandon real property in which Debtors still have equity on the Chapter 13 petition date. *In re Kuhlman*, 254 B.R. 755 (Bankr. N.D. Cal. 2000).

The Declaration of Bob Brazeal, who states to have "substantial experience in the marketing and sale of real estate in the greater Modesto, California area," where the Ceres Property is situated, testifies to his belief that the Ceres Property is worth between $135,000 and $145,000. ¶ 2, Declaration of Bob Brazeal, Dckt. No. 37. This is in excess of the lien held by Wells Fargo Home Mortgage, which Debtors report to be in the amount of $95,167.89.

The court finds that the debt secured by the Debtors' real property located at 506 N. Eucalyptus Avenue in Waterford, California, and Individual Retirement Account with Wells Fargo Bank, exceeds the value of the property, and that there are negative financial consequences to the Estate retaining the property. The court determines that the Debtors' real property located at 506 N. Eucalyptus Avenue in Waterford, California, and Individual Retirement Account with Wells Fargo Bank is of inconsequential value and benefit to the Estate, and grants the Motion to Compel Trustee to Abandon pursuant to 11 U.S.C. § 554 with respect to those two pieces of property.

With regard to the Debtors' rental property, located at 1809 Larkspur Lane in Ceres, California, however, it appears that the equity in that property has not been exhausted, and can still be sold and liquidated to generate value for the benefit of the estate. The court will deny the Motion as to the real property commonly known as 1809 Larkspur Lane, Ceres, California.

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 Abandon Property filed by Steven W. Goolsby and Terri L. Cantrell ("Debtors") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the Property identified as:
>
> 1. Real property located at 506 N. Eucalyptus Avenue in Waterford, California
>
> 2. Debtors' Individual Retirement Account with Wells Fargo Bank, not to exceed the value of $21,000.00
>
> and listed on Schedules A and B by Debtors is abandoned to Steven W. Goolsby and Terri L. Cantrell by this order, with no further act of the Trustee required.
>
> All other relief requested in the Motion is denied without prejudice.

19. 14-90060-E-7 HCS-3 | **STEVEN GOOLSBY AND TERRI CANTRELL** | **MOTION TO EMPLOY BOB BRAZEAL AS REALTOR(S)**
Christian J. Younger | **4-17-14 [39]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on April 17, 2014. By the court's calculation, 14 days' notice was provided. 14 days' notice is required. That requirement was met.

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

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

Chapter 7 Trustee, Irma C. Edmonds, requests authority from the court to employ Bob Brazeal of PMZ Real Estate in Modesto, California, to assist the Trustee in the marketing and sale of real property located at 1809 Larkspur Lane, Ceres, California, which constitutes property of the bankruptcy estate.

The Debtors filed this case on January 15, 2014. Debtors disclosed an interest in the Ceres Property at $100,000, but did not claim the Ceres property exempt. In their Schedule D, Debtors listed a lien on the Ceres Property held by Wells Fargo Home Mortgage in the amount of $95,167.89.

Trustee has contacted Bob Brazeal to assist her in valuing the Ceres Property and possibly marketing it and listing it for sale. Mr. Brazeal conducted an initial investigation of the Ceres Property, and believes that it is worth between $135,000 and $145,000. Brazeal Declaration, Dckt. No. 41. This is in excess of the lien apparently held by Wells Fargo Home Mortgage, by approximately $39,832.11 to $49,832.11.

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals,

including real estate agents, to represent or assist the trustee in carrying out the trustee's duties under Title 11. *See In re Avon Townhomes Venture*, 433 B.R. 269, 313 (Bankr. N.D. Cal. 2010) aff'd, BAP NC-11-1068-HDOD, 2012 WL 1068770 (B.A.P. 9th Cir. Mar. 29, 2012) ("a real estate broker is a "professional person" as contemplated by § 327."). To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate, and be a disinterested person.

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

Trustee states that Mr. Brazeal will review the history of ownership of the Ceres Property, evaluate the condition of the Ceres Property, provide an opinion as to the value of the Ceres Property, and list and market the property for sale. Upon closing of the approved sale of the property, Ms. Brazeal may apply to the court for an order authorizing his compensation, pursuant to 11 U.S.C. § 330, for a sales commission of six percent of the gross sales price. Mr. Brazeal has not been retained for any prepetition servies on behalf of the Debtor or Trustee, and has not received retainers or advanced fees.

Taking into account all of the relevant factors in connection with the employment and compensation of Mr. Brazeal, considering the declaration demonstrating that Mr. Brazeal 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 Bob Brazeal of PMZ Real Estate as real estate agent for the Chapter 7 estate for the purpose of valuing, marketing, and listing for sale the property located at 1809 Larkspur Lane, Ceres, California.

Mr. Brazeal's employment by the estate shall be on the terms and conditions set forth in Mr. Brazeal's Declaration filed in support of the motion (Docket No. 41), specifically, that Mr. Brazeal may apply for an order authorizing his compensation pursuant to § 330(a) for a sales commission of six percent of the gross sales price of the property located at 1809 Larkspur Lane, Ceres, California, which will be listed and sold by PMZ Real Estate. The approval of the fee is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by the Chapter 7 Trustee having been presented to the court, and upon review of the

pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Employ is granted and the Chapter 7 Trustee is authorized to employ real estate agent Bob Brazel of PMZ Real Estate on the terms and conditions set forth in Mr. Brazeal's Declaration filed in support of the motion (Docket No. 41).

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. The request may be included as part of a motion to approve the sale of the property.

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

20. 13-90465-E-7 KIMBERLY VEGA **MOTION TO SET ASIDE**
14-9004 MR-1 **4-10-14 [27]**
MCGRANAHAN V. VEGA ET AL

Motion Not Set for Hearing Under Local Bankruptcy Rules.

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendants, the Chapter 13 Trustee, all creditors, and Office of the United States Trustee on April 24, 2014. By the court's calculation, only 7 days' notice was provided.

Tentative Ruling: The Motion to Set Aside the Clerk's Entry of Default for Defendant Maria Rangel was not properly set for hearing. The Plaintiff Trustee having filed an opposition, the court will address the merits of the motion. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court's tentative decision is to deny without prejudice the Motion to Set Aside the Clerk's Entry of Default. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

DEFECTIVE NOTICE AND SERVICE

Local Bankruptcy Rule 9014-1(e)(2) requires that a proof of service, in the form of a certificate of service, be filed with the court clerk concurrently with the pleadings or documents served, or not more than three (3) days after they are filed. The proof of service must be filed as a separate document and shall bear its own Docket Control Number. The Certificate of Service filed by Defendant, Dckt. No. 46, reflects that the pleadings were served on April 24, 2014, 14 days after the filing of the Motion to Set Aside. The court cannot determine whether the Defendant attempted to set the hearing for notice under Local Bankruptcy Rule 9014-1(f)(1) or (f)(2).

Additionally, Local Bankruptcy Rule 9014-1(d)(2) requires that every motion shall be accompanied by a separate notice of hearing stating the Docket Control Number, the date and time of the hearing, the location of the courthouse, the name of the judge hearing the motion, and the courtroom in which the hearing will be held. Local Bankruptcy Rule 9014-1(d)(3) further provides that the he notice of hearing shall advise potential respondents whether and when written opposition must be filed, the deadline for filing and serving it, and the names and addresses of the persons who must be served with any opposition. The Notice of Hearing, simply states the date, time, and location of the hearing, with no advisement of whether written opposition must be filed and to whom and where the opposition must be sent. Dckt. No. 28.

REVIEW OF THE MOTION

The Defendant in this adversary proceeding, Maria Rangel ("Defendant"), seeks an order from the court, setting aside the entry of default by the clerk of the court. Dckt. No. 13. The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

A. This Motion is made pursuant to Federal Rule of Civil Procedure 60.

B. Movant is requesting to set aside the default judgment within one month based on mistake, inadvertence, and excusable neglect.

C. The Motion seeks to set aside the clerk's default against "defendant, Maria Rangel." The Motion, however, is not dated and signed by the Movant. Dckt. No. 27 at 2. The signature and date lines are left blank.

D. The Motion cites to Federal Rule of Civil Procedure 60. Movant states that in the present case, Defendant (presumably referring to herself), did not file a timely response to the complaint for the reasons stated in the attached declaration.

E. The policy of the law is to have every case tried on its merits, and any doubts in applying Federal Rule of Bankruptcy Procedure 2004 must be resolved in favor of the party seeking relief from default.

The Motion to Set Aside the Default does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief is based. The motion merely refers the court's attention to read Defendant's Declaration to determine the grounds for the relief requested. This is not sufficient.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

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

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

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

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

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

UNSWORN DECLARATION

The declaration offered by Defendant contains the following statement: I have personal knowledge of the matters discussed below, and if

called as a witness, I could competently testify to them." Dckt. No. 29. The Declaration is not signed does not include a verification of the declarant, stating that the statement is made under the penalty of perjury under the laws of the United States pursuant to the requirements of 28 U.S.C. § 1746. Thus, the court cannot accept this declaration as competent evidence of Defendant's right to relief under Federal Rules of Civil Procedure Rule 60(b), as made applicable by Bankruptcy Rule 9024.

The requirements for what constitutes an adequate declaration are set out in 28 U.S.C. § 1746, which provides:

> § 1746. Unsworn declarations under penalty of perjury
>
> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
>
> (1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).
>
> (Signature)".
>
> (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
>
> (Signature)".

The Declaration offered does not provide for any qualification on stating that the information is true and correct.

The court notes that even if Defendant's declaration consisted of a sworn statement, along the proper certification statement, the facts alleged do not meet the standard of .

> Defendant states,
>
> I mailed the complaint. My son and I tried to engage an attorney. We went to seven different attorney's None would take the case. We do have their business cards. The

bankruptcy relative was only a co-signer on my loan and has no interest in my home. I have paid all the payments and down payment.

Defendant's stated grounds for relief do not meet any of the factors enumerated by Federal Rules of Civil Procedure Rule 60(b). Federal Rules of Civil Procedure Rule 60(b), as made applicable by Bankruptcy Rule 9024, governs the reconsideration of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Red. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993). The court uses equitable principals when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Fed. R. Civ. P. 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id.* at 863 n.11.

Defendant fails to make a showing of any grounds that would entitle her to relief under Federal Rule of Civil Procedure 60(b). Defendant's contention that she could not find an attorney, and her denial that the Debtor has an interest in her property, does not implicate any issues with the clerk's entry of Defendant's default (Defendant has not alleged that the entry was fraudulent, void, etc.). Moreover, Defendant's does not allege that she has encountered surprise, or committed a mistake, inadvertence, or excusable neglect, in finding an attorney to defend her in this adversary proceeding.

Defendant's unsigned evidence and pleadings present another problem for the court. The signature line on page 2 of the Defendant's Motion is left blank. Federal Rule of Bankruptcy Procedure 9011 requires that,

> every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

Fed. R. Bankr. P. 9011(a). Without the Defendant's Movant's signature on the Motion, the Defendant has failed to verify that the Motion is not being presented for any improper purpose, that the claims contained therein are warranted by existing law, that the allegations contained in the Motion are supported by the record, and that denials of factual contentions are reasonably based on the evidence offered or on a lack of information or belief under Federal Rule of Bankruptcy Procedure 9011(b).

The court cannot verify the identity of the Movant and that the pleadings submitted are representations being made to the best of the Movant's knowledge, information, and belief. Fed. R. Bankr. P. 9011(b).

OPPOSITION BY TRUSTEE

Plaintiff, Michael D. McGranahan, the Trustee in Debtor's parent bankruptcy case, opposes the Motion to Set Aside. Trustee correct points out that the Defendant has not provided sufficient notice and response time to the motion filed. Plaintiff did not receive the documents until April 11, 2014. Defendant has set the matter for May 1, 2014, but the notice of hearing provided is not in compliance with the court's local rules. Given that the Motion has been filed in the course of an adversary proceeding, time cannot be shortened based on Local Bankruptcy Rule 9014-1(f)(2)(A).

Trustee also opposes the Motion on the basis that Defendant has not provided any admissible evidence, and presents no evidence under oath. Additionally, as the court has discussed, the Defendant has not given the court any reason why relief under Federal Rule of Civil Procedure 60(b) is justified. The Motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Set Aside the Default filed by Defendant Maria Rangel 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 Set Aside the Default is denied without prejudice.

21. 13-90465-E-7 KIMBERLY VEGA **MOTION TO SET ASIDE**
14-9004 VV-1 **4-10-14 [31]**
MCGRANAHAN V. VEGA ET AL

Motion Not Set for Hearing Under Local Bankruptcy Rules.

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendants, the Chapter 13 Trustee, all creditors, and Office of the United States Trustee on April 24, 2014. By the court's calculation, only 7 days' notice was provided.

Tentative Ruling: The Motion to Set Aside the Clerk's Entry of Default was not properly set for hearing. The Plaintiff Trustee having filed an opposition, the court will address the merits of the motion. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court's tentative decision is to deny without prejudice the Motion to Set Aside the Clerk's Entry of Default against Defendant Victor Vega. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

DEFECTIVE NOTICE AND SERVICE

Local Bankruptcy Rule 9014-1(e)(2) requires that a proof of service, in the form of a certificate of service, be filed with the court clerk concurrently with the pleadings or documents served, or not more than three (3) days after they are filed. The proof of service must be filed as a separate document and shall bear its own Docket Control Number. The Certificate of Service filed by Defendant, Dckt. No. 46, reflects that the pleadings were served on April 24, 2014, 14 days after the filing of the Motion to Set Aside. The court cannot determine whether the Defendant attempted to set the hearing for notice under Local Bankruptcy Rule 9014-1(f)(1) or (f)(2).

Additionally, Local Bankruptcy Rule 9014-1(d)(2) requires that every motion shall be accompanied by a separate notice of hearing stating the Docket Control Number, the date and time of the hearing, the location of the courthouse, the name of the judge hearing the motion, and the courtroom in which the hearing will be held. Local Bankruptcy Rule 9014-1(d)(3) further provides that the he notice of hearing shall advise potential respondents whether and when written opposition must be filed, the deadline for filing and serving it, and the names and addresses of the persons who must be served with any opposition. The Notice of Hearing, simply states the date, time, and location of the hearing, with no advisement of whether written opposition must be filed and to whom and where the opposition must be sent. Dckt. No. 28.

REVIEW OF THE MOTION

The Defendant in this adversary proceeding, Victor Vega ("Defendant"), seeks an order from the court, setting aside the entry of default by the clerk of the court. Dckt. No. 13. The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

A. This Motion is made pursuant to Federal Rule of Civil Procedure 60.

B. Movant is requesting to set aside the default judgment within one month based on mistake, inadvertence, and excusable neglect.

C. The Motion seeks to set aside the clerk's default against "defendant, Victor Vega." The Motion, however, is not dated and signed by the Movant. Dckt. No. 31 at 2. The signature and date lines are left blank. The Docket Control Number listed on this Motion indicates that the moving party is Defendant, Victor Vega, but as further discussed below, the absence of the purported Movant's signature makes it impossible for the court to confirm the true identity of the filing party.

D. The Motion cites to Federal Rule of Civil Procedure 60. Movant states that in the present case, Defendant (presumably referring to herself), did not file a timely response to the complaint for the reasons stated in the attached declaration.

E. The policy of the law is to have every case tried on its merits, and any doubts in applying Federal Rule of Bankruptcy Procedure 2004 must be resolved in favor of the party seeking relief from default.

The Motion to Set Aside the Default does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief is based. The motion merely refers the court's attention to read Defendant's Declaration to determine the grounds for the relief requested. This is not sufficient.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to

state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

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

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

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing,

> [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

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

UNSWORN DECLARATION

The declaration offered by Defendant contains the following statement: I have personal knowledge of the matters discussed below, and if called as a witness, I could competently testify to them." Dckt. No. 29. The Declaration is not signed does not include a verification of the declarant, stating that the statement is made under the penalty of perjury under the laws of the United States pursuant to the requirements of 28 U.S.C. § 1746. Thus, the court cannot accept this declaration as competent evidence of Defendant's right to relief under Federal Rules of Civil Procedure Rule 60(b), as made applicable by Bankruptcy Rule 9024.

The requirements for what constitutes an adequate declaration are set out in 28 U.S.C. § 1746, which provides:

> § 1746. Unsworn declarations under penalty of perjury
>
> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true

under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

The Declaration offered does not provide for any qualification on stating that the information is true and correct.

The court notes that even if Defendant's declaration consisted of a sworn statement, along the proper certification statement, the facts alleged do not meet the standard of .

Defendant states,

I mailed the complaint. My mother and I tried to engage an attorney. We went to seven different attorney's None would take the case. We do have their business cards. The bankruptcy relative was only a co-signer on my mother’s loan and has no interest in my home. I have paid all the payments and down payment.

Defendant’s stated grounds for relief do not meet any of the factors enumerated by Federal Rules of Civil Procedure Rule 60(b). Federal Rules of Civil Procedure Rule 60(b), as made applicable by Bankruptcy Rule 9024, governs the reconsideration of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

Red. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993). The court uses equitable principals when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Fed. R. Civ. P. 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id.* at 863 n.11.

Defendant fails to make a showing of any grounds that would entitle him to relief under Federal Rule of Civil Procedure 60(b). Defendant's contention that he could not find an attorney, and his denial that the Debtor has an interest in his property, does not implicate any issues with the clerk's entry of Defendant's default (Defendant has not alleged that the entry was fraudulent, void, etc.). Moreover, Defendant does not allege that he has encountered surprise, or committed a mistake, inadvertence, or excusable neglect, in finding an attorney to defend him in this adversary proceeding.

Defendant's unsigned evidence and pleadings present another problem for the court. The signature line on page 2 of the Defendant's Motion is left blank. Federal Rule of Bankruptcy Procedure 9011 requires that,

> every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

Fed. R. Bankr. P. 9011(a). Without the Defendant's Movant's signature on the Motion, the Defendant has failed to verify that the Motion is not being presented for any improper purpose, that the claims contained therein are warranted by existing law, that the allegations contained in the Motion are supported by the record, and that denials of factual contentions are reasonably based on the evidence offered or on a lack of information or belief under Federal Rule of Bankruptcy Procedure 9011(b).

Additionally, the court cannot verify the identity of the Movant and that the pleadings submitted are representations being made to the best of the Movant's knowledge, information, and belief. Fed. R. Bankr. P. 9011(b). The court also notes that the concurrently filed Motions to Set Aside the Default, Dckt. Nos. 27 and 31, are substantially similar in content, and Defendant's, and the lack of the purported Movant's signature makes it impossible for the court to confirm the true identity of the filing party.

OPPOSITION BY TRUSTEE

Plaintiff, Michael D. McGranahan, the Trustee in Debtor's parent bankruptcy case, opposes the Motion to Set Aside. Trustee correct points out that the Defendant has not provided sufficient notice and response time to the motion filed. Plaintiff did not receive the documents until April 11, 2014. Defendant has set the matter for May 1, 2014, but the notice of hearing provided is not in compliance with the court's local rules. Given that the Motion has been filed in the course of an adversary proceeding, time cannot be shortened based on Local Bankruptcy Rule 9014-1(f)(2)(A).

Trustee also opposes the Motion on the basis that Defendant has not provided any admissible evidence, and presents no evidence under oath. Additionally, as the court has discussed, the Defendant has not given the court any reason why relief under Federal Rule of Civil Procedure 60(b) is justified. The Motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Set Aside the Default filed by Defendant Victor Vega 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 Set Aside the Default is denied without prejudice.

22. 14-90076-E-7 PATRICIO/MARIA BATAD — MOTION FOR DENIAL OF DISCHARGE OF BOTH DEBTORS UNDER 11 U.S.C. SECTION 727(A)
UST-1 Thomas O. Gillis — 3-20-14 [13]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, the Chapter 7 Trustee, and Office of the United States Trustee on March 20, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

The Motion for Denial of Discharge of Both Debtors is granted. No appearance is required at the May 1, 2014 hearing.

Tracy Hope Davis, the U.S. Trustee ("UST") requests that the court enter an order denying the discharge of Debtors Patricio Batad and Maria Batad ("Debtors"), pursuant to 11 U.S.C. § 727(a)(8). UST contends that Debtors filed a voluntary petition for relief under Chapter 7 in this court, Case No. 11-94107-E-7, on November 30, 2011, in which both of the Debtors received a discharge on March 12, 2012. Exhibit B, Dckt. No. 17. The prior case was commenced within eight years before the date of the filing of the petition in the current case, January 17, 2014.

The Debtors did to list the Prior Case on their current petition, but did list the date only of a prior Chapter 13 case, In re Patricio NMN Batad and Maria Rosario Batad, Case No. 09-93288-D-13.

Section 727(a)(8) provides that a Chapter 7 debtor cannot receive a discharge if the debtors has previously obtained a discharge in a case commenced within eight years of the current case.

It appears Debtors obtained a discharge in their prior case filed March 12, 2012, which falls within eight years from the filing of the current case on January 17, 2014. Therefore, the Debtors are not eligible for a discharge in their current case.

Debtors filed a statement of non-opposition to the Motion on April 17, 2014. Dckt. No. 19.

Cause exists to deny the discharge of Patricio Batad and Maria Batad pursuant to 11 U.S.C. § 727(a)(8). The court grants the Motion and denies the discharge of Debtors in the current case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Denial of Discharge of Both Debtors, Patricio Batad and Maria Batad, filed by U.S. Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the Debtors in this Chapter 7 case, Patricio Batad and Maria Batad, and each of them, are denied discharges in this bankruptcy case, Case No. 14-90076-E-7, pursuant to 11 U.S.C. § 727(a)(8).

23. 13-92179-E-7 CURTIS/SANDRA ARLT — AMENDED MOTION TO COMPEL ABANDONMENT
BSH-2 Brian S. Haddix — 4-15-14 [51]

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

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)(iii).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee and Office of the United States Trustee on April 15, 2014. By the court's calculation, 16 days' notice was provided. 14 days' notice is required. That requirement was met.

The Motion to Abandon Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Abandon Property is granted.

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

PRIOR MOTION TO COMPEL ABANDONMENT

The court continued this matter from the original hearing on April 10, 2014 to allow the Debtors to file an amended motion. Dckt. No. 49. The court had noted that the original Motion to Compel Abandonment of the Property did not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it did not plead with particularity the grounds upon which the requested relief is based. Debtors did not describe with particularity the encumbrances, lien and exemptions claimed for each item of real and personal property.

A debtor must establish by a preponderance of the evidence that the Property is burdensome or of inconsequential value and benefit to the estate in seeking an order compelling the abandonment of property of the estate. *In re Viet Vu*, 245 B.R. 644, 650 (B.A.P. 9th Cir. 2000). The courts have held that an order compelling abandonment is the exception, not the rule; abandonment should only be compelled in order to help the creditors by assuring some benefit in the administration of each asset. Absent an attempt by the trustee to churn property worthless to the estate just to increase fees, abandonment should rarely be ordered." *Id.* at 647 (quoting *Morgan v. K.C. Mach. & Tool Co. , 816* F.2d at 246).

In their original motion, Debtors merely asserted that the property is of inconsequential value, operating on the assumption that since Trustee has not taken action to liquidate the assets described since the 341 Meeting of Creditors took place on January 23, 2014, the court should direct the Trustee to abandon the estate's interest in the listed assets. Dckt. No. 36 at 2.

REVIEW OF PRESENT MOTION

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

Asset	**Value**	**Encumbrances**	**Equity**	**Exemption**

Real Property commonly known as 3344 Sierra Str., Riverbank, CA	$155,000	Bank of America for $104,008 and Stan. Co. Credit Control for $4,617.40	$46,374.60	§704.730 for $46,374.60
Cash on Hand	$400	None	$400	§704.070 for $300
Golden 1 Credit Union Savings (3302-0) bank account	$128.79 (75% of $171.72)	None	$128.79	§704.070 for $128.79 (75%)
Golden 1 Credit Union Checking (3302-9 bank account)	$63.70 (75% of $84.93)	None	$63.70	§704.070 for $63.70 (75%)
Chase Savings (3270) bank account	$146.36 (75% of 195.15)	None	$146.36	§704.070 for $146.36 (75%)
Chase Checking (3383) bank account;	$7.97 (75% of $10.63	None	$7.97	§704.070 for $7.97
Household goods & furnishings	$2,645	None	$2,645	§704.020 for $2,645
Wearing apparel	$200	None	$200	§704.020 for $200
Engagement and Wedding Rings, Rings, Costume Jewelry	$345	None	$345	§704.040 for $345
Fishing Gear & Tackle	$50	None	$50	Non-exempt
403(b) Retirement Plan	$109.23	None	$109.23	§704.115(a)(1) & (2), (b) for $109.23
2013 CA State Tax Refund	$235	None	$235	Non-exempt
2012 Dodge Ram 2500	$36,000	Golden 1 C.U. for $45,802	None	N/A

2012 Dodge Avenger	$15,000	Golden 1 C.U. for $15,093	None	N/A
1997 Dodge Ram Laramie 2500	$3,500	None	$3,500	§704.010 for $2,900 2003
2003 Dodge Neon	$8,000	WFS Financial for $8,695	None	N/A
One full-bred collie, 2 mixed-breed collies, 2 mixed-breed cats	$100	None	$100	Non-exempt

In support of the motion, the Debtors aver that they filed this bankruptcy case on December 16, 2013. Debtors are a "party in interest." Debtors have claimed the equity in the property as exempt. The first date set for the 11 U.S.C. § 341 Meeting was held on January 23, 2014. Debtors argue that Trustee has had a reasonable amount of time to evaluate the asset's value. Debtors argue that the property is of inconsequential value or benefit to the estate, and thus request that the court enter an order directing the Trustee to abandon the estate's interest in the listed assets.

The court finds that the debt secured by the Property exceeds the value of the Property, and that there are negative financial consequences to the Estate retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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 Abandon Property filed by Curtis Leo Arlt and Sandra Darlene Arlt ("Debtors") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the Property identified as:
>
> 1. Real Property commonly known as 3344 Sierra Str., Riverbank, CA, 95367;
>
> 2. $400 cash on hand;
>
> 3. 75% of $171.72 in Golden 1 Credit Union Savings (3302-0) bank account, with a value not to exceed $128.79 (75% of $171.72);

4. 75% of $84.00 in Golden 1 Credit Union Checking (3302-9 bank account), with a value not to exceed $63.70 (75% of $84.93);

5. 75% of $195.15 in Chase Savings (3270) bank account, with a value not to exceed $146.36 (75% of 195.15) ;

6. 75% of Chase Checking (3383) bank account, with a value not to exceed $7.97 (75% of $10.63);

7. The debtors' household goods and furnishings listed in Exhibit A to Schedule B with a value of $2,645;

8. The debtors' personal clothing listed in Schedule B;

9. The debtors' engagement and wedding rings, other rings, and costume jewelry listed in Schedule B with a value of $345.00;

10. The debtors' interest in a 403(b) Retirement Plan held through Franklin Templeton Investments with a value of approximately $109.23;

11. A 1997 Dodge Ram Laramie 2500;

12. A 2012 Dodge Avenger SE 4D;

13. A 2012 Dodge Ram 2500 Laramie;

14. A 2003 Dodge Neon SRT-4 4D;

15. 1 full blood border collie (family pet);

16. 2 mixed-breed collies (family pets);

17. 2 mixed-breed cats (family pets).

and listed on Schedules and B by Debtors are abandoned to Curtis Leo Arlt and Sandra Darlene Arlt by this order, with no further act of the Trustee required.

24. 13-91985-E-7 MICHAEL SMITTLE — AMENDED MOTION TO COMPEL ABANDONMENT
BSH-2 Brian S. Haddix — 4-15-14 [33]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee and Office of the United States Trustee on April 15, 2014. By the court's calculation, 16 days' notice was provided. 14 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Abandon Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Compel Abandonment. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

PRIOR MOTION TO COMPEL ABANDONMENT

The court denied Debtor's original Motion to Compel Abandonment, based on procedural defects surrounding the Certificate of service, and the Motion's failure to describe the personal property sought to be abandoned. Dckt. No. 22.

A debtor must establish by a preponderance of the evidence that the Property is burdensome or of inconsequential value and benefit to the estate in seeking an order compelling the abandonment of property of the estate. *In re Viet Vu*, 245 B.R. 644, 650 (B.A.P. 9th Cir. 2000). The courts have held that an order compelling abandonment is the exception, not the rule; abandonment should only be compelled in order to help the creditors by assuring some benefit in the administration of each asset. Absent an

attempt by the trustee to churn property worthless to the estate just to increase fees, abandonment should rarely be ordered." *Id.* at 647 (quoting *Morgan v. K.C. Mach. & Tool Co. , 816* F.2d at 246).

In his original motion, Debtor did not provide sufficient information regarding the property to be abandoned. Debtor did not sufficiently describe the funds in certain checking and brokerage accounts, and did not describe his interests in the certain household good and furnishings with much particularity.

REVIEW OF PRESENT MOTION

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

Asset	**Value**	**Encumbrance(s)**	**Equity**	**Exemption**
Bank of America Checking Account ending in 1799	$800	None	$800	§703.140(b)(5) for $800
Household goods & furnishings	$1,170	None	$1,170	§703.140(b)(3) for $1,170
Wearing apparel	$200	None	$200	§703.140(b)(3) for $200
Fishing Pole and Tackle	$20	None	$20	§703.140(b)(5) for $20
Waste Management Retirement Plan	$8,000	None	$8,000	§703.140(b)(10)(E) for $8,000
2013 Federal Tax Refund	$144.95	None	$144.95	§703.140(b)(5) for $144.95
1992 Chevy 1 Ton Truck (non-op)	$100	None	$100	§703.140(b)(2) for $100
1972 Chevy ½ Ton Truck (not running)	$500	None	$500	§703.140(b)(2) for $500
2004 Circle J	$1,000	None	$1,000	Stock Trailer §703.140(b)(2) for $1,000
1994 Chevy ½ Ton 4WD Truck	$3,000	None	$3,000	§703.140(b)(2) for $3,000

One mixed breed dog	$1.00	None	$1.00	§703.140(b)(3) for $1.00

In support of the motion, the Debtor avers that he filed this bankruptcy case on November 6, 2013. Debtor is a "party in interest," and has claimed the equity in the property as exempt. The first date set for the creditors' meeting under section 341 was held on December 12, 2013. The trustee concluded the meeting. Debtor argues that Trustee has had a reasonable amount of time to evaluate the asset's value, and that the property is of inconsequential value or benefit to the estate, and thus request that the court enter an order directing the Trustee to abandon the estate's interest in the listed assets.

The court finds that the debt secured by the Property exceeds the value of the Property, and that there are negative financial consequences to the Estate retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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 Abandon Property filed by Michael Smittle ("Debtors") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the Property identified as:
>
> 1. Bank of America Checking Account, ending in 1799, value not to exceed $800
> 2. Household goods and furnishings
> 3. Wearing Apparel
> 4. Fishing Pole and Tackle
> 5. The debtors' interest in the Waste Management Retirement Plan worth approximately $8,000
> 6. 2013 Federal Tax Refund in the amount of $144.95
> 7. A 1992 Chevy 1 Ton Truck (non-op)
> 8. A 1972 Chevy ½ Ton Truck (not running)
> 9. A 2004 Circle J Stock Trailer

10. A 1994 Chevy ½ Ton 4WD Truck

11. One mixed breed dog

and listed on Schedule B by Debtor are abandoned to Michael Smittle by this order, with no further act of the Trustee required.

25. 13-91189-E-11 MICHAEL/JUDY HOUSE
RMY-8 Robert M. Yaspan

MOTION FOR COMPENSATION FOR EDWARDS, LIEN AND TOSO, INC., APPRAISER(S)
4-7-14 [102]

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

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)(iii).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 7 Trustee, parties requesting special notice, all creditors, and Office of the United States Trustee on April 7, 2014. By the court's calculation, 24 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6), 21 day notice requirement.) That requirement was met.

The Motion for Allowance of Professional Fees was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion for Allowance of Professional Fees is granted.

FEES REQUESTED

Jeffrey Lien of Edwards, Lien & Toso, Inc., the Appraiser ("Applicant") for Debtors and Debtors-in-Possession Michael House and Judy House ("Client"), make a Request for the Allowance of Fees and Expenses in this case. The order of the court approving employment of Applicant was entered on November 25, 2013. Dckt. No. 74.

The application seeks allowance of and authorization to pay the appraisers of Edwards, Lien & Toso a flat fee of $9,000 on a final basis for Edwards, Lien & Toso's professional appraisal services. A deposit of $6,500 was made prior to the commencement of the appraisal; and a final payment of $2,500 is due to Edwards, Lien & Toso.

The Motion states that Jeffrey Lien handled the assignment on behalf of Edwards, Lien & Toso, along with another appraiser, Rich Kilgores, and Diana Souza, an Administrative Assistant. The Applicant provides a "Project Hours and Description of Services," detailing the services provided by the employees of Edwards, Lien & Toso. Dckt. No. 102 at 3. The description of services provided are categorized by the individual performing the described tasks.

The Project Hours and Description of Services overview shows that Jeffrey Lien conducted correspondence, made phone calls, met with staff, met with client to prepare the bid, and spent 8 hours on these tasks for project management. Mr. Lien also inspected the subject properties and comparable properties, and reviewed area demographics for his report of value. Mr. Lien also did poultry sales research, analysis, and development, reviewed valuations and report, and did in house consulting with Rich Kilgore. Mr. Lien spent a total of 25.00 hours on this case.

Rich Kilgore, another appraiser with Edwards, Lien & Toso, spent 49 hours inspecting the subject properties and comparable properties; conducting land sales and poultry sales research, analysis, and development; preparing the report and description of the property; preparing a valuation, analysis, and report of value; and did in house consulting with Jeffrey Lien.

Diana Souza, an Administrative Assistant with Edwards, Lien & Toso, spent 13 hours doing file management of photos, maps, and the report, and assisted in preparing the report.

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).

Benefit to the Estate

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

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

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including preparing a 160-page real estate appraisal report. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES ALLOWED

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Jeffrey Lien	25	$350.00	$8,750.00
Rich Kilgore	49	$350.00	$17,150.00
Diane Souza	13	$50.00	$650.00
Total Fees For Period of Application			$26,550.00

The Applicant states that had Edwards, Lien & Toso charged its hourly rate, rather than a flat fee of $9,00.00, the fee would have been approximately $26,550 (as shown on the chart above).

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. The Motion for Compensation for Edwards, Lien & Toso in the flat-rate amount of $9,000 is authorized to be paid by the Debtors-in-Possession from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 Case. A deposit of $6,500 was made prior to the work performed on the appraisal, and is being held in a trust account by Edwards, Lien & Toso pending approval of the court.

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

Fees $ 9,000.00
Costs and Expenses $ 0.00

pursuant to this Application 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 Edwards, Lien & Toso ("Applicant"), Appraiser for Debtors-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Edwards, Lien & Toso is allowed the following fees and expenses as a professional of the Estate:
>
> Edwards, Lien & Toso, Professional Employed by Debtors-in-Possession
>
> Fees in the amount of $ 9,000.00
> Expenses in the amount of $ 0.00,
>
> The Fees and Costs pursuant to this Applicant, and Fees in the amount of $9,000.00 are approved as final fees and costs pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that Applicant is authorized to receive the disbursal of the $6,500 deposit (made prior the commencement of work on the apprisal), being held in a trust account by Applicant.
>
> **IT IS FURTHER ORDERED** that the Debtors-in-Possession are authorized to pay the remaining fees of $2,500 due to Applicant and allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

26. 12-90696-E-7 CLEO PAUGH **MOTION FOR COMPENSATION FOR**
SSA-10 Brian S. Haddix **GRIMBLEBY COLEMAN, CERTIFIED PUBLIC ACCOUNTANTS, INC., ACCOUNTANT**
3-20-14 [125]

Final Ruling: No appearance at the May 1, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, Applicant, and Office of the United States Trustee on March 20, 2014 By the court's calculation, 42 days' notice was provided. 35 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6) 21 day notice and L.B.R. 9014-1(f)(1) 14-day opposition filing requirements.)

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties 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.

FEES REQUESTED

Jeffrey Coleman, the Accountant ("Applicant") for Irma Edmonds, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period of April 25, 2012 to February 20, 2014. The order of the court approving employment of Applicant was entered on May 15, 2012. Dckt. No. 44.

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

Tax Analysis and Preparation of Returns: Applicant spent 11.15 hours in this category. Applicant conducted discussions, correspondence, and analysis regarding the tax consequences of a sale of property located at

2100 Edsel Lane, Modesto California. Applicant also completed final income tax returns for the years of 2012 and 2013.

Fee/Employment Application : Applicant spent 3.3 hours on this task. The Applicant reviewed the bankruptcy application, performed a conflict check, and prepared time records for his fee application.

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).

Benefit to the Estate

Even if the court finds that the services billed by professional are "actual," meaning that the fee application reflects time entries properly

charged for services, the professional must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). A professional must exercise good billing judgment with regard to the services provided as the court's authorization to employ a professional to work in a bankruptcy case does not give that professional "free reign [sic] to run up a [professional fees and expenses without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits, including an evaluation of the tax consequences of the sale of property commonly known as 2100 Edesel Lane, Modesto, California, and preparing final income tax returns for the tax years of 2012 and 2013. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES ALLOWED

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

Jeffery Colman: $290/ hr
Debbie Sanders: $165.00/ hr
Donae Caravalho: $185.00/ hr

Applicant’s itemized billing statements, filed as Exhibit “1" in support of the Motion, aggregate the time entries of the above-listed professionals by date. Dckt. No. 129. The timesheets reflect that the Applicant and his colleagues spent 14.45 hours on the Chapter 7 case of Debtor Cleo V. Paugh, for a total of $2,635.50 in fees.

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

Fees	$2,635.50

Costs and Expenses $ 0.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Jeffrey Coleman, CPA at Grimbleby Coleman, Certified Public Accountants, Inc. ("Applicant"), Accountant for the Chapter 7 Trustee, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Jeffrey Coleman, CPA at Grimbleby Coleman, Certified Public Accountants, Inc. is allowed the following fees and expenses as a professional of the Estate:
>
> Jeffrey Coleman, CPA at Grimbleby Coleman, Certified Public Accountants, Inc., Professional Employed by the Chapter 7 Trustee
>
> Fees in the amount of $ 2,635.50
> Expenses in the amount of $0.00,
>
> The Fees and Costs pursuant to this Applicant, and Fees in the amount of $2,635.50 are approved as final fees and costs pursuant to 11 U.S.C. § 330.
>
> [**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 a manner consistent with the order of distribution in a Chapter 7 Case.

27. 12-90696-E-7 CLEO PAUGH **MOTION FOR COMPENSATION FOR**
SSA-11 Brian S. Haddix **STEVEN S. ALTMAN, TRUSTEE'S ATTORNEY**
3-20-14 [131]

Final Ruling: No appearance at the May 1, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Accountant for the Chapter 7 Trustee, and Office of the United States Trustee on March 20, 2014. By the court's calculation, 42 notice was provided. 35 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6) 21 day notice and L.B.R. 9014-1(f)(1) 14-day opposition filing requirements.)

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties 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.

FEES REQUESTED

Steven S. Altman, the Attorney ("Applicant") for Irma C. Edmonds, the Chapter 7 Trustee ("Client"), makes a Second and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period of October 10, 2013 through March 14, 2014 as a Chapter 7 expense administration. The Appointment of Client as the Interim Trustee for this case was filed on March 14, 2012. Dckt. No. 2.

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

General Case Administration: Applicant spent 1.3 hours in this category. Applicant coordinated and conducted compliance activities for the case by performing tasks like communicating with Trustee concerning follow-up work necessary in the case, exchange emails with the accountants of the Trustee relating to the completion of final fiduciary tax returns and the status of taxes, sending follow up emails to the staff secretary

and Trustee relative to the status of taxes, and completing the fee applications for himself and the CPA Accounant's firm.

Fee Applications: Applicant spent 3.7 hours in this category. Applicant reviewed billings and prepared the first and final fee application and supporting documents for CPA firm Grimbleby Coleman for Compensation and Reimbursement of Expenses and supporting documents. Applicant sent transmittal to Trustee for review, execution, and approval. Applicant prepared a second and final fee application for himself and the supporting documents, and sent this to the Trustee for review, execution, and approval. These fees include calculations for prospective hearings for the approval of fees for the Applicant and the Trustee's CPA accounting firm.

Claims Administration: Applicant spent .2 hours in this category. Applicant reviewed claims in the estate and sent a short transmittal email to Trustee regarding the claims for case administration matters.

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).

Benefit to the Estate

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including defeating a relief from stay motion filed early in the case by creditor Starineri Family Trust to foreclose Debtor’s real property locatd in or about 2331 Edsel Lane. Applicant also assisted Trustee in securing the appointment of broker Fried Eichel to market and sell a portion of Debtor’s real property at 2100 Edsel Lane, Modesto, California for the gross sales price of $310,000.00 to buyer William Strohm. Applicant also helped Trustee resolve and compromise a longstanding dispute concerning the residual proceeds owed to the Starnieri Family Trust on favorable terms, pursuant to a settlement announced in the compromise motion approved by this court on March 4, 2013. Dckt. No. 97.

Applicant also helped the estate bond around a purported deed of trust claim held by claimants Nick G. Karras and Mario Toti, recorded against the 2100 Edsel property in Stanislaus County on November 28, 1973, for the amount of $8,000 in motion held and approved by this court on August 22, 2013. Dckt. No. 114. The estate has $46,256.22 of unencumbered

monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES ALLOWED

The fees request are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rate for Applicant is $250/hour, from April 17, 2012 through March 1, 2014 for Applicant Steven S. Altman. This rate increased to $300/hour from March 1, 2014. During the relevant service period, fees were generated in the amount of $1,505.00.

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. Fees in the amount of $1,505.00 pursuant to 11 U.S.C. § 331 and 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.

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $14.82 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
"Costs"		$14.82
Total Costs Requested in Application		$14.82

The Costs in the amount of $14.82 pursuant to 11 U.S.C. § 331 and 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.

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

Fees $1,505.00
Costs and Expenses $ 14.82

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

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

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

The Motion for Allowance of Fees and Expenses filed by Steven Altman ("Applicant"), Attorney for the Chapter 7 Trustee, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that [Name of Applicant] is allowed the following fees and expenses as a professional of the Estate:

Steven Altman, Attorney for the Chapter 7 Trustee
Fees in the amount of $ 1,505.00
Expenses in the amount of $ 14.82,

The Fees and Costs pursuant to this Applicant are approved pursuant to prior Interim Application are approved as final fees and costs pursuant to 11 U.S.C. § 330.

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.

28. 13-91297-E-7 ARIANA AVESTA, INC. MOTION TO ABANDON
WSS-2 W. Steven Shumway 3-31-14 [67]

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

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 31, 2014. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

In its Motion, Debtor Ariana Avesta, Inc. ("Debtor") states that seeks an order compelling the Trustee to abandon the bankruptcy estate's interest in the Debtors' business, Promotions by Schneider (a sole proprietorship) pursuant to Federal Rule of Bankruptcy Procedure 6007 and 11 U.S.C. § 554. Debtor operated a small gas station and convenience store in Wallace, California. The convenience store has a liquor license that allowed it to sell beer and wine.

Debtor states that the business convenience store has closed and the real property, which was owned by the principals of the Debtor, was foreclosed upon. The new owner of the real property would like to purchase the liquor license from the Debtor for $7,500. There are tax obligations owed by the Debtor in excess of $35,000. These tax obligations entitle the taxing authorities to rights to all proceeds from the sale of the liquor license. On this basis, Debtor asserts that there is no value in the business for unsecured creditors of the estate and it is burdensome to the estate. The proceeds from the sale of the liquor license will go directly to the taxing authorities from escrow.

The Declaration of Shaima Kakar, who testifies to being the corporate secretary of the Debtor business, states that she and her husband owned the real property where the Debtor business was operated. Kakar states that there tax obligations owed by the Debtor in excess of $35,000. These tax obligations entitle the taxing authorities to rights to all proceeds from the sale of the liquor license. ¶ 6, Declaration of Shaima Kakr, Dckt. No. 69.

It is unclear to the court, however, whether Debtor is requesting an order to compel the Trustee to abandon Debtor's business, or the liquor license that Debtor has valued at $17,000 on Debtor's Amended Schedule B. The Motion states that Debtor seeks to abandon the estate's interest in Debtor's business, Promotions by Schneider. Dckt. No. 67. Debtor's Memorandum of Points and Authorities filed in support of the Motion, however, states that Debtor seeks to abandon the liquor license, identified as License No. 451140, as property of the estate. Dckt. No. 71.

STIPULATION BY TRUSTEE

Gary Farrar, the Chapter 7 Trustee ("Trustee"), files a "stipulation" acknowledging that because of State of California tax liens, there is no equity for the estate in the liquor license owned by the Debtor. The Trustee asserts that the property is burdensome and/or inconsequential value to the estate. Dckt. No. 70.

SUPPLEMENT TO MOTION TO ABANDON PERSONAL PROPERTY OF THE ESTATE

Debtor state that it has been advised by the California State Board of Equalization that the Board believes the value of the liquor license to be $18,000, and that the Board will oppose any sale of the liquor license for less than $18,000. Dckt. No. 73. The new owner of the real property is willing to purchase the liquor license from the Debtor for $18,000. The proceeds from the sale of the liquor license will go directly to the taxing authorities from escrow.

Although Debtor has not sufficiently identified the property that it is requesting to be abandoned, and neither Debtor nor Trustee have provided the court with adequate identification information for the liquor license in their respective Motion to Abandon and Stipulation pleadings, the court turns to the Debtor's Memorandum of Points and Authorities to collect more information on the asset. FN.1.

FN.1. There is little reason why this identifying information should not be included in Debtor's Motion itself. In articulating additional grounds for relief and adding heretofore undisclosed factual contentions in the Debtor's Memorandum of Points and Authorities, Debtor is asking that the court accept a combined motion and points and authorities ("Mothorities") in which the court and Plaintiff are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Bankr. P. 9013), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Defendant.

The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and uniformly applied.

In the first paragraph of Debtor's Memorandum of Points and Authorities in Support of the Motion to Abandon, Debtor states that the Motion seeks an order abandoning the liquor license, No. 451140, as property

of the estate. ¶ 1, Memorandum of Points and Authorities, Dckt. No. 71. Having found this more specific reference in the body of Debtor's Memorandum of Points and Authorities filed in support of the Motion, the court will grant the Motion and order that the estate's interest in Liquor License No. 451140 abandoned.

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 Abandon Property filed by Ariana Avesta, Inc. ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the Property identified as:
>
> Liquor License No. 45110
>
> and listed on Schedule B as an "off site beer and wine license" by Debtor is abandoned to Ariana Avesta, Inc. by this order, with no further act of the Trustee required.

29. 14-90552-E-7 DHS-1 — TERRELL/ANELA BROWN — David S. Henshaw — MOTION TO AUTHORIZE RELEASE OF EXEMPTED FUNDS TO DEBTORS O.S.T. 4-23-14 [13]

Notice Provided: The Order Authorizing Release of Funds and Setting Further Hearing was served by the Clerk of the Court through the Bankruptcy Noticing Center on the parties on April 24, 2014. 7 days notice of the hearing was provided.

REVIEW OF MOTION

Terrell Brown and Anela Brown, the Chapter 7 Debtors, filed a Motion to Authorize the Release of Exempt Funds and an *ex parte* motion to shorten time for a hearing on the motion. Because of the exigent circumstances for the Debtors and the inability of the court to schedule a timely hearing, the court addresses the substance of the Motion to release exempt monies on an ex parte basis.

The Debtors commenced this Chapter 7 bankruptcy case on April 16, 2014. Irma C. Edmonds has been appointed as the interim Chapter 7 Trustee in the case. On Amended Schedule B the Debtors list four Wells Fargo Bank, N.A. accounts. They are not identified by the last four digits of the account numbers, but only show balances for each: $3,162.46, checking account; $25.00 savings account; $2,764.13 checking account; and $0.00 savings account. Dckt. 11 at 1.

On Amended Schedule C the Debtors claim the three bank accounts with positive balances as exempt pursuant to California Code of Civil Procedure § 703.140(b)(5), the California "wildcard exemption." The § 703.140(b)(5) exemptions claimed on Amended Schedule C total $19,042.67. *Id.* at 5. The maximum aggregate California wildcard exemption allowed is $25,340.00. Cal. C.C.P. § 703.140(b)(1), (5).

This court has previously addressed the issue that assets of a debtor in which exemptions are claimed are property of the estate until abandoned to the Debtor. *Zavala v. Wells Fargo Bank, N.A. (In re Zavala)*, 444 B.R. 181 (Bankr. E.D. Cal. 2011). This can cause a cash flow disruption at the start of a case if a debtor has just deposited a paycheck or other monthly income source just before the commencement of the case.

The present Motion to Authorize the Release of Exempt Funds states with particularity the following grounds (Fed. R. Bank. P. 9013) upon which the requested relief is based:

A. The Debtor has two checking accounts and two savings accounts at Wells Fargo Bank, N.A. FN.1.

FN.1. The Motion merely references a "Wells Fargo Bank," which the court interprets for this emergency motion as the banking institution Wells Fargo Bank, N.A. The FDIC lists on its financial institution web page five different federally insured financial institutions with the words "Wells Fargo Bank" in their names. http://www3.fdic.gov/idasp/main.asp. The California Secretary of State lists two corporations with the words "Wells Fargo Bank" in their names. http://kepler.sos.ca.gov/. When a specific entity is not clearly identified in the Motion the court routinely denies the motion without prejudice. However, in light of the circumstances the court will infer that it is Wells Fargo Bank, N.A. as the institution at which the accounts are located. If it is a different entity, the Debtors will have to proceed with a new motion.

B. The Debtors have filed an Amended Schedule C in which all of the monies in the accounts have been claimed as exempt.

C. Wells Fargo Bank, N.A. froze the funds upon the commencement of the Chapter 7 bankruptcy case by the Debtors.

D. It is asserted that the Chapter 7 Trustee asserts that she does not have the authority to permit the release of the monies to the Debtors.

E. The Debtors had outstanding checks for their mortgage payment and health insurance outstanding when the bankruptcy case was filed.

F. One of the Debtors needs to purchase medicine by Friday, April 25, 2013, for an ongoing medical condition.

G. The Debtors need to use the monies for payment of medications and basic living expenses.

H. The Debtors request that the court order the turnover of the exemption funds or authorize the Chapter 7 Trustee to authorize the release of the monies by Wells Fargo Bank, N.A.

Though the motion is thin on the grounds, such as identifying the accounts, amounts claimed as exempt, and the amounts to be disbursed to the Debtors, the court assembles the information from the other pleadings and schedules.

David Henshaw has provided his declaration in support of the Motion. He testifies to having received a letter from Wells Fargo Bank, N.A. which states that the accounts have been frozen following the bankruptcy filing as property of the estate subject to the control of the bankruptcy trustee. Exhibit A. (In Exhibit A the bank is identified as Wells Fargo Bank, N.A.). Counsel further testifies that the Trustee stated that she would not authorize the release of any monies until the Debtors completed the First Meeting of Creditors. Then, in a subsequent conversation the Chapter 7 Trustee stated that she did not have the authority to authorize the release of the monies (citing to an unnamed person in the U.S. Trustee's Office).

Debtor Terrell Brown has also provided his declaration in support of the Motion. He testifies that when the case was commenced the Debtors believed that the insurance payment, mortgage payment, and several other payments, which totaled $3,130.82, had cleared the bank prior to filing. They were incorrect. The Debtor testifies to seven checks not clearing the bank prior to the case being commenced. Mr. Brown also testifies to the need for monies to pay for insurance and medicine.

The court authorized Wells Fargo Bank, N.A. immediately disburse the total sum of $1,750.00 to Terrell Brown or Anela Brown, as however may be divided between them, from the bank accounts which are the subject to the account hold described in the April 18, 2013 letters which have been filed as Exhibit A in support of the Motion. The court also ordered that the $1,750.00 disbursed to Debtors shall be applied to the Debtors' claim of exemption pursuant to California Code of Civil Procedure § 703.140(b)(5), and subject to disgorgement if the court disallows the exemption.

The court also continued the hearing, with opposition to be presented orally at the hearing.

MAY 1, 2014 HEARING

At the hearing....