

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

June 12, 2014 at 10:30 a.m.

1. 14-90108-E-7 MARLENE RODRIGUEZ MDM-1 Thomas O. Gillis	MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR 5-2-14 [20]
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Final Ruling: No appearance at the June 12, 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, and Office of the United States Trustee on May 2, 2014. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion to Extend the Time to File an Objection to Discharge was properly 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 and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Extend the Time to File an Objection to Discharge is granted.

Michael D. McGranahan, Chapter 7 Trustee ("Trustee") moves for an order extending the deadline to file an objection to debtor's discharge.

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). The Trustee explains that he made oral demands at the 341 Meetings, and written demand on the debtor and her counsel, for credit card statements that are necessary for prosecution of certain preference payments. Copies of Trustee's demand letters to debtor, and debtor's response, are provided in Exhibits 1, 2, and 3 to the Trustee's Declaration. Trustee states that the credit card statements have not been provided.

June 12, 2014 at 10:30 a.m.

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 the Time to File an Objection to Discharge 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 is granted and the deadline for the Chapter 7 Trustee to object to Debtor's discharge is extended to August 4, 2014.

2. [11-93411](#)-E-11 SANJIV/SHEENA CHOPRA
RMY-38 Robert M. Yaspan

**MOTION FOR COMPENSATION BY THE
LAW OFFICE OF LAW OFFICES OF
ROBERT M. YASPAN DEBTOR'S
ATTORNEY(S)
5-2-14 [[944](#)]**

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, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on May 2, 2014. By the court's calculation, 41 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P.

2002(a)(6), 21 day notice requirement.)

The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here the moving party reused a Docket Control Number. This is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

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

Law Offices of Robert M. Yaspan, the "Attorney" ("Applicant") for Sanjiv and Sheena Chopra the Debtors in Possession ("Client"), makes a Second Interim 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 May 1, 2012 through February 20, 2014. The order of the court approving employment of Applicant was entered on January 31, 2012.

In the Robert Yaspan's Declaration, he provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

Administrative Services: Applicant spent 42.26 hours in this category for total reduced amount of fees of \$17,224.75. Specifically included in this category include: work relating to the review and revision of the agenda of matters prepared for the Court; the analysis of the monthly operating reports; reviewing and analyzing correspondence from the Internal Revenue Service regarding tax payment issues; review of the Debtors' tax returns; emails to the Debtors regarding tax return issues; preparation for and court appearances relating to Status Conferences; telephone calls with the Debtors re hearings; preparing of documents relating to various filings; general meetings and telephone calls with the Debtors regarding status of the case; preparation and drafting of applications to employ, specifically for the appraiser, Steven Geller and the accountant, Robert Farias; preparation of the fee application for the appraiser so he could be paid for his work effort and coordination of the payment; emails with the accountant regarding his employment application; telephone calls and emails with the United States Trustee's office regarding various issues relating to the bankruptcy; review and analysis of documents relating to the Chapter 11 proceeding; reviewing tentative rulings; emails with the Debtors regarding requested documents; telephone call with the Debtors regarding Sanjiv Chopra's hearings as it relates to the claims that were filed by Sanjiv Chopra's father (eventually to obtain its own subcategory); meetings and telephone calls regarding the status of matters; discussions regarding the amendment of the schedules; issues relating to the bar date in light of the You Fit litigation (own subcategory); preparation for deposition in Nagra

matters (own subcategory).

Claims and Objections to Claims: Applicant spent 6.58 hours on claims issues for total reduced fees of \$2,632.00 and 57.83 hours on objections to claims issues for total reduced fees of \$23,615.31. Included in these time categories are services related to the claims, including preparation and filing of objections to proofs of claim, stipulations and/or settlements relating to the objections to proofs of claims, motions to compromise, and general issues arising related to the proofs of claim. The billing included preparation of claim objections, motions, agendas for the court regarding the various claim objections, hearings, drafting documents relating to the settlements, and communications with opposing counsel and/or the Debtors. Debtors filed and/or resolved claims objections with The Leasing Company, Rachel Surber, the IRS, Banc of the West/Jonathan Neil, Sanghera, American Express, Focus Up /Knapp, Crockett, and Sawtantra Chopra. When a claim involved became more involved, these claims were broken out into their own category, which are discussed in more detail under that particular category. This includes claims for Surber, Sethi and Nagra.

Edenathan Services: Applicant spent 199.48 hours in this category for total fees of \$91,807.25. Applicant provided services related to the ongoing Edenathan litigation, which involved four lawsuits (two against Debtor, and two against Debtor's father) and an objection to the Edenathan proof of claim. Applicant initially researched various legal theories to determine whether a motion to dismiss could be properly filed, but ultimately determined that the Debtors would answer the first amended complaint and proceed with the theories as defenses. The matter involved depositions of key witnesses; review of prior discovery and depositions in the State Court case; and extensive settlement negotiations (including attempts to mediate in front of Central District bankruptcy judges). Debtors brought a motion for turnover of the property, which although denied, facilitated the settlement with the creditor. The case was scheduled for trial, and Applicant prepared for trial with both legal research and preparation of documents for trial, including the retention of the appraiser for the case. Once settlement was reached, there were several drafts of the settlement documents that were exchanged. The various lawsuits and objections were eventually resolved and a motion to compromise was filed and granted.

Fee Application Services: Applicant spent 12.03 hours in this category for total fees of \$11,875.50. The fees requested are for the preparation of the first interim fee application and work to prepare the final fee application. As set forth below, additional time of approximately 13.9 hours is incurred and being estimated in the preparation of this final fee application.

Golds Gym Franchising Services: Applicant spent .30 hours in this category for total fees of \$150.00. Applicant performed services related to an issue of dischargeability of Debtor's debts as a guarantor of the franchise obligations of some of his wholly owned companies.

Knapp Services: Applicant spent 12.84 hours in this category for total fees of \$5,133.34. This was a creditor who claimed a \$492,000 claim (as amended) and an objection to the claim was filed. There was a settlement

that provided that the claim would be reduced to \$448,000 and a payment from a third party. The amount of recovery was capped. A motion to compromise was filed and approved by the Court.

Magna Services: Applicant spent 1.9 reduced to 1.2 hours in this category for total fees of \$480.00. This category involves a small claims case that was ready to go to trial, notifying the court and filing and preparing correspondence and documents regarding the automatic stay. An entry for the You Fit category was inadvertently included in this section. It is being reduced in this category and will be included in the You Fit category.

Microtel Services: Applicant spent 45.45 hours in this category for total fees of \$13,389.95. This category revolves around the claims by the Debtor Sanjiv Chopra as to whether or not he was harmed by the actions of Microtel. The Debtor had already brought this action for damages as against Microtel and a franchise broker. Applicant took over the prosecution of the case, developed the facts, and settled the matter. Various drafts of the settlement agreement were exchanged. During the drafting of the settlement documents, status conferences were continued. The court initially denied the motion to compromise, and revisions needed to be made to the motion itself and to the settlement agreement. An additional issue arose during the second motion to compromise, wherein the attorney for the Chapter 11 Trustee for the Sawtantra and Aruna Chopra case needed additional time to determine whether or not it had a claim to the settlement proceeds. After discussions with the attorney for the Chapter 11 Trustee, it was determined that there was no entitlement and the motion to compromise was ultimately granted.

Motions: Applicant spent 11.75 hours in this category for total reduced fees of \$4,194.25. Applicant states this is a general category relating to various motions that have been filed. The matters include the relief from stay motion filed by Ford Motor Credit and matters relating to various You Fit motions such as the injunction motion, relief from stay motion and the motion for contempt. Also included in this category are work on a variety of motions to compromise, including Bank of the West. There is also some billing related to the fee application of the appraiser, Stephen Geller.

Nagra: Applicant spent 131.62 hours in this category for total reduced fees of \$57,287.03. Applicant prosecuted Debtor's action for damages against Microtel and a franchise broker, and settled the matter for which a motion to compromise will be filed with this court. This matter commenced as a claims objection. The claim was for in excess of \$3,000,000. The proof of claim procedure could not determine the claim on the original papers. A supplemental proof of proof of claim was filed by Nagra and Debtors filed an answer to the supplemental proof of claim. Additionally, an adversary complaint was filed by Debtors against Nagra and the cases were administered together. The case was fully litigated with a 2004 exam of Debtor Sanjiv Chopra and other depositions that took place over a couple of days. Issues arose during the depositions, and Debtor's office contacted the Court regarding facilitation of discovery issues (which fortunately were worked out). The case was scheduled to proceed to trial and trial work was conducted. Nagra had filed objections to the plan confirmation and attempted to substantively consolidate the case with entities owned by Debtors and to

have a Chapter 11 Trustee appointed. Both of these motions were denied. The litigation with Nagra was settled after over a year of litigation. The final settlement involved Debtors guaranteeing a payment from a third-party non-debtor limited liability company of \$300,000 with full ownership being vested of certain membership interested being owned by an entity belonging to Debtors.

Plan Services: Applicant spent 315.25 hours in this category for total reduced fees of \$141,165.41. This category includes the services related to the drafting, promulgation and confirmation of the Plan of Reorganization. This was a complicated plan to prepare on many levels and brought complex issues to the forefront, such as nondischargeability complaints filed against only spouse and the potential obligations of the community. Additionally, there were issues relating to potential punitive damages and how they would be assessed against the community estate that needed to be addressed. There were three plans and disclosure statements that were filed with the Court. In addition, there were objections to the Plan of Reorganization. Revisions to the versions of the were oftentimes subject to various settlements that were occurring during the process. Debtors had to appraise the gym assets and had to work with the appraiser to determine the valuations for the Plan. Because of the objections to claims that were pending, Applicant also researched issues relating to the claim estimation. Other matters that occurred during the Plan were motions filed by Nagra and Sethi regarding substantive consolidation and how it affected the plan and temporary allowance that needed to be researched and opposed. Applicant had to research and prepare motions to amend the ballots and to late file the ballots.

Postcon: Applicant spent 1.30 hours in this category for total fees of \$715.00. This category applies to miscellaneous work on the case after an interim confirmation order was entered. The billing in this category includes work on the plan payments and a hearing on the motion to compromise with Nagra.

Sawtantra: Applicant spent 15.08 hours in this category for total fees of \$6,386.50. This category relates directly to the proof of claim of Sawtantra Chopra that was filed as a secured claim in the sum of \$485,000. Sawtantra Chopra had filed a Chapter 11 bankruptcy and a Chapter 11 Trustee was appointed for the estate. Initially, the Debtors tried to resolve the claim with Sawtantra's Chapter 11 Trustee and provided information to the Chapter 11 Trustee relating to Debtors' position and a proposed stipulation to settle the matter. A settlement was not reached with Sawtantra's Chapter 11 Trustee, and thereafter an objection to the proof of claim in its entirety was filed. Ultimately, the claim was disallowed.

Sethi: Applicant spent 30.78 hours in this category for total fees of \$13,494.75. This category is the companion claim objection to the Nagra case. Since both of the creditors were represented by the same counsel, depositions and 2004 exams were billed to Nagra, except to the extent that it dealt solely with the Sethi matter. The claim tiled by Sethi was in excess of \$394,000. Adversary rules applied to this case, and disclosures were served and depositions taken. Documents were also prepared for the pre-evidentiary hearing conference, including exhibit, witness and discovery

lists. A statement was also prepared regarding the direct testimony. The claim settled for an actual payout of \$31,000 over time and Sethi withdrew his objections to the Plan.

Settlements: Applicant spent 17.69 hours in this category for total fees of \$7,355.48. This category deals directly with work related to settlements, including the preparation of the settlement documents and the motions to compromise. Various settlements that were billed to this category include, Sanghera, MM&H, BOW/JNA and (attempted Sawtantra). The settlement with BOW/JNA included the preparation of satisfactions of judgment, since judgments were recorded in the real property and personal property records.

Substantive Consolidation: Applicant spent 45.83 hours in this category for total fees of \$20,627.50. A motion for substantive consolidation was filed in or about October 2013 by Nagra in order to substantively consolidate the Debtors' estate with assets owned by the Debtors. As such, the Debtors were forced to oppose this motion. Additionally, there was an attempt to appoint a Chapter 11 Trustee. The manner the motion was drafted left open the potential for many of the entities owned by Debtors to become part of the estate; thus increasing the number of creditors. Therefore, it was necessary to prepare a detailed opposition to the motion, including declarations. Debtors ultimately prevailed on their opposition and there was no substantive consolidation - thus facilitating the settlement with Nagra and the plan being confirmed.

Surber: Applicant spent 17.69 hours in this category for total reduced fees of \$4,833.12. This category involves a claim objection to a claim by Rachel Surber. Although the amount of the claim was not excessive, during the course of the bankruptcy, Surber had two small claim cases against the Debtor and obtained a default judgment against the Sanjiv Chopra in one of the small claims cases. Also, a mechanic's lien was recorded. A settlement was reached, but besides the settlement agreement, additional work was needed to be done to address the mechanic's lien, and dismissing the cases (complicated by the judgment being entered in one case). A motion to compromise was filed and approved by the Court.

YouFit: Applicant spent 275.88 hours in this category for total reduced fees of \$61,709.00. This was a case that was filed post-petition in the Florida District Court against Debtors and entities owned by Debtors. There were issues regarding whether the alleged claim was pre-petition or post-petition by the Debtors and whether the automatic stay applied. Debtors removed the case to the bankruptcy Court and a notice of removal was filed. A motion to strike was subsequently filed by the plaintiffs in the District Court and Applicant drafted a response to the motion to strike. Nonetheless, a motion to dismiss was considered, but the Debtors ultimately filed an answer in the bankruptcy court for the district court action. The District Court granted the motion to strike the removal, however, there was still an issue regarding the motion for relief from the automatic stay. A motion for contempt and sanctions was filed for, what the Debtors believed, was a violation of the automatic stay. After the motion for contempt was filed, the plaintiffs filed a motion to confirm that the automatic stay was not in effect.

An extensive amount of work was incurred in opposing the motion to

confirm the stay was not in effect, as it was necessary for the Debtors to provide evidence that the claims were within the purview of the bankruptcy Court and the automatic stay did apply. Debtors also brought an adversary complaint for declaratory relief against You Fit that included a request for a temporary restraining order and preliminary injunction. The motion for injunction was filed and brought on an ex parte basis. The Debtors prevailed on the motion confirming that the relief from stay was not in effect. As such, the plaintiffs brought a "renewed" motion for relief from stay. The Court set briefing schedules with regard to all other hearing and adversaries. Applicant prepared another detailed opposition relating to the renewed motion for relief from the automatic stay. Even though an answer was filed in the Bankruptcy Court, the plaintiffs in the District Court action filed a default against the Debtors, thus precipitating bringing a motion to set aside the default.

Throughout the litigation, Applicant states there were continual attempts to settle the case. Applicant prepared stipulations and orders to continue the numerous hearings while settlement discussions occurred. The settlement negotiations broke down and the motions were fully briefed by the parties. This Court ultimately allowed the relief from the automatic stay with regard to the case with the District Court determining the date of the damages. The other motions were denied by the Court. After the relief from stay was determined, the plaintiffs filed a motion for sanctions against the Debtors in the District Court case. Applicant successfully defended the Debtors in the motion, but was forced to prepare an extensive opposition. The plaintiffs brought motions to remand and abstain from the adversaries in the case. The motion to remand was denied. This was denied by the Court, but ultimately, the adversaries were resolved and/or dismissed.

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 [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 negotiating various settlements, engaging in complex litigation regarding claims, and ultimately confirming a Chapter 11 plan. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES ALLOWED

Pursuant to prior Interim Fee Applications the court has approved pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330.

Application	Interim Approved Fees	Interim Fees Paid
First Interim	\$145,370.95	\$72,685.00
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	\$145,370.95	

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
Robert Yaspan (1972)	49.08	\$500.00	\$24,540.00
	315.94	\$550.00	\$173,767.00
	27	\$250.00	\$6,750.00
Debra Brand (1992)	71.15	\$400.00	\$28,460.00
	254.78	\$435.00	\$110,829.30
Jason Gorowitz (2003)	75.02	\$400.00	\$30,008.00
	199.80	\$435.00	\$86,913.00
Joseph McCarty (1990)	8.80	\$400.00	\$3,520.00
	217.43	\$435.00	\$94,582.05
Tatyana Menachian (JD/paralegal)	2.0	\$150.00	\$300.00
	23.80	\$160.00	\$3,808.00
	1.0	\$90.00	\$90.00
Nancy Nakamura (paralegal)	.2	\$150.00	\$30.00
	3.71	\$160.00	\$593.60
Alla Viner (secretary)	1.6	\$85.00	\$136.00
Alla Viner	5.8	\$90.00	<u>\$522.00</u>

Total Fees For Period of Application	\$564,848.95
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However, Applicant seeks the voluntary reduction in fees to **\$481,444.14**. Applicant has reviewed each category and reduced several charges voluntarily. Applicant states the total of the hours spent on this matter from May 1, 2012 to February 20, 2014 was approximately 1,242.21. The blended hourly rate according to the billable hours is \$449.87 but that after the reductions, the blended hourly rate is **\$387.57 per hour**. Applicant also states that conferencing hours are less than 5% of the total hours billed.

A review of the task billing analysis illustrates the complex nature of this proceeding and the difficulties that have confronted the Debtors and the Applicant. Exceptional knowledge and skills have been required to counsel the Debtors through this proceeding and to provide them with the information and analysis necessary to enable the Debtors to marshal their assets and confirm a viable Chapter 11 Plan of Reorganization. Applicant has shown knowledge and skill appropriate for the hourly rates billed and used reasonable services to benefit the estate.

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. Second Interim Fees in the amount of \$481,444.14 and prior Interim Fees in the amount of \$145,370.95 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Plan Administrator under the confirmed plan from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

COSTS ALLOWED

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$10,103.64 pursuant to this applicant. Pursuant to prior interim applications, the court has allowed costs of \$3,601.00.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage		\$2,379.90
Copies	\$.10 per copy	\$3,164.90
Filing Fees and Court Costs		\$65.95
PACER Charges	\$.10 per copy	\$2,060.60
Federal Express		\$86.09
Deposition Transcripts		\$1,866.50

Attorney Service	filing service	\$209.00
Travel		\$271.00
Total Costs Requested in Application		\$10,103.94

The Second Interim Costs in the amount of \$10,103.94 and prior Interim Costs in the amount of \$3,601.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Plan Administrator under the confirmed plan from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

Applicant is allowed, and the Plan Administrator under the confirmed plan is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	\$481,444.14
Costs and Expenses	\$ 10,103.94

pursuant to this Application and prior interim fees of \$145,370.95 and interim costs of \$3,601.00 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 Law Offices of Robert M. Yaspan, the "Attorney" ("Applicant") for Sanjiv and Sheena Chopra the Debtors in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Law Offices of Robert M. Yaspan is allowed the following fees and expenses as a professional of the Estate:

Law Offices of Robert M. Yaspan, Professional Employed by Debtor in Possession

Fees in the amount of \$ 481,444.14
Expenses in the amount of \$ 10,103.94,

The Fees and Costs pursuant to this Applicant, and Fees in the amount of \$145,370.95 and costs of \$3,601.00 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 Plan Administrator under the confirmed plan is authorized to pay the fees allowed by this Order from the available Plan Funds in a

manner consistent with the order of distribution under the confirmed Plan.

3. [12-92723](#)-E-7 JOHN/KRISTINE ROBINSON MOTION FOR COMPENSATION BY THE
 ADJ-3 Dan Nelson LAW OFFICE OF BERLINER COHEN FOR
 ANTHONY D. JOHNSTON,
 TRUSTEE'S ATTORNEY(S)
 5-21-14 [[43](#)]

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, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on May 21, 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.

FEES REQUESTED

Anthony D. Johnston, Berliner Cohen, the Attorney ("Applicant") for Michael D. McGranahan the Chapter 7 Trustee ("Client"), makes a 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 14, 2013 through May 21, 2014. The order of the court approving employment of Applicant was entered on May 21, 2014, Dckt. 43.

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

Asset Analysis and Recovery: Applicant spent 5.2 billable hours in this category. Applicant reviewed the Adversary proceeding against Debtors by Modesto European to determine if there were any potential assets to recover for the benefit of the bankruptcy estate. To date, there is no evidence that the bankruptcy estate will recover any assets as a result of the Adversary proceeding. Applicant prepared the Settlement Agreement (and motion for its approval) involving the fraudulent transfer of the Volvo by Debtors to their daughter.

Fee and Employment Applications: Applicant spent 3.9 billable hours in this category. Applicant prepared the necessary application and supporting documents to obtain approval for the Trustee to employ him for this case. Applicant also prepared this application for allowance of compensation, the supporting declarations, the notice of hearing, and the certificates of service. Applicant is waiving any fees in connection with his appearance at the hearing.

Asset Disposition: Applicant spent 1.0 billable hours in this category. Applicant prepared a Purchase Agreement for the Debtors' purchase of a camper from the Trustee for \$1,350.00.

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 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 settling the fraudulent transfer. The estate has \$11,400.00 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy

estate and 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
Anthony Johnston	10.10	\$250.00	<u>\$2,525.00</u>
Total Fees For Period of Application			\$2,525.00

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 \$2,525.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$212.05 for copies and postage pursuant to this applicant.

The Final Costs in the amount of \$212.05 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	\$2,525.00
Costs and Expenses	\$ 212.05

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 Anthony Johnston ("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 Anthony Johnston is allowed the following fees and expenses as a professional of the Estate:

Anthony Johnston, Professional Employed by Trustee

Fees in the amount of \$ 2,525.00
Expenses in the amount of \$ 212.05,

The Fees and Costs pursuant to this Applicant are approved as final fees and costs pursuant to 11 U.S.C. § 330.

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

4. 09-92630-E-12 **DANIEL/JANEY BAXTER** **MOTION FOR ENTRY OF DISCHARGE**
CWC-7 **Carl W. Collins** 5-1-14 [[96](#)]

Tentative Ruling: The Motion for Entry of Discharge 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 - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, parties requesting special notice, and Office of the United States Trustee on May 1, 2014. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Discharge 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 and other parties in interest are entered.

The Motion For Entry of Discharge is denied without prejudice.

The Motion for Entry of Discharge has been filed by Daniel Leroy Baxter and Janey Ayers Baxter, "Debtor."

PLEADING WITH PARTICULARITY

However, the Motion for Entry of Discharge 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 (confirmation) is based. The motion merely states that the Debtors request an order that a discharge shall be entered in this Chapter 12 case and then instructs the court to find the requirements for discharge in the Declaration of the Debtors.

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."

**THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING
IF MOVANT CAN SHOW PROPER GROUNDS FOR WHICH THE REQUESTED
RELIEF MAY BE ENTERED IN LIGHT OF THE FORGOING ISSUES**

ALTERNATIVE RULING

With some exceptions, 11 U.S.C. § 1328 permits the discharge of debts provided for in the Plan or disallowed under 11 U.S.C. § 502 after the completion of plan payments. The Chapter 12 Trustee's final report was filed on April 2, 2014, and no objection was filed within the specified 30 day period. See Fed. R. Bankr. P. 5009. The order approving final report and discharging the trustee has not been entered to date. The entry of an order approving the final report is evidence that the estate has been fully administered. See *In re Avery*, 272 B.R. 718, 729 (Bankr. E.D. Cal. 2002).

The Debtor's Declaration certifies that the Debtor:

1. has completed the plan payments and fulfilled all the requirements under the confirmed Chapter 12 Plan,
2. does not have any delinquent domestic support obligations,
3. that § 522(q) does not apply because Debtors have not claimed an exemption in property over \$136,875.00.
4. is not a party to a pending proceeding which implicates 11 U.S.C. § 522(q)(1)(A) or (B).

There being no objection, the Debtor is entitled to a discharge.

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

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

The Motion for Entry of Discharge filed by the Daniel Leroy Baxter and Janey Ayers Baxter, Debtors-in-Possession, "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 court shall enter the discharge for each debtor in this case.

5. [09-92630](#)-E-12 DANIEL/JANEY BAXTER
CWC-8 Carl W. Collins

MOTION TO MAINTAIN CHAPTER 12
CASE OPEN PENDING RESOLUTION OF
POST-DISCHARGE MATTERS
5-1-14 [[100](#)]

Tentative Ruling: The Motion to Maintain Chapter 12 Case Open 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 - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, parties requesting special notice, and Office of the United States Trustee on May 1, 2014. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion to Maintain Chapter 12 Case Open Pending Resolution of Post-Discharge Matters 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 and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The hearing on the Motion to Maintain Chapter 12 Case Open Pending Resolution of Post-Discharge Matters is continued to 10:30 a.m. on September 4, 2014.

Debtors-in-Possession Daniel and Janey Baxter ("Movant") request that their Chapter 12 case remain open pending the resolution of certain post-discharge matters. Movant states that the Chapter 12 plan was

confirmed on December 8, 2009 and that they have made all payments and moved for a discharge. Movant states that until they receive their discharge in this case, they will be unable to request that the California State Board of Equalization to release its tax lien on the real property located at 11802 Sawyer Avenue, Oakdale, California, which was valued at zero by the court.

Movant also alleges that "Bank of America" has erroneously impounded property taxes and property insurance under its Note secured by a Deed of Trust which was modified by the Chapter 12 plan in violation of the Order Confirming Plan. Movant seeks to leave the case open pending either Movant's successful resolution of these issues, or for sufficient time to file contested matters or adversary proceedings.

The court believes that continuing the hearing on this Motion, which in and of itself will prevent the closing of the case, is the prudent method to allow the Debtors to engage in the post-plan completion documentation and determine whether the case should remain open, an adversary proceeding is required (and the case can be closed), or that everything has been resolved and they can dismiss this motion pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041.

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 Maintain Chapter 12 Case Open Pending Resolution of Post-Discharge Matters filed by Debtors-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion to Maintain Chapter 12 Case Open Pending Resolution of Post-Discharge Matters is continued to 10:30 a.m. on September 4, 2014.

6. [12-91736](#)-E-12 ANTONIO GOMES
MNE-1 Thomas O. Gillis

MOTION TO DISMISS CASE FOR
FAILURE TO MAKE PLAN PAYMENTS
4-16-14 [[209](#)]

Tentative Ruling: The Motion to Dismiss the Bankruptcy Case 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, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on April 16, 2014. By the court's calculation, 57 days' notice was provided. 14 days' notice is required.

The Motion to Dismiss the Bankruptcy Case 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 Dismiss the Bankruptcy Case is denied without prejudice.

M. Nelson Enmark, Chapter 12 Trustee, moves to dismiss the case on the grounds that the Debtor has failed to make payments as required by the plan. Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1208(c)(1).

The Trustee testifies that the Debtor serving as Plan Administrator has "failed to make payments as required by the Plan." Dckt. 211. Other than that finding of fact by the Trustee, no other testimony as to the grounds is provided. Additionally, the Motion fails to state with particularity the grounds upon which dismissal is requested (i.e. the specific amounts in default, the monthly payments missed, and other

grounds).

For the court to grant the Motion, it would have to abdicate the court's duty to make findings of fact and conclusions of law, and allow the Movant to dictate what orders shall be entered by the court. Though the court denies the present motion, it anticipates a new motion being filed if the default has not been cured prior to June 5, 2014. The court further anticipates that in connection with any motion to dismiss due to payment defaults, the Debtor will not only explain the reason for the default and what has been done to prevent that from occurring in the future, but also provide a credible explanation as to how the Debtor had the "extra" monies in a given month to cure prior the month default(s).

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 Dismiss the Chapter 12 case filed by the Chapter 12 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 Dismiss is denied without prejudice.

7. [11-94146](#)-E-11 DOMINIC/MARIA DEPALMA
WFH-23 Naresh Channaveerappa

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF WILKE, FLEURY,
HOFFELT, GOULD & BIRNEY, LLP
FOR MEGAN A. LEWIS, TRUSTEE'S
ATTORNEY(S)
5-8-14 [[482](#)]

Final Ruling: No appearance at the June 12, 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, Chapter 11 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on May 8, 2014. By the court's calculation, 35 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

Wilke, Fleury, Hoffelt, Gould & Birney, LLP ("Wilke Fleury"), the "Attorney" ("Applicant") for Michael D. McGranahan, the Chapter 11 Trustee ("Client"), makes a Third Interim 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 April 5, 2012 through March 31, 2014. The order of the court approving employment of Applicant was entered on May 29, 2012.

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

Asset Analysis and Recovery: Applicant spent 8.0 hours and incurred total fees of \$2,865.00 in connection with this task. During the time covered by this fee application, Applicant assisted Trustee by preparing the stipulated judgment and application for approval of the stipulation between

the Trustee and Gino Farming, LLC and Gino DePalma. The stipulated judgment resolved a pending adversary proceeding between the Trustee, Gino Farming LLC and Gino DePalma. In the event the Trustee does not have sufficient funds under the confirmed Plan, he will be able to enforce the judgment against Gino Farming LLC or Gino DePalma.

Asset Disposition: Applicant spent .8 hours incurred total fees of \$264.00 in connection with this task. During the time covered by this fee application, Applicant assisted the Trustee in facilitating the settlement between the Trustee and Chase concerning the Debtor's Lexus.

Avoidance Action: Applicant spent 10.1 hours incurred total fees of \$2,952.00 in connection with this task. During the time covered by this fee application, Applicant assisted the Trustee in analyzing the transfer of the Garst Road Property from the Debtor's to Gino Farming, LLC. Applicant analyzed whether it was a fraudulent transfer and recoverable under the applicable bankruptcy laws. In addition, Applicant assisted the Trustee in drafting the complaint against Gino Farming, LLC and Gino DePalma for avoidance of the transfer and recovery of \$720,000, which represented the difference in value between the payment for the property and the fair market value at the time of the transfer. These efforts of preparing and filing the complaint, resulted in the Trustee obtaining a stipulated judgment for the full amount of \$720,000. This provided a substantial benefit to the estate because in the unlikely event that the Trustee did not have cash on hand to pay creditors in full pursuant to the plan, he holds the power to enforce this judgment.

Case Administration: Applicant spent 1.0 hours and incurred total fees of \$226.00 in connection with this task. During the time covered by this fee application, Applicant consulted with the Trustee about the status of the case, and engaged in tasks necessary to coordinate the various duties involved in administering the legal aspects of this case. Applicant attended a status conference and consulted the Trustee regarding his bond requirements post-confirmation.

Claims and Plan: Applicant spent 12.7 hours and incurred total fees of \$4,237.00 in connection with this task. During the time covered by this fee application, Applicant assisted the Trustee with analyzing claims in connection with drafting the plan treatment for creditors. Specifically, Applicant negotiated and prepared a motion to approve payment of Farmers & Merchants Bank in full prior to plan confirmation. This benefitted the estate by reducing interest and it eliminated the risk of a pending motion to dismiss. The Trustee was putting what turned out to be essentially a consensual plan wherein creditors were paid in full. If the bankruptcy case had been dismissed, the creditors would have faced a long state court battle to get paid.

Financing/Cash Collection: Applicant spent 4.2 hours and incurred total fees of \$1,290.00 in connection with this task. During the time covered by this fee application, Applicant prepared its fifth and final motion for use of cash collateral. Applicant worked closely with the Trustee to ensure that an accurate, realistic and acceptable budget was put in place for the last duration of the case.

Fee/Employment Applications: Applicant spent 22.8 hours and incurred total fees of \$5,842.00 in connection with this task. During the time covered by this fee application, Applicant worked on various applications. Applicant prepared its second interim fee application and attended the hearing. Applicant advised the trustee on payment to Anthony Drew Rowe and Ben Hetrick. Applicant reviewed and revised the Trustee's application to employ a real estate broker to sell the Las Vegas Property and negotiate with US Bank. Applicant also began work on this final fee application during this period.

Plan and Disclosure Statement: Applicant spent 121.8 hours and incurred total fees of \$39,952.00 in connection with this task. During the time covered by this fee application, Applicant spent extensive and substantial time analyzing various plan options, developing and negotiating a plan of reorganization. Applicant had numerous communications negotiating with Debtors' counsel. Debtors' counsel was not experienced in bankruptcy but overall was instrumental in assisting the Trustee form a consensual plan. However, it took a substantial amount of time to educate the Debtors through their counsel of the plan process and impact on claims. Applicant assisted the Trustee in analyzing different structures of the plan and considering the impact on taxes and cash flow. Applicant worked with the Trustee on developing the plan projections and cash flow projections that would demonstrate the amount of estimated cash on hand to make the plan work. As discussed above, Applicant also negotiated with Gino DePalma (through Debtors' counsel) and structured the plan to have a safety net with the possible enforcement of a stipulated judgment as needed. Applicant assisted the Trustee in developing the plan treatment for priority creditors, secured creditors, and unsecured creditors. Specifically, Applicant actively negotiated with US Bank that held 4 separate claims, Bonnie Anderson of the unsecured creditors class, F&M Bank before payment in full. Applicant incurred time drafting the disclosure statement, plan of reorganization, amended plan, confirmation brief and supporting evidence. Applicant's efforts resulted in a consensual 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 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 [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 drafting the disclosure statement, plan of reorganization, amended

plan, confirmation brief and supporting evidence resulting in the confirmation of a consensual Chapter 11 plan. 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	2013 Hourly Rate	2014 Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Daniel L. Egan	\$390.00	\$390.00	\$5,265.00
Megan A. Lewis	\$330.00	\$340.00	\$46,680.00
Steven J. Williamson	\$280.00	\$285.00	<u>\$5,684.00</u>
Total Fees For Period of Application			\$57,629.00

Pursuant to prior Interim Fee Applications the court has approved pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330.

Application	Interim Approved Fees	Interim Fees Paid
First Interim	\$59,394.50	\$59,394.50
Second Interim	\$102,679.00	\$51,339.50
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	\$162,073.50	

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. Third Interim Fees in the amount of \$57,629.00 and prior Interim Fees in the amount of \$162,073.50 (for a total of \$219,702.50) are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Plan Administrator under the confirmed plan from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$2,473.90 pursuant to this applicant. Pursuant to prior interim applications, the court has allowed costs of \$4,002.31.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Photocopies	.10 per page	\$1,626.00
Postage		\$503.65
Federal Express		\$51.25
Filing Fees		\$293.00
Total Costs Requested in Application		\$2,473.90

The Third Interim Costs in the amount of \$2,473.90 and prior Interim Costs in the amount of \$4,002.31 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Plan Administrator under the confirmed plan from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

Applicant is allowed, and the Plan Administrator under the confirmed plan is authorized to pay, the following amounts as compensation to this professional in this case:

Third Interim Fees	\$57,629.00
Costs and Expenses	\$ 2,473.90

pursuant to this Application and prior interim fees of \$162,073.50 and interim costs of \$4002.31 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 Wilke, Fleury, Hoffelt, Gould & Birney, LLP, the "Attorney" ("Applicant") for Michael D. McGranahan, the Chapter 11 Trustee ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Wilke, Fleury, Hoffelt, Gould & Birney, LLP is allowed the following fees and expenses as a professional of the Estate:

Wilke, Fleury, Hoffelt, Gould & Birney, LLP , Professional
Employed by Trustee

Fees in the amount of \$ 57,629.00
Expenses in the amount of \$ 2,473.90,

The Fees and Costs pursuant to this Applicant, and
Fees in the amount of \$162,073.50 and costs of \$4002.31

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 Plan Administrator under the confirmed plan is authorized to pay the fees allowed by this Order from the available funds of the Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

8. [11-94146-E-11](#) **DOMINIC/MARIA DEPALMA** **MOTION FOR COMPENSATION FOR**
WFH-24 **Naresh Channaveerappa** **ATHERTON & ASSOCIATES, LLP,**
ACCOUNTANT(S)
5-8-14 [[490](#)]

Final Ruling: No appearance at the June 12, 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, Chapter 11 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on May 8, 2014. By the court's calculation, 35 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

Atherton & Associates, LLP, the "Accountant" ("Applicant") for Michael D. McGranahan the Chapter 11 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 April 24, 2012 through March 27, 2014. The order of the court approving employment of Applicant was entered on May 15, 2014.

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

Correspondence: Applicant spent 7.70 hours in this category. Applicant assisted Client with information needed to prepare the estate's tax returns, and regarding IRS and Franchise Tax Board notices relating to returns and information needed by those taxing agencies.

Tax Planning: Applicant spent 30.2 hours in this category. Applicant assisted the Trustee with tax planning. Many of the Debtors' parcels of real property had low tax bases, and as a result, would generate significant tax liability if sold. Applicant prepared a number of tax projections at the Trustee's request to assist him in deciding which parcels were to be sold, and to assist him in developing a plan of reorganization that would limit tax liability.

Tax Preparation: Applicant spent 38.6 hours in this category. Applicant prepared tax returns for the years ending October 31, 2013 and October 31, 2014. Applicant also prepared 1099s for the estate, applied for an EIN, gathered and summarized the estate activity through December 31, 2012, and change the year end to October 31.

Fee Applications: Applicant spent 2.1 hours in this category. Applicant assisted in the preparation of this application by preparing and reviewing the time records and the declaration in support.

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 preparing estate tax returns. The estate has \$184,188.10 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
Maria Stokman (Partner)	72.6	\$230.00	\$16,698.00
Linda Stanley (Accountant)	0.4	\$140.00	\$56.00
Jasmine Bohn (Accountant)	3.8	\$115.00	\$437.00
Tyler Wookey (Accountant)	1.8	\$90.00	<u>\$162.00</u>
Total Fees For Period of Application			\$17,353.00

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 \$17,353.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Plan Administrator from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

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

Fees	\$17,353.00
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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 Atherton & Associates, LLP ("Applicant"), Accountant for Michael D. McGranahan the Chapter 11 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 Atherton & Associates, LLP is allowed the following fees and expenses as a professional of the Estate:

Atherton & Associates, LLP, Professional Employed by Trustee
Fees in the amount of \$ 17,353.00

The Fees pursuant to this Applicant are approved as
final fees and costs pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that the Plan Administrator
under the confirmed plan is authorized to pay the fees
allowed by this Order from the available Plan Funds in a
manner consistent with the order of distribution under the
confirmed Plan.

9. [11-94146](#)-E-11 DOMINIC/MARIA DEPALMA
WFH-25 Naresh Channaveerappa

MOTION FOR COMPENSATION FOR
MICHAEL D. MCGRANAHAN, CHAPTER
11 TRUSTEE(S)
5-8-14 [[495](#)]

Final Ruling: No appearance at the June 12, 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, Chapter 11 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on May 8, 2014. By the court's calculation, 35 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 Trustee's Fees is granted.

FEES REQUESTED

Michael D. McGranahan, the Chapter 11 Trustee ("Applicant"), makes a Second Interim 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 1, 2013 through June 20, 2014. The order of the court approving employment of Applicant was entered on April 16, 2012.

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

Accounting/Auditing: Trustee spent 33.1 hours in this category. Trustee has prepared monthly operating reports and worked with the Debtors relating to their living allowance and expenses. The Trustee incurred time analyzing bank statements, ledgers and payments requested relating to pending contracts. The Trustee also reviewed bills and authorized payment of

ongoing farming expenses. The Trustee worked closely with his accountant relating to tax analysis on property sales and tax returns.

Asset Analysis/Recovery: Trustee spent 10.10 hours in this category. Trustee incurred time pertained to Debtors' real property located in Las Vegas, Nevada. The Trustee selected a real estate agent and negotiated a listing agreement. Trustee also incurred time relating to the almond contract with Capay.

Asset Disposition: Trustee spent 2.4 hours in this category. Trustee incurred time relating to consideration of the next property to sell. The Trustee worked with his real estate agent on listings and property valuations.

Business Operations: Trustee spent 2.9 hours in this category. The Trustee worked with his farm management company on farming operations.

Case Administration: Trustee spent 54.8 hours in this category. The Trustee worked on insurance policies, including crop insurance, property and liability insurance. It was difficult for the Trustee to obtain insurance coverage so he spent a substantial amount of time on this task. The Trustee worked on the insurance claim relating to the accident which damaged the Debtors' house and Lexus. Trustee coordinated the repairs to the house. Trustee met with the Debtors multiple times relating to bills and the vehicle.

Cash Collateral: Trustee spent 2.4 hours in this category. Trustee continued to revise the cash collateral budget and assisted counsel with declarations supporting the cash collateral motions and attended the hearings.

Claims Administration: Trustee spent 2.1 hours in this category. Trustee assisted with the negotiations with Farmers & Merchants Bank and the motion to pay the claim.

Farming Operations: Trustee spent 22.2 hour in this category. Trustee analyzed and paid farming bills. Trustee worked with the farm management company on several issues, including fertilizing, pruning, irrigating, and replanting of orchards. The Trustee also worked on a farming budget which included projecting future costs for replanting. The Trustee spent time on the almond harvest.

Fee/Employment Application: Trustee spent 7.8 hour in this category. Trustee reviewed Wilke Fleury's fee application, this fee application and Atherton's fee application.

Litigation: Trustee spent .2 hour in this category. Trustee coordinated litigation against Gino DePalma.

Plan and Disclosure Statement: Trustee spent 42.1 hours in this category. Trustee worked heavily with counsel in developing a plan of reorganization. Trustee spent a substantial amount of time negotiating with creditors relating to plan treatment. The Trustee worked with his accountant on tax implications. The Trustee worked on plan projections. The

Trustee reviewed and revised the plan and disclosure statement. Trustee worked on plan distributions and payments.

Tax Issues: Trustee spent 14.0 hours in this category. Trustee incurred time working with the accountant relating to the estate's tax liability and tax returns. The Trustee also worked with his accountant on a tax analysis relating to the sale of real property.

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 not only administering the assets of the estate, but doing so in a manner to maximize the potential of this surplus case for the Debtors. The Trustee has successfully negotiated the sale of the Firehouse Property and the 7519 Yosemite Property, as well as conducting other business for the benefit of the Estate. The estate has \$175,167.56 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 Trustee seeks Second Interim and Final compensation for total fees in this case of \$85,236.03 calculated as follows:

\$5,000	25%	\$1,250
\$45,000	10%	\$4,500
\$950,000	5%	\$47,500
\$1,066,200.86	3%	\$31,986.03
<hr/>		
Total	\$2,066,200.86	\$85,236.03

This represents the maximum percentage fees which could be awarded under 11 U.S.C. § 326. This Section permits the bankruptcy judge to award trustee's fees of not more than the percentage amounts in the statute, subject to such allowed amount constituting "reasonable compensation." For the "average case" handled by a Chapter 7 trustee, allowing the maximum percentage fee as a "commission" (11 U.S.C. § 330(a)(7) stating that in determining trustee

fees the court treat the fees as a commission) coincides with the amount being reasonable. It is where the assets passing through the estate have a large dollar value that the percentages may well work to generate an "unreasonable" compensation number.

The Trustee has backed up his percentage computation with actual time sheets and a lodestar analysis. The total hours billed by the Trustee for this case are 194.10. Exhibit B, Trustee's Time Sheets, Dckt. 498. For the \$85,236.03 in fees, that averages \$439.13 per hour.

This Chapter 11 case for the Trustee was anything but "usual," even by bankruptcy standards. The Debtor attempted to prosecute the case as Debtor in Possession, but failed. In addition to the ability, the Debtors were encumbered by being in business with members of their family who were not paying for the use of the farm property. Several creditors were circling and on the verge of having the automatic stay terminated. See Status Reports by Western Farm Service, Inc. and Yosemite Land Bank, FLCA; Dckts. 60 and 64, respectively. As stated by the court at the March 14, 2013 Status Conference,

"The Status Conference Statements filed by Farmers & Merchant Bank of Central California and Western Farm Service raise significant issues of concern about the Debtors' in Possession ability to serve their fiduciary duties in this case. This does not relate to their "honesty," but financial acumen, the lack of cash flow, and the personal issues relating to a substantial account receivable being owed by a family member.

The court determines that the appointment of a trustee is necessary and proper based on the conduct to date. The appointment of the trustee is delayed until the continued status conference on April 4, 2012, to allow the Debtors in Possession one last opportunity to engage the necessary professional persons to assist them in fulfilling their fiduciary duties, including the filing of monthly operating reports and developing a business plan for a bankruptcy estate which is land rich but cash poor.

The court will order the appointment of a trustee at the April 4, 2012 hearing if the Debtors in Possession cannot demonstrate that they have engaged the necessary professionals, have filed the monthly operating reports (or provided the declaration of the professional engaged to prepare the reports providing a reasonable explanation as to why they have not been filed), and a business plan for obtaining sufficient monies from the properties of the

estate to pay creditor claims. These Debtors in Possession have been in bankruptcy proceedings for a year (including the prior Chapter 12 case) without providing for payment of creditor claims. Continuing on this path is likely to lead to the Debtors in Possession, in violation of their fiduciary duty to the estate, in wasting valuable property to creditors who will obtain relief from the automatic stay for foreclose on properties with significant equity."

March 14, 2014 Civil Minutes, Dckt. 52. The then Debtors in Possession were not able to meet the benchmarks stated by the court to measure the minimum fulfilling of the fiduciary duties as the debtors in possession, and the appointment of a trustee was ordered.

This Trustee had to wrestle with "cash poor" farming issues and creditors who had grown tired and weary of the Debtors business operations, their collateral (including crops) being used, and there being no cash to pay creditors.

As addressed above, the Trustee had to deal with more sophisticated farming, commercial, and bankruptcy issues in attempting to develop a plan to avoid liquidation. At the end of the day, a consensual plan was worked out.

The court also notes that the Chapter 11 Trustee demonstrated that debtors removed from possession in a Chapter 11 case not only have a place at the table, but that such debtors and their counsel can work with creditors and the trustee to reorganize a case and maximize the surplus for these Debtors.

The fees of \$85,236.03 for the Chapter 11 Trustee in this case are not only within the fee percentage cap of 11 U.S.C. § 326, but are reasonable as required by 11 U.S.C. §§ 326 and 330 for the actual and necessary services rendered by the Trustee for this bankruptcy estate.

Pursuant to prior Interim Fee Applications the court has approved pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330.

Application	Interim Approved Fees	Interim Fees Paid
First Interim	\$45,044.48	\$45,044.48
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	\$45,044.48	

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. Second Interim Fees in the amount of \$40,191.15 and prior Interim Fees in the

amount of \$45,044.48 for a total amount of \$85,236.03 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Plan Administrator under the confirmed plan from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$301.84 pursuant to this applicant. Pursuant to prior interim applications, the court has allowed costs of \$274.37.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Copies	.10 per copy	\$35.10
Postage		\$128.04
Phone Calls		\$18.70
Travel	.50 per mile	\$120.00
Total Costs Requested in Application		\$301.84

Applicant is expected as part of its hourly rate to have the necessary and proper office and business support to provide these professional services to Client. These basic resources include, but are not limited to, basic legal research (such as on-line access to bankruptcy and state law and cases); phone, email, and facsimile; and secretarial support. The costs requested by Applicant include telephone charges. No information has been provided to the court by Applicant that these cost items were extraordinary expenses than one would expect for Applicant providing professional services to Client to be changed in addition to the professional fees requested as compensation. The court disallows \$18.70 of the requested costs.

The Second Interim Costs in the amount of \$283.14 and prior Interim Costs in the amount of \$274.37 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Plan Administrator under the confirmed plan from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

Applicant is allowed, and the Plan Administrator under the confirmed plan is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	\$85,236.03
Costs and Expenses	\$ 557.51

inclusive of the \$45,044.40 fees and 274.37 in costs approved under interim fee applications, with the total fees so approved as a final allowance of fees and costs pursuant to 11 U.S.C. § 330 in this case.

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

that:

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

The Motion for Allowance of Fees and Expenses filed by Michael D. McGranahan, the Chapter 11 Trustee ("Applicant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Michael D. McGranahan, the Chapter 11 Trustee is allowed the following fees and expenses as a professional of the Estate:

Michael D. McGranahan, the Chapter 11 Trustee

Fees in the amount of \$85,236.03
Expenses in the amount of \$ 557.51,

inclusive of the \$45,044.40 fees and 274.37 in costs approved under interim fee applications. The total Fees and Costs 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 Plan Administrator under the confirmed plan is authorized to pay the fees allowed by this Order from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan, after full credit for any payments made pursuant to the order approving interim fees in this case.

10. [14-90446-E-7](#) **ALEXANDER/ASHLEE CRISPIN** **MOTION TO COMPEL ABANDONMENT**
JAD-1 Jessica A. Dorn 4-29-14 [[13](#)]

Final Ruling: No appearance at the June 12, 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, parties requesting special notice, and Office of the United States Trustee on April 29, 2014. By the court's calculation, 44 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). 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 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). Here the

The Motion filed by Alexander Emile Crispin and Ashlee Nicole Crispin ("Debtor") requests the court to order the Trustee to abandon property commonly known as 3016 Quail Hollow Drive, Modesto, California (the "Property"). This Property is encumbered by the lien of Mortgage Service Center, securing a claim of \$142,679.00. Debtors have claimed an exemption under C.C.P. § 704.730 in the amount of \$35,321.00. The Declaration of Mark Verschelden has been filed in support of the motion and values the Property to be \$178,000.

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 Alexander Emile Crispin and Ashlee Nicole Crispin ("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:

3016 Quail Hollow Drive, Modesto, California

and listed on Schedule A by Debtor is abandoned to Alexander Emile Crispin and Ashlee Nicole Crispin, Debtors, by this order, with no further act of the Trustee required.

11. [12-93049](#)-E-11 **MARK/ANGELA GARCIA**
Mark J. Hannon

**ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
5-27-14 [[371](#)]**

Tentative Ruling: The court issued an order to show cause based on the Debtor in Possession's failure to pay the required fees in this case (\$11.50 for due on May 12, 2014 for the filing fee of a Certification in this case). The court docket reflects that the Debtor in Possession still has not paid the fees upon which the Order to Show Cause was based.

The court's tentative decision is to sustain the Order to Show Cause and order the case dismissed.

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 sustained, no sanctions are issued pursuant thereto, and the case is dismissed.

12. [14-90150](#)-E-11 MIGUEL/SILVIA TOSCANO
WTL-3 Thomas O. Gillis

MOTION TO PREVENT AND ENJOIN
THE USE OF CASH COLLATERAL
5-22-14 [[72](#)]

Tentative Ruling: The Motion to Prevent and Enjoin the Use of Cash Collateral 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, and Debtor-in-Possession's Attorney, the United States Trustee, and the 20 Largest Unsecured Creditors on May 22, 2014. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Motion to Prevent and Enjoin the Use of Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). 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 is to deny without prejudice the Motion to Prevent and Enjoin the Use of Cash Collateral.

Movant Focus Business Bank ("Creditor") seeks an order preventing and enjoining Debtors Miguel Toscano and Silvia Toscano ("Debtors") from using the Creditor's cash collateral, for the segregation and sequestration of their cash collateral, and for accounting, or in the alternative, conditions on the use of such cash collateral.

STATING GROUNDS WITH PARTICULARITY

The Motion to Prevent and Enjoin the Use of Cash Collateral does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does state with particularity the grounds upon which the requested relief (relief from stay) is based. The Movant is essentially requesting that the court to treat the points and authorities as the "motion."

The Motion is a combined Notice of Motion and Motion which fails to set forth the grounds for the sought relief. A review of the Motion identifies the following being stated with particularity:

- A. Notice is given that a hearing will be conducted on June 12, 2014.
- B. Movant seeks an order preventing and enjoining Debtors, Miguel Toscano and Silvia Toscano, from using Movant's cash collateral, for the segregation and sequestration of the cash collateral, and for accounting or, in the alternative, that conditions be imposed on the use of such cash collateral.
- C. Failure of the Debtors or their attorney to appear at the hearing may result in the court granting the requested relief.
- D. No written opposition is required because fewer than twenty-eight (28) days' notice of a hearing has been given under Local Bankruptcy Rule 9014-1(f)(2). Opposition shall be presented at the hearing on the motion.
- E. If opposition is presented, or if there is other good cause for a continuance, the court may continue the hearing to permit the filing of evidence and briefs.
- F. The Motion is based on the following documents to understand the basis for the relief and specific relief requested:
 - 1. The Notice of Hearing [which doubles as the motion for Movant];
 - 2. The Memorandum of Points and Authorities;
 - 3. Declaration of Kenneth A. Corsello filed on March 7, 2014 (identified as Docket Numbers 27, 28, 32, and 33)
 - 4. The Declaration of Wm. Thomas Lewis, filed on March 7, 2014 (identified as Docket Numbers 29 and 30);
 - 5. All other pleadings;
 - 6. All other paper, and
 - 7. All other records on file in this case.

Notice of Motion and Motion, Dckt. 72.

First, the court notes that the Notice of Motion and Motion appears to be nearly identical to the Notice of Motion and Motion pleading submitted for Focus Business Bank's concurrently filed Motion for Relief from Stay in this same Debtors' case, Dckt. No. 82. Aside from some minor changes in the captions of the Notices/Motions to reflect the title of the Motions, the content of the Notices are identical.

The contents of the Motion and supporting pleadings described in the last paragraph of the Notices/Motions on Docket Numbers 72 and 82 refer to pleadings and supporting documentation filed as part of the previously combined Motion to Prevent the Use of Cash Collateral and for Relief from the Stay (Dckt. No. 26), filed on March 7, 2014 that had been denied by this court for Movant's attempt to improperly join claims. Civil Minutes, Dckt. No. 59. The court denied Movant's original Motion on the basis that Movant included multiple claims for relief in one contested matter. *Id.*

It appears that Movant has lifted and repurposed the deficient Notice of Motion and Motion from that Matter, to use as a "Motion" and Notice of Motion for Movant's latest Motion for Relief from the Automatic Stay, and the present Motion to Enjoin the Use of Cash Collateral in this case. The references to declarations and supporting evidence are not updated to direct the court's attention to the exhibits and Declarations filed in the present matter (which appear to be Declarations of Kenneth A. Corsello filed in support of the Motion, on Dckt. Nos. 73 and 74; and the Declaration of Wm. Thomas Lewis, Dckt. No. 78; and exhibits filed in support of the Declarations: Dckt. Nos. 75-77 and 78).

Moreover, in substance, the above "motion" is an instruction for the court to canvas all of the pleadings in the file, assemble what the court thinks that the Movant would assert as grounds for the Motion; assemble for Movant the evidence the court believes the Movant would use to support the grounds the court believes the Movant would state in support of the motion; assemble an argument based on such grounds and evidence the court believes that Movant would state in support of the motion; advance such argument for the Movant, and then rule on Movant's "motion" which the court has assembled and argued.

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 Motion provides no basis for the relief requested. Creditor acknowledges as such, instructing the court to read the Memorandum of Points and Authorities to understand the basis for the Motion to Prevent and Enjoin the Use of Cash Collateral.

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."

This is grounds to deny the motion.

**THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING
IF MOVANT CAN SUFFICIENT ADDRESS THE ISSUES STATED ABOVE**

ALTERNATIVE RULING

The Secured Creditor in this matter, Focus Business Bank ("Creditor") and Debtors-in-Possession, Miguel Toscano and Silvia Toscano ("Debtors-in-Possession") are parties to a

loan transaction in the amount of \$1,092,000 (the "Loan"). The loan documents granted the Creditor a blanket security interest in substantially all of Debtors-in-Possession's personal property assets and an assignment of all rents, issues and profits from the real property commonly known as 1200 6th Street, Modesto, CA (the "6th Street Property") and the real property commonly known as 3200 Sierra Street, Riverbank, CA (the "Sierra Street Property").

Debtors-in-Possession are in default under the Loan Documents, which defaults include the failure to pay and satisfy the Loan, when and as due. As a result of such defaults, the Creditor sued Debtors-in-Possessions in state court seeking (among other things) judicial foreclosure of the 6th Street Trust Deed and the Sierra Street Trust Deed, appointment of a receiver, claim and delivery, and other remedies. Creditor reports that this action is still pending in Stanislaus County Superior Court.

On February 10, 2014, Debtors-in-Possession filed for Chapter 11 relief. Creditor argues that from and after the date of Debtor-in-Possession's petition, the Debtor-in-Possession has been using Bank's cash collateral without Creditor's consent and without court approval, despite its written demand that Debtor-in-Possession cease using the cash collateral, that the Debtor-in-Possession segregate and sequester the cash collateral, and that the Debtor-in-Possession account to Bank for such use.

There remains outstanding unpaid principal in the sum of \$1,042,264, as well as other sums under the Loan Documents. On March 7, 2014, Creditor filed a combined and substantially similar motion identified as Motion to Prevent Use of Cash Collateral, Condition Use of Cash Collateral, Accounting, Adequate Protection, Motion for Relief from Stay, and Motion to Convert Case from Chapter 11 to Chapter 7 or Dismiss Case, Dckt. Nos. 24-35. The court denied the combined but similar motions without prejudice, because the Creditor combined multiple items of relief in a single motion in violation of Federal Rule of Bankruptcy Procedure 9014. This motion is one of two separate motions, each of which now separately addressees one of the items of relief sought in the Original Motion.

Creditor asserts that the rents and proceeds from the sale and disposition of the 6th Street and Sierra Street properties are cash collateral under 11 U.S.C. § 363(a). Similarly, Creditor states that it was granted a security interest in proceeds from operation of the business, including from sales or other dispositions of equipment and inventory, and in the Rents derived from each Property, so that all of these items and assets constitute the Creditor's cash collateral. Thus, use and consummation of the rents and equipment and inventory from the Debtors-in-Possession's property is subject to 11 U.S.C. § 363.

The Creditor's Security Agreement (Exhibit A, March Bank Declaration, Dckt. No. 28 at pgs. 11-17) grants the Creditor a blanket security interest in substantially all of the Debtor-in-Possession's personal property assets. Included in the personal property collateral (without limitation) are "all Deposit Accounts, Machinery, Equipment and Furniture, Inventory, Chattel Paper and Documents, Accounts, Instruments and General Intangibles, wherever located... [whether same] is owned now or acquired later; all accessions, additions, replacements, and substitutions relating to any of the foregoing; all records of any kind relating to any of the foregoing; all proceeds relating to any of the foregoing (including insurance, general intangibles, and other accounts proceeds)."

The 6th Street Trust Deed (Exhibit B, March Bank Declaration, Dckt. No. 32, pgs. 1-9) and the Sierra Street Trust Deed (Exhibit C, March Bank Declaration, Dckt. No. 33, ps. 1- 9) assigns to Bank "all of [Debtor]'s right, title, and interest in and to all present and future leases of the Property and all Rents from the Property. This is an absolute assignment of Rents made in connection with an

obligation secured by real property pursuant to California Civil Code Section 2938. In addition, Trustor grants to lender a Uniform Commercial Code security interest in the Personal Property and Rents." Each Trust Deed defines "Personal Property" to mean "all equipment, fixtures, and other articles of personal property now or hereafter owned by [Debtor], and now or hereafter attached or affixed to the Real Property; together, with all accessions, parts, and additions to, all replacements of, and all substitutions for, any of such property; and together with all proceeds (including without limitation all insurance proceeds and refunds of premiums) from any sale or other disposition of the Property" and defines "Rents" to mean "all present and future leases, rents, revenues, income, issues, royalties, profits, and other benefits derived from the Property together with the cash proceeds of the Rents."

The 6th Street Rents Assignment (Exhibit B, March Bank Declaration, Dckt. No. 32, pgs. 10-15) and the Sierra Street Rents Assignment (Exhibit C, March Bank Declaration, Dckt. No. 33, pgs. 10-15) (the "Rents Assignments") assigns to Creditor "a continuing security interest in, and conveys to [Bank] all of [Debtor]'s right, title, and interest in and to the Rents [from such Property]." Each Rents Assignment defines "Rents" to mean "all of [Debtor]'s present and future right, title and interest in, to and under any and all present and future leases, including, without limitation, all rents, revenue, income, issues, royalties, bonuses, accounts receivable, cash or security deposits, advance rentals, profits and proceeds from [such] Property, and other payments and benefits derived or to be derived from such leases of every kind and nature, whether due now or later, including without limitation, [Debtor]'s right to enforce such leases and to receive and collect payment and proceeds thereunder."

By this particular motion, the Creditor requests an order preventing and enjoining the Debtors-in-Possession from using the Creditor's cash collateral, for the segregation and sequestration of the cash collateral, and for accounting or, in the alternative, conditioning the use of such cash collateral.

DISCUSSION

The court may authorize use of cash collateral so long as the creditor is adequately protected. 11 U.S.C. § 363(e). The Debtors-in-Possession have the burden of proof on the issue of adequate protection. 11 U.S.C. § 363(p)(1). Adequate protection includes providing periodic cash payments to cover the loss in value of the creditor's interest. 11 U.S.C. § 361(1). Additionally, a substantial equity cushion in property provides adequate protection. See *In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984).

Here, Debtors-in-Possession have not obtained the Creditor's consent to the use of cash collateral. Creditor also argues that Debtors-in-Possession have not provided adequate protection for the value of the Creditor's security interest in the 6th Street and Sierra Street properties. As stated in the Declaration of Wm. Thomas Lewis filed on March 7, 2014, Dckt. No. 29, Debtor was put on notice of the existence of Bank's lien on such cash collateral and of Bank's non-consent to the use of same by Debtor. The Declaration states that the Creditor electronically filed and served its Notice Regarding Segregation of Cash Collateral ("Notice") on Debtors and Debtors' attorney on February 7, 2014. ¶ 2, Declaration of Wm. Thomas Lewis, Dckt. No. 29.

Debtors-in-Possession's counsel, Thomas Gillis, did not contact Bank's counsel about consensual use of cash collateral until February 25, 2014, nearly 20 days after the February 6, 2014 petition date. *Id.* The Lewis Declaration states that to date, no agreement for the consensual use of the Bank's cash collateral has been reached.

This is inconsistent with the information that Debtors-in-Possession have been presenting in

their regular status reports. In Section 3 of their February 20, 2014 status report, the Debtors-in-Possession asserted that the “Debtor has a paid off duplex,” even though the duplex is pledged to the Creditor under the Sierra Street Trust Deed. In Section 7 of the February 20, 2014 status report, the Debtors-in-Possession asserted that “[t]here are no issues of cash collateral in this case. Debtor does get \$800 rent, but there is no mortgage on the property. The business receipts appear to be the result of ‘after acquired’ purchases of inventory, not classified as cash collateral. Debtor will work with the Bank’s attorney to arrive at an adequate protection payment on the gas station loan.”

As of the petition date, the Debtors-in-Possession’s Schedule B confirms that the value of the accounts receivable (\$762), office equipment (\$200), business fixtures (\$1000), inventory and gasoline (\$12,500) is in the total sum of \$14,462. Creditor states that this proves that the Debtors-in-Possession admit that they are collecting the Rents and that they are selling the Creditor’s personal property collateral in existence on the petition date, without the Creditor’s consent or a court order authorizing same.

For instance, in the court’s Civil Minutes to the Creditor’s Objection to Exemptions, dated May 1, 2014, Dckt. No. 67, it identifies the Debtors-in-Possession withdrawing “406.00 from the MOCSE Credit Union Account at the Black Oak Casino, North Side Cage.” In review of their April 2014 Monthly Operating Report, Dckt. No. 71, it appears that the Debtors-in-Possession are continuing to use cash collateral by withdrawing money from an ATM at the “South Side Cageblack” from possibly the same casino, Black Oak, totaling 3 separate transactions of \$203 totaling \$609.00. Additionally, Debtors-in-Possession have check card and point-of-sale “POS” purchases from retail establishments identified in the Wells Fargo transaction history (Dckt. No. 71) from Foodmaxx, Wal Mart, Costco, Target and from fast food restaurants Carl’s Jr. and Imperial Gardens in excess of \$300.00 – all without the Creditor’s consent or court order.

Creditor requests that, if the court is going to permit the continued use of cash collateral, such use should be subject to such conditions as are necessary to provide adequate protection. In order to provide the Creditor with adequate protection, the Creditor proposes several conditions; the Creditor requests that Debtor be required to make monthly cash payments to Bank, retroactive to February 6, 2014 petition date, at the non-default rate specified by the Loan Documents (with automatic relief from stay, if not paid within (3) three days after notice that same is past due); Creditor asserts that it should be granted, effective as of the petition date, a “replacement lien” pursuant to sections 361 and 363(e) in all prepetition and post-petition assets of the same classes and types on which Bank held same pre-petition, to the extent Creditor’s interest in same are and were valid, enforceable, properly perfected and unavoidable. Creditor also asserts that the court should also limit the Debtors-in-Possession’s right to use cash collateral, by requiring that the value of the accounts, accounts receivable, inventory and cash be maintained by Debtor on a post-petition basis at the same \$14,462 level as existed on the petition date, in order to insure that the value of the collateral not be decreased, among other conditions.

It appears that the Debtors-in-Possession are still using the Creditor’s cash collateral, even though the Creditor has not consented to such use. Since no court order permitting the use of Creditor’s cash collateral was obtained and Creditor did not consent to such use, the Creditor is entitled to an order enjoining the use of cash collateral, requiring the segregation and sequestration of any cash collateral, and for accounting under 11 U.S.C. §363(c)(4).

Motion to Convert

On June 5, 2014, the Debtors-in-Possession filed a Motion to Convert their Chapter 11 to a

Chapter 7 Case. Dckt. No. 92. The Creditor, Focus Business Bank, filed a statement of non-opposition. Dckt. No. 93.

Notwithstanding such a motion, the Debtors in Possession and Debtors are not permitted to use cash collateral. It further appears that this Creditor has unearthed some potentially serious issues concerning the accuracy, truthfulness, and candor of statements made to the court by and on behalf of the Debtors and Debtors in Possession. The court leaves that to the U.S. Trustee, Chapter 7 Trustee, and other parties in interest to address another day, if any such party believes that an issue exists for the court to address.

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 Prevent and Enjoin the Use of Cash Collateral filed by the Creditor, 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 Motion to Prevent and Enjoin the Use of Cash Collateral is granted, and Debtors-in-Possession, Miguel Toscano and Silvia Toscano, are enjoined from further use of the Creditor's cash collateral -----.

13.	12-90356-E-7 HCS-2	DOUGLAS/PAULA COX Jessica A. Dorn	MOTION FOR COMPENSATION BY THE LAW OFFICE OF HERUM\CRABTREE\SUNTAG FOR DANA A. SUNTAG, TRUSTEE'S ATTORNEY(S) 5-8-14 [81]
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Final Ruling: No appearance at the June 10, 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, creditors, and Office of the United States Trustee on May 8, 2014. By the court's calculation, 35 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

Herum\Crabtree\Suntag, the "Attorney" firm ("Applicant") for Eric J. Nims, 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 28, 2012 to June 8, 2013. Exhibit A, Dckt. No. 84. The order of the court approving employment of Applicant was entered on April 23, 2014, Dckt. 80. The order authorizing Suntag's employment was entered on February 13, 2013, with employment authorized effective for February 1, 2013.

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 15.70 hours on this task category. This time included assisting the Trustee in employing his accountant, assisting the Trustee by corresponding with the Debtor's counsel to obtain tax documents from the Debtors, advising the Trustee on whether to file an adversary proceeding and the applicable statute of limitations, preparing the employment application for Applicant (no time was billed for preparing the application), and preparing the present application for compensation. Applicant anticipates having to attend the hearing on this application by telephone.

Employment of Realtor and Sale of Real Property. Debtors owned a 1/6 interest in 71.1 acres of vacant real property located on Place Road, Los Banos, California. The Debtors failed to disclose the property before the case closed on June 1, 2012.

On October 11, 2012, the court reopened the case to allow the Trustee to investigate and administer the estate's interest in the Property. Counsel for the proposed buyers of the Property contacted the Trustee and provided him information regarding the pending sale of the property. The buyers informed him that on July 12, 2012, a general partnership named A&H Investments ahd agreed to purchase the Property from the Debtors and other co-owners for \$888,750.00. On July 17 and July 18, the parties signed an addendum, which clarified that because A&H was buying only 2/3 of the Property, the actual purchase price was actually \$591,875.00.

The Trustee reviewed the terms of the proposed purchase, and the Applicant reviewed the transaction and liens on the Property, and trust documents related to the Property, to determine who they would affect the amount of sales proceeds that would go to the estate. The Trustee determined that the already pending proposed sale of the estate's 1/6 interest in the Property to A&H was the best method of liquidating it for the estate. Applicant prepared an application to employ the Trustee's realtor, and an addendum to the purchase agreement to make the sale an "as

is" sale.

In an effort to move the sale forward, Applicant also assisted the Trustee (and the parties to the pending sale and their counsel), in strategies regarding the fact that an individual had filed a lawsuit as to the property and recorded a lis pendens, claiming that he had an option interest in the property. The individual was also a debtor in a Chapter 11 case pending in the Northern District of California; Applicant reviewed this individual's bankruptcy case and ultimately confirmed that the sale could go forward, despite the bankruptcy and the lis pendens.

At the direction of the Trustee, Applicant also obtained from Debtors' counsel a trust instrument under which Debtors had an interest in the Property. Applicant was able to confirm that the Property in trust would not be an impediment to the estate's sale of its interest in the property. Applicant prepared and filed a motion to sell the estate's interest in the Property, combined with a request for authorization to compensate the realtor from the sales proceeds. This motion was granted. Applicant spent 43.7 hours in connection with these tasks.

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 [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 providing legal advice to the Chapter 7 Trustee regarding case administration and strategies on how to handle the property of the estate, as well as assisting the Trustee in obtaining court authorization to employ a realtor, and help review the terms of, and to facilitate a transaction in which the estate's interest in property located in Merced County was sold. The estate has \$136,617.71 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
Dana A. Suntag	24.70	\$315.00	\$7,780.50
Loris L. Bakken	7.4	\$295.00	\$2,183.00
Ricardo Z. Aranda	21.8	\$250.00	\$5,450.00
	0	\$0.00	\$0.00
	0	\$0.00	\$0.00
	0	\$0.00	\$0.00
	0	\$0.00	<u>\$0.00</u>
Total Fees For Period of Application			\$15,413.50

Although the court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided, the court's calculations of the rates multiplied by the time charged by attorneys Dana A. Suntag, Loris L. Bakken, and Ricardo Z. Arando in the filed billing sheets total \$15,413.50 in attorney's fees.

Applicant offers the following figures in the "Professional Personnel" section of Applicant's First and Final Application Summary Sheet, Exhibit A, Dckt. No. 84: Dana Suntag: \$315.00 per hour, 24.7 hours; Loris L. Bakken, 295.00 per hour, 7.4 hours; Ricardo Z. Aranda, \$250.00 per hour, 21.8 hours. Multiplying the time spent by each attorney by the rates charged, the total amount of attorney fees computed by the court is \$15,413.50. Instead, Applicant lists the total legal fees, which they also break down by task category, as \$15,908.50. This does not align with the numbers offered in the Professional Personnel Section of Applicant's Invoice. Exhibit A, Dckt. No. 84.

Using the court's computation of the fees claimed, Final Fees in the amount of \$15,413.50 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 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 \$183.52 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
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Postage		\$29.52
Copying Costs	\$0.10	\$154.00
Total Costs Requested in Application		\$183.52

The Costs in the amount of \$183.52 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 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	\$15,413.50
Costs and Expenses	\$ 183.52

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 Herum\Crabtree\Suntag ("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 Herum\Crabtree\Suntag is allowed the following fees and expenses as a professional of the Estate:

Herum\Crabtree\Suntag, Professional Employed by Trustee

Fees in the amount of \$ 15,413.50
Expenses in the amount of \$ 183.52,

The Fees and Costs pursuant to this Applicant, and Fees in the amount of \$15,597.02 are approved as final fees and costs pursuant to 11 U.S.C. § 330.

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

14. [13-91856-E-7](#) BENITO HURTADO
HCS-2 Thomas O. Gillis

MOTION TO EMPLOY PMZ REAL
ESTATE AS REALTOR(S)
5-9-14 [[28](#)]

Tentative Ruling: The Motion to Employ has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor 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).

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 Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on May 9, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion to Employ is granted.

The Chapter 7 Trustee in this case, Gary R. Farrar, requests the court's authority to employ Bob Brazeal of PMZ Real Estate in Modesto, California, to assist the Trustee in valuing, marketing, and possibly listing for sale real property located at 2601 Turpin Avenue, Riverbank, California. The Trustee believes that employing Mr. Brazeal is in the best interests of creditors, and that the court should approve this application pursuant to 11 U.S.C. § 327.

On October 16, 2013, the Debtor filed this case. In his schedules, the Debtor listed the Property as follows: "Single Family Residence Brothers House, Debtor co-signed Total Value \$102,550." Debtor stated that the current value of the Debtor's interest in the Property was \$0.00, and that it was subject to a secured claim of \$31,336 held by Citimortgage Inc. The Trustee investigated the ownership of the Property, and determined that the Debtor has a 1/2 interest in the Property.

Mr. Brazeal has conducted an initial investigation of the Property, and Trustee believes that the Property has equity for the estate.

Accordingly, the Trustee wishes to employ Mr. Brazeal, who is a real estate broker licensed by the State of California, License No. 00800029. Mr. Brazeal has substantial experience in the marketing an sale of real estate in the greater Stanislaus Coutny area, including Riverbank, California, where the Property is located. Mr. Brazeal will review the history of ownership of the Property, evaluate the condition of the Property, and provide an opinion as to the value of it. Based on this information, the Trustee wil decide whether to list the Property for sale.

Mr. Brazeal may apply to the court for an order authorizing his compensation, pursuant to 11 U.S.C. § 330(a), for his consulting services in connection with the Property if the Trustee decides not to list it for sale. If the Trustee decides to list the property for sale, as this court has stated in the past, the realtor Mr. Brazeal may be awarded sales commission pursuant to 11 U.S.C. § 330(a) as part of the order approving the sale of the subject property.

OPPOSITION BY DEBTOR

Benito Hurtado, the Debtor in this Chapter 7 case, files a "Limited Objection" to the Motion for Employment asserting that the prayer of the Motion actually asks for permission to "employ a realtor and sale the property" [sic]. The opposition further states that Debtor objects to to an order which would allow the sale of the Property, without a determination of whether or not the estate has an interest in the property. Dckt. No. 33.

REPLY TO DEBTOR'S OPPOSITION

The Trustee states that Debtor failed to file a timely opposition to the Application under Local Bankruptcy Rule 9014-1(f)(1)(B). Even if the Debtor's opposition were timely submitted, however, Debtor's opposition lacks merit. The Motion merely requests that the Trustee be authorized to employ Mr. Brazeal for the purpose of evaluating the condition of the property, providing an opinion of value of the property, consulting with the Trustee, and only then--only after those collective efforts to determine whether a sale of the property is desirable have been undertaken--will Mr. Brazeal help list, market, and possibly sell the property. Trustee explicitly states that he will bring a motion to approve the sale and seek authorization for the sale from the court. ¶ 11, Motion to Employ, Dckt. No. 11.

In the Trustee's Reply, the Trustee reiterates that the present Motion only seeks authorization of Mr. Brazeal's employment. If Mr. Brazeal locates a buyer, Trustee will seek to sell the property, and will do so by motion under 11 U.S.C. § 363(b).

The court does not interpret the Trustee's application to employ Mr. Brazeal for the express purpose of evaluating the value of the property and providing the opinion of the value of the property for the Trustee's use, in preparation for a *possible* sale, to be a Motion to Approve the Sale of the subject property. Instead, the court will evaluate the present Motion for

what it purports and appears to be--a Motion seeking the authorization of employment of Mr. Brazeal of PMZ Real Estate.

DISCUSSION

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

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

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 Trustee, Gary R. Farrar, for the purpose of valuing, marketing, and listing for sale the property located at 2601 Turpin Avenue, Riverbank, 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 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 Brazeal of PMZ Real Estate on the terms and conditions set forth in Mr. Brazeal's Declaration filed in support of the motion (Docket No. 30).

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

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved

unless unambiguously so stated in this order or in a subsequent order of this court. The court approves a 6% commission for such services which would be paid from the proceeds from any 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.

15. [13-91459](#)-E-11 LIMA BROTHERS DAIRY
KDG-7 Hagop T. Bedoyan

CONTINUED 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 \$-
----- in fees and \$----- 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 erroneously 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 time sheets 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.

MAY 1, 2014 HEARING

On the first hearing on this Application, which occurred on May 1, 2014, the court noted that the US Trustee's objection was well taken, and echoed the court's comments when denying the prior application for fees. The court had previously noted in its denial of Applicant's first application for fees that,

Kerry Krisher, a "Principal" has billed 19.50 hours of work at \$395.00 an hour. The Motion gives no hint 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 stated that it 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 revealed 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
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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 regarding data 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 correspondence 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 Client	\$295.00	0.4	\$118.00

George Demos	12/30/2013	Receipt 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 receivable 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 were:

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
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	77.9 Hours	\$21,718.50

The court subtracted 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 added back the non-professional bookkeeping work and what appears to be clerical (giving applicant the benefit of the doubt). This calculation was as follows:

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 stated that it was satisfied that adjusting the first interim fees to \$44,899.50, and disallowing all amounts in excess thereof was appropriate. The court noted that Applicant can now focus on going forward in properly maintaining his time records, reducing the hourly rate for clerical service, and only billing for the reasonable services provided.

The court also stated that it commonly authorizes the payment of 50% of the fees on an interim basis. Because the court adjusted both the time allowed and hourly rate, the court authorized 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 was 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.

At the prior hearing the court was prepared to allow Applicant the following amounts as compensation to this professional in this case:

Fees \$44,899.50
Costs and Expenses \$ 598.24

interim fees pursuant to 11 U.S.C. § 331 in this case.

The hearing was continued to allow Applicant to address the issues

raised by the U.S. Trustee and concerns expressed by the court.

REPLY BY APPLICANT

The Applicant, GlassRatner Advisory & Capital Group, LLC, through its Reply, proposes a different division of time between bookkeeping and clerical services and professional services, than was proposed by the United States Trustee in its opposition. The Applicant agrees that a lower rate should be paid for low-level accounting services, but seeks to provide further detail regarding the professional nature of the services for which the professional rates are sought, and to provide further information establishing that the time classified by the United States Trustee as "vague" was reasonable and necessary. Dckt. No. 246.

Applicant states that the Debtor-in-Possession and Applicant have determined that 26.80 hours that were included in the Application were for services that could be classified as lower-level accounting work, and that the appropriate rate that for bookkeeping should be \$125.00 per hour. The Applicant amends the Motion to reduce the prayed for fees by \$4,440.00, and requests approval of the fees in the amount of \$57,078.00 and costs in the amount of \$598.24, for a total of \$57,676.24.

Bookkeeping

The United State's Trustee's Opposition identified an accountant that performed bookkeeping for the estate in the *In re Edward & Rosie Lopes Esmali, dba CrimeTek Security*, Chapter 11 Case No. 11-94224-E-11, at the rate of \$75.00 per hour. The Applicant points out, however, that the court also approved fees for bookkeeping at the rate of \$175.00 per hour in the case of *In re Mark Anthony Garcia and Angela Marie Garcia*, Chapter 11 Case No. 12-93049.

The Applicant believes that a rate of \$175.00 per hour for bookkeeping is appropriate, given the fact that the court has approved services at that rate in the past, but has agreed with the Debtor-in-Possession to compromise for a rate of \$125 per hour for bookkeeping services subject to the court's approval.

The Applicant states that the Debtor-in-Possession believes that a rate higher than \$75 an hour is justified in this case because the Applicant would have had to spend reviewing the books and records of Debtor-in-Possession to become familiar with the financial affairs of Debtor-in-Possession that was not spent or charged, because Applicant was already familiar with the financial affairs as a result of performing the bookkeeping. Applicant asserts that it would have had to spend time consulting with an independent bookkeeper and correct bookkeeper work because of the complexity of the work that was performed, and Applicant's expertise allowed them to perform the bookkeeping quicker than a separate bookkeeper, creating efficiency that justifies a higher rate.

Additionally, not all time entries identified by the United States Trustee as bookkeeping were simple bookkeeping services.

Bookkeeping Services							
Timekeeper	Date	Description of Services	Rate	Time	Charge	Fees at the alternate rate of \$125/hour	Resulting Fee Reduction
Brad Smith, CPA	12/12/2013	Reconcile DIP account - November	\$275	0.7	\$192.50	\$87.50	\$105.00
Brad Smith, CPA	12/12/2013	Reconcile DIP account - October	\$275	0.6	\$165.00	\$75.00	\$90.00
Brad Smith, CPA	12/12/2013	Reconcile DIP account - September	\$275	0.5	\$137.50	\$62.50	\$75.00
Brad Smith, CPA	12/12/2013	Reconcile DIP account - August	\$275	0.7	\$192.50	\$87.50	\$105.00
Brad Smith, CPA	12/18/2013	Update accounting records w/ new information	\$275	0.5	\$137.50	\$62.50	\$75.00
Brad Smith, CPA	12/24/2013	Reconcile Delta bank account	\$275	0.7	\$192.50	\$87.50	\$105.00
Brad Smith, CPA	12/26/2013	Update Accounting records	\$275	1.5	\$412.50	\$187.50	\$225.00
Brad Smith, CPA	12/27/2013	Update Accounting records	\$275	0.7	\$192.50	\$87.00	\$105.00
Brad Smith, CPA	1/6/2014	Process December disbursements	\$275	1.3	\$357.50	\$162.50	\$195.00
Brad Smith, CPA	1/7/2014	Update Quickbooks with additional disbursements information	\$275	1.6	\$440.00	\$200	\$240.00
Brad Smith, CPA	1/14/2014	Update Quickbooks from banking detail received from LBD for 2nd week of Jan	\$275	0.4	\$110.00	\$50	\$60
Brad Smith, CPA	1/17/2014	Update quickbooks from banking detail received from LBD for 1st week of Jan	\$275	0.7	\$192.50	\$87.50	\$105.00
Brad Smith, CPA	1/23/2014	Update Quickbooks w/ weekly transaction data	\$275	0.7	\$192.50	\$87.50	\$105.00
Brad Smith, CPA	1/24/2014	update bank transactions with EFT items received from bank	\$275	0.4	\$110.00	\$50	\$60
Brad Smith, CPA	1/24/2014	Reconcile DIP account	\$275	0.6	\$165.00	\$75.00	\$90
Brad Smith, CPA	1/27/2014	Update Quickbooks records for weekly disbursements	\$275	0.5	\$137.50	\$62.50	\$75.00
Brad Smith, CPA	1/28/2014	review cleared bank transactions	\$275	0.4	\$110.00	\$50.00	\$60.00

Brad Smith, CPA	1/28/2014	update Quickbooks records with cleared bank transactions	\$275	0.3	\$82.50	\$37.50	\$45.00
Brad Smith, CPA	1/29/2014	review cleared bank transactions	\$275	0.2	\$55.00	\$25.00	\$30.00
Brad Smith, CPA	1/31/2014	review cleared bank transactions	\$275	0.2	\$55.00	\$25.00	\$30.00
Brad Smith, CPA	2/3/2014	update accounting records	\$275	0.7	\$192.50	\$87.50	\$105.00
Brad Smith, CPA	2/4/2013	update accounting records	\$275	0.2	\$55.00	\$25.00	\$30.00
Brad Smith, CPA	2/10/2014	update accounting records	\$275	0.7	\$192.50	\$87.50	\$105.00
Brad Smith, CPA	2/17/2014	update accounting records	\$275	0.9	\$247.50	\$112.50	\$135.00
Brad Smith, CPA	2/21/2014	Reconcile held funds balance	\$275	0.4	\$110.00	\$50.00	\$60.00
Brad Smith, CPA	2/25/2014	update accounting records	\$275	0.9	\$247.50	\$112.50	\$135.00
Brad Smith, CPA	3/4/2014	update accounting records	\$275	0.8	\$220.00	\$100	\$120.00
Brad Smith, CPA	3/5/2014	update accounting records	\$275	1.1	\$302.50	\$137.50	\$165.00
Brad Smith, CPA	3/6/2014	update accounting records	\$275	0.2	\$55.00	\$25.00	\$30.00
Brad Smith, CPA	3/11/2014	update accounting records	\$275	1.3	\$357.50	\$162.50	\$195.00
Brad Smith, CPA	3/17/2014	update accounting records	\$275	1.2	\$330.00	\$150.00	\$180.00
Brad Smith, CPA	3/24/2017	update accounting records	\$275	0.9	\$247.50	\$112.50	\$135.00
		TOTAL BOOKKEEPING		23.4	\$6,435.00	\$2,925.00	\$3,510.00

Applicant contends that a portion of the time characterized by the United States Trustee as bookkeeping was actually document review and analysis that Applicant needed to do to perform its duties and "is properly compensated at the professional rates." Applicant has distilled its time entries accordingly, and reduced its rate "for the portion attributable to bookkeeping." The table below describes these entries:

Document Review and Bookkeeping Type Services							
Timekeeper	Date	Description of Services	Rate	Time	Charge	Fees	Resulting Fee Reduction
Brad Smith, CPA	12/11/2013	Review and analyze August deposits and disbursements for DIP account for proper application.	\$275.00	.9	NA	NA	NA

		Process August deposits and disbursements for DIP account in Quickbooks	\$275	.8	\$220.00	\$100.00	\$120.00
Brad Smith, CPA	12/12/2013	Review and analyze October deposits and disbursements for DIP account for proper classification	\$275.00	.9	NA	NA	NA
		Process October deposits and disbursements for DIP account in Quickbooks	\$275	.7	\$192.50	\$87.50	\$105.00
Brad Smith, CPA	12/12/2013	Review and analyze November deposits and disbursements for DIP account for proper classification	\$275.00	.8	NA	NA	NA
		Process November deposits and disbursements for DIP account in Quickbooks	\$275.00	.5	\$137.50	\$62.50	\$75.00
Brad Smith, CPA	12/12/2013	Review and analyze September deposits and disbursements for DIP account for proper classification	\$275.00	.8	NA	NA	NA
		Process September deposits and disbursements for DIP account in Quickbooks	\$275.00	.6	\$165.00	\$75.00	\$90.00
Brad Smith, CPA	12/13/2013	Review and analyze August-October deposits and disbursements for DIP account for proper classification	\$275.00	1.3	NA	NA	NA
		Process August-October deposits and disbursements for DIP account in Quickbooks	\$275.00	.8	\$220.00	\$100.00	\$120.00
	Total Document Review (billed at professional rate):			4.7	\$935.00		
	Total Bookkeeping (fee reduced)			3.4		\$425.00	\$510.00

Much of the time spent classified by the United States Trustee as bookkeeping was forensic, analytic accounting performed by Applicant, which included constructing historical books and records back to the petition date. Applicant states that this work required Applicant GlassRatner to track down and analyze source documents and create a general ledger based on

the information obtained and analyzed. This was necessary because the Debtor-in-Possession did not have computerized books and records; the items that the Debtor-in-Possession had were inaccurate and handwritten, without reconciliation or proof of revenue other than bank statements. Applicant asserts that this work was not simple bookkeeping and should be compensated at professional rates. This work included the following entries:

Higher Level Accounting Type 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	12/12/2013	Call w/ Lima to review receipts and disbursements from petition date to current	\$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
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	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	1/17/2014	Reconcile cow sales per MORs to detail list	\$275	1.2	\$330.00
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	Draft memo to Lima re deposits to DIP account	\$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	3/5/2014	Draft fax memo to Lima re bank transactions	\$275	0.2	\$55.00

Brad Smith, CPA	3/11/2014	draft email to Lima re disbursements	\$275	0.2	\$55.00
		Total Higher Level Accounting		8.3	\$2,290.50

Applicant claims that now that the forensic work is complete, the Debtor-in-Possession has hired a bookkeeper. In summary, the Debtor-in-Possession and Applicant classify 26.8 hours as bookkeeping. Debtor-in-Possession and Applicant compromised on the bookkeeping rate at \$125 per hour, for a total of \$3,350.00 for bookkeeping services. Additionally, Debtor-in-Possession and Applicant classify 13.00 hours that were classified as bookkeeping by the United States Trustee, but that were actually professional services as described above, totaling \$3225.50 at the professional's rates. Therefore, the Applicant reduces the fee request related to the \$10,953.00 that the United States Trustee identified as bookkeeping fees by \$4,020.00 to \$6,933.00.

Clerical

The United States Trustee identified \$1,419.00 in time that it classified as being clerical, which Applicant speculates were selected because it pertains to the gathering of information and documentation and dissemination of reports as clerical. Applicant states that it has agreed to accept "bookkeeper rates" for all of the time entries identified as clerical except for the 2.2 hours in time entry for George Demos.

On December 12, 2013, there was a two hour meeting between George Demos and the principals of Debtor-in-Possession. This was an important meeting consisting of substantive discussions regarding the finances and operations of Debtor-in-Possession that is vital to Applicant's role as a business and financial consultant. On December 26, 2013, George Demos communicated with the Debtor-in-Possession's counsel for .2 hours regarding the timing and status of the case, having to do with the available records and data of Debtor-in-Possession.

Based on these adjustments, the Debtor-in-Possession and Applicant reduce the fee request related to the \$1,419.00 identified by the United States Trustee as clerical by \$420.00 to \$999.00.

MOR Preparation

Applicant describes MOR preparation as including time spent preparing, analyzing, and revising the MORs including time spend communicating with Debtor-in-Possession and Debtor-in-Possession's counsel regarding the MORs.

The Opposition states that a bookkeeper can prepare the MORs because they are on a cash basis, but Applicant challenges this, and argues that MOR preparation in Debtor-in-Possession's case is not the equivalent of bookkeeping and the MORs are not prepared on a straight cash basis. This is true because of several factors present in this case.

First, the Debtor-in-Possession had filed only one inaccurate, handwritten MOR at the time Applicant was employed. Applicant was required

to reconstruct historical data in order to prepare and amend the MORs for August, September, October, November, and December 2013. A significant portion of the Debtor-in-Possession's revenue is assigned to two creditors under three security agreements (American AgCredit and Cargill, Inc.). These funds are never deposited to the Debtor-in-Possession's accounts and are still accounted for in the MORs.

The revenues assigned to American AgCredit were more than what was required to cover the monthly debt service; the AgCredit held these funds and paid certain expenses on behalf of the Debtor-in-Possession from the excess funds. This required a separate accounting for the excess funds, the balance of which is included in the Debtor-in-Possession's MORs.

Additionally, the Debtor-in-Possession pays its employees a flat amount each pay period and periodically calculates and pays the taxes that are due on the net amounts. The normal payroll process calculates gross wages, and then takes the normal payroll tax deductions from the gross pay. Under the payroll process, wages must be grossed up from the net amount, which requires calculations and consideration of limits on certain taxes. The MORs require disclosure of the Debtor-in-Possession's outstanding tax liabilities, and calculations must be performed every month.

For these reasons, the Applicant asserts that MOR preparation is not "bookkeeper work," and that \$9,346.50 classified as MOR preparation by the United States Trustee should be paid at the professional rates.

Time Entries Classified as Vague

The United States Trustee identified 13 hours of time entries as too vague to assess whether they were reasonable or necessary services. The Applicant argues that all time billed was spent advancing the Debtor-in-Possession's case. Most of the time identified by the United States as vague is communications.

Applicant states that this communication was especially important in December 2013 and January 2014 shortly after Applicant was employed, because American AgCredit had filed a Motion for Relief from Automatic Stay, and was agreeing to short continuances of the hearing on the Motion based on the progress that was shown in the accounting work provided by Applicant as well as a report concerning the cull activity of the Debtor-in-Possession from the petition date to December 2013. Applicant asserts that the regular communications and work performed by the Applicant resulted in American AgCredit agreeing to continue the hearing on the Motion multiple times, allowing Debtor-in-Possession to administer its Chapter 11 case without litigating with American AgCredit concerning the Motion.

Additionally, travel time for George Demos enabled him to have face to face conferences with Debtor-in-Possession's principals as well as inspect Debtor-in-Possession's facilities and operations. These meetings and inspections are crucial for Applicant's understanding of the operations and financial affairs of Debtor-in-Possession and necessary for Applicant to perform its duties properly. Further, this time was calculated from the Bakersfield office of Applicant, and not Mr. Demos' home office in Irvine, California.

On this basis, Applicant asserts that all of the time entries characterized as the United States Trustee as vague were for reasonable and necessary services rendered by Applicant.

CONCLUSION

The court finds that Applicant's revised application, with adjustments made for tasks that were more "bookkeeping" and "clerical" in nature to be reasonable and fair under the circumstances. While one could pick at the application, there is no good reason to so do. Taken at its word, Applicant has set up an accounting and monthly operating report system which the Debtor in Possession and a bookkeeper can properly use. Applicant has also agreed to reduce the amount of requested fees by \$4,440.00, which includes \$4,020.00 in reduced fees for "bookkeeping tasks," and a \$420.00 reduction in "clerical" tasks.

The court allows GlassRatner Advisory & Capital Group, LLC professional fees \$57,078.00 in fees and \$598.24 in costs as interim fees, which includes the \$30,000.00 in fees which were previously authorized to be paid on an interim basis

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 \$57,078.00
Expenses in the amount of \$ 598.24,

as First Interim Fees and Costs, which includes the \$30,000.00 in fees which were previously provisionally authorized ("interim-interim fees") by Order of this Court in this Contested Matter (Dckt. 230). The Debtor in Possession is authorized to pay 75% of the allowed fees (\$42,808.50) and 100% of the costs from unencumbered monies of the estate or as authorized by a separate order of the court or the Bankruptcy Code, after credit for the \$20,000.00 retainer paid to Applicant.

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.

16. [08-92261](#)-E-7 **PATRICIA BECERRA** **MOTION FOR COMPENSATION FOR**
CWC-3 **Pro Se** **CARL W. COLLINS, TRUSTEE'S**
 ATTORNEY(S)
 5-6-14 [43]

Final Ruling: No appearance at the June 12, 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, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 6, 2014. By the court's calculation, 37 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

Carl W. Collins "Applicant"), Counsel for the Chapter 7 Trustee in this matter Stephen C. Ferlmann, ("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 July 2, 2013 through April 29, 2014. The order of the court approving employment of Applicant was entered

on September 17, 2013, Dckt. 33.

Applicant maintained contemporaneous daily time records for each timekeeper, which set for the specific services rendered by the Applicant in this case.

The Applicant provides his time and expense records in support of the Application for Final Compensation and Reimbursement of Expenses, Dckt. No. 46. In providing a Statement of Professional Services Rendered and Costs Incurred, with time entries and listings of the responsibilities performed in this case, as well as an Invoice of costs advanced in this case (which include listings for copying and posting charges, and the dates the fees were incurred), the Applicant provides evidence of the attorney's fees and expenses claimed in this case.

The Applicant's tasks performed in this case included participating in a telephone conference with the Trustee regarding the re-opening of the case, reviewing the bankruptcy file, and drafting pleadings to re-open the case and for filing by the Trustee. The Applicant's services also included preparing and revising the Trustee's applications to employ counsel and to employ an accountant. The Applicant also communicated with the Trustee regarding the Debtors' Amended Schedule C, the need to engage an accountant for the estate, and to discuss the applications to employ professionals and related pleadings. Statement of Professional Services, Dckt. No. 46.

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 [professional fees and expenses legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney 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 preparing a Motion to re-open the Debtor's Chapter 7 case to recover a previously undisclosed asset. The Debtor previously had not listed a negotiated settlement of a personal injury cause of action in a matter being heard in the state of Arkansas in her bankruptcy schedules, and had not disclosed this asset at her Meeting of Creditors.

The Trustee was able to recover this asset with the assistance of the Applicant, which will provide a 100% distribution to the claims of

timely filed unsecured creditors. The bankruptcy estate now has a deposit on the sum of \$61,468,43, derived from the settlement action. This figure represents the amount of unencumbered monies to be administered as of the filing of the application.

The Trustee also filed a statement of approval in support of the Application on May 6, 2014. Dckt. No. 47. 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
Carl W. Collins	4.40	\$295.00	\$1,298.00
Claudia Alarcon (paralegal)	2.10	\$90.00	\$189.00
	0	\$0.00	\$0.00
	0	\$0.00	\$0.00
	0	\$0.00	\$0.00
	0	\$0.00	\$0.00
	0	\$0.00	\$0.00
	0	\$0.00	<u>\$0.00</u>
Total Fees For Period of Application			\$1,487.00

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. The Application for Final Fees in the amount of \$1,487.00 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 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 \$30.10 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
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July 2, 2013 Copying Charge for 51 copies for the petition.		\$5.10
August 6, 2013 Copying charge for 25 copies.		\$2.50
August 6, 2013 postage charge for the Application to Employ.		\$5.60
August 13, 2013 copying charge for 5 copies.		\$0.50
August 13, 2013 postage charge for supplemental POS on the Application to Employ.		\$1.12
September 20, 2013 copying charge for 7 copies.		\$0.70
September 20, 2013 postage charge for Order to Employ.		\$3.22
December 16, 2013 copying charge for 32 copies.		\$3.20
December 16, 2013 postage charge for application to employ CPA.		\$3.68
December 30, 2013 copying charge for 8 copies.		\$0.80
December 30, 2013 postage charge for the POS on the order to appoint the CPA.		\$3.68
Total Costs Requested in Application		\$30.10

Costs in the amount of \$30.10 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 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	\$ 1,487.00
Costs and Expenses	\$ 30.10

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

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

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

The Motion for Allowance of Fees and Expenses filed by Carl W. Collins ("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 Carl W. Collins is allowed the following fees and expenses as a professional of the Estate:

Carl W. Collins, Professional Employed by Trustee

Fees in the amount of \$ 1,487.00
Expenses in the amount of \$ 30.10,

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

17. [13-90465](#)-E-7 KIMBERLY VEGA
[13-9028](#)
MCGRANAHAN V. VEGA

CONTINUED PRE-TRIAL CONFERENCE
RE: COMPLAINT OBJECTING TO
DISCHARGE OF DEBTOR
8-14-13 [[1](#)]

ADV. CASE DISMISSED 5/21/14

Final Ruling: No appearance at the June 12, 2014 Pre-Trial Conference is required.

The Adversary Proceeding having been dismissed, the Pre-Trial Conference is removed from the calendar.

Adversary Proceeding Dismissed on May 21, 2014 by an Order by this court, Dkct. No. 48, and closed on June 9, 2014.

18. [13-90465](#)-E-7 KIMBERLY VEGA
[13-9028](#) SSA-3
MCGRANAHAN V. VEGA

MOTION FOR APPROVAL OF JOINT
STIPULATION FOR ENTRY OF ORDER
OF DISMISSAL
5-13-14 [[41](#)]

ADV. CASE DISMISSED 5/21/14

Final Ruling: No appearance at the June 12, 2014 hearing is required.

The case having previously been dismissed, the Motion is denied as moot.

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 Approval of Joint Stipulation having been presented to the court, this Adversary Proceeding having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied as moot, the Adversary Proceeding previously having already been dismissed.

19. [10-94874-E-7](#) STEVEN/JOANNE JETT
SSA-4 Bryan L. Ngo

MOTION TO COMPROMISE CLAIM OR
CONTROVERSY CONCERNING
MEDICAL/PHARMA SUIT AND PAYMENT
OF SPECIAL COUNSEL'S FEES AND
COSTS
4-23-14 [[51](#)]

Tentative Ruling: The Motion to Approve Compromise 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 Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on April 23, 2014. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

The Motion For Approval of Compromise has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 in interest are entered.

The Motion For Approval of Compromise is granted.

BACKGROUND

Debtors Steven Cary Jett and Joanne A. Jett filed their original bankruptcy petition on December 16, 2010. Their case was closed as a "no asset" case on April 1, 2013. Michael McGranahan, the Chapter 7 Trustee in Debtors' case, later learned that Debtors had failed to include in their schedules a pharmaceutical/medical claim, and prospective settlement of \$43,165.41, arising out of a personal injury/products liability suit which Debtor Steven Jett ("Jett") initiated back in 2009. As such, the case was reopened on June 21, 2013.

Beginning in 2009, the Debtor Jett was a plaintiff in a state law products liability matter, against a large pharmaceutical company involving the ingestion of a pharmaceutical drug and subsequent development of a

neuropsychological disorder. This matter was filed in federal court, and consolidated along with other similar actions in Multidistrict Litigation. In his products liability case, Jett alleged that he had developed this disorder as a result of ingesting a prescription drug that was manufactured by the defendant pharmaceutical company. His symptoms included anger, hostility, aggression, and depression, for which he was prescribed further medication, as well as professional counseling.

The Trustee took steps to appoint the firm of Richardson, Patrick, Westbrook & Brickman, LLC and the Goldwater Law Firm ("Contingency Fee Counsel") by order of this court on October 31, 2013, to represent Jett in the state court case. Dckt. No. 39. The contingency fee contract for special counsel provides a 40% fee to counsel from the gross settlement amount obtained, with any litigation costs and expenses incurred to be deducted from the settlement. According to the terms of the appointment of special counsel, contingency fee of 40% between the two firms will be split as follows: the Richardson firm will receive 90% of the 40% fee award, and the Goldwater firm a 10% fee of the 40% fee award. Trustee's Application to Appoint Special Counsel Nunc Pro Tunc to Prosecute Pharma/Medical Claim, fn.2, Dckt. No. 30.

Jett's claim was settled in an aggregate settlement, along with 693 other similarly situated claimants. All of the claimants were represented by Elizabeth Burke, the estate's current special counsel, of the Richardson Patrick law firm. The settlement fund was administered by a Claims Administrator and third-party neutral, the Garretson Resolution Group (Garretson).

To allocate the aggregate settlement among the numerous claimants, Garretson developed an allocation model to fairly compensate all qualifying claimants based upon the following facts: (1) the severity of their injury, (2) the quality of the proof supporting their injury, (3) their previous medical history, (4) any latency period between their last use of the drug and report of symptoms, and (5) the claimants age at injury. Exhibit 2. Under these factors, points were allocated to each claimant based on the severity of injury and any extraordinary circumstances surrounding their case that would merit an increase. Points were conversely deducted from claimants for any weaknesses, if any, in their claims. As part of his individual settlement, and based on the individual facts of his case, Debtor Jett was allocated a sum of 67.5 Total Award Points by the Claims Administrator. Exhibit 2, Dckt. No. 56.

Points were allocated based upon the severity of each claimant's injury, with suicide receiving the most points under the allocation model and neuropsychiatric disorder receiving the least. While Debtor's injuries were adequately documented in his medical records, and his injury manifested within 6 months of his last ingestion of the drug, the value of his claim was limited by his damages since his neuropsychiatric injury fell at the lowest end of the allocation spectrum. Trustee reports that likewise, Debtor also received a 10% deduction in his overall case value because he was over the age of 44 at the time he developed his neuropsychiatric disorder. Based on medical literature, the risk of developing a neuropsychiatric disorder increases with advanced age.

Based on his award of 67.5 total award points at approximately \$579.63 per award point, Jett's Initial Gross Settlement Award was fixed at \$39,124.76. This value was later adjusted by a Pro Rata Reserve Award of \$4,040.65 in his favor, for a final gross settlement amount of \$43,165.41. Per the fee agreement with special counsel, the proposed final gross settlement amount of \$43,165.41 is then reduced by \$17,266.16, which represents a 40% contingency fee to special counsel. Of this \$17,266.16 payable to special counsel as attorney's fees, \$1,726.62 (or 4%) has been allocated by order of the MDL judge to cover the Special Counsel's portion of the Multi-District Litigation (MDL) Common Benefit Fund Assessment of Fees that area associated with the Debtor's case.

This 4% was chargeable to all plaintiffs' counsel who filed individual cases with the MDL. After deducting the \$17,266.16 for attorney's fees, the proposed gross settlement amount is then reduced by \$3,033.74 for costs/expenses associated with the Debtor's case. These costs/expenses are compromised of Special Counsel's case-specific expenses (\$675.94), a pro-rata share of Special Counsel's costs associated with the overall litigation (\$275.60), the Debtor's pro rata portion of the Multi-District Litigation (MDL) Common Benefit Fund Assessment of Costs (3% of \$1,294.96), and various deductions by the Claims Administrator for settlement administration expenses (\$787.24). See Settlement Statement Breakdown of Fees and Costs, Exhibit 3, Dckt. No. 56.

Thus, the Net Settlement Award due to the Debtor under the terms of the settlement is \$22,865.51. This number is derived from the Final Gross Settlement amount of \$43,1165.41. Through this Motion, the estate is requesting approval of the proposed settlement agreement, which will act as a compromise of all past, present, and future claims and disputes between the Debtor and the pharmaceutical defendant in the pharma/medical products liability case.

STANDARD FOR APPROVAL OF COMPROMISE

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;
2. Any difficulties expected in collection;
3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and
4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Woodson*, 839

F.2d 610, 620 (9th Cir. 1988).

Here, the Trustee argues that the four factors have been met. The Trustee contends that the foregoing compromise is in the best interests of the estate, and otherwise meets the standard for the court's approval of compromise and settlement agreements.

Probability of Success

General bankruptcy counsel, the Trustee, and Special Counsel in the liability litigation all believe that the result achieved by the settlement is as good, if not better, than what could be achieved if litigation had been continued through trial. Litigation would be protracted, costly, and require the significant retention of experts to establish both general and specific causation. Trial counsel would need to convince either the court, if a bench trial, or jury that the injuries sustained by claimants, such as Debtor, were in fact caused by the drug in question and not by other individual factors associated with the individual claimant. Because of some potentially significant causation issues that Debtor Jett's case posed, Special Counsel recommended that he accept the award assigned to him under the allocation model to avoid the uncertainty, time, and significant expense that protracted litigation of a products liability claim can pose.

Difficulties in Litigation and Collection

Trustee states that proving the elements of specific causation and damages each posed significant obstacles to recovery in the Debtor's products liability action. As a result of ingesting a prescription drug, Debtor claimed that he experienced a neuropsychological disorder. His symptoms included anger, hostility, aggression, and depression for which he was prescribed further medication, as well as professional counseling.

While the Debtor's injuries were adequately documented in his medical records, and his injury manifested within 6 months of his last use of the drug, the value of his claim, is limited by the fact that he developed a neuropsychiatric disorder, as opposed to contemplating, attempting, or committing suicide--the latter three injuries being considered much more significant injuries. Medical literature also documents that the risk of developing a neuropsychiatric disorder increases with advanced age.

Debtor in this case was 56 years of age when he developed neuropsychiatric disorder, a fact which prompted a 10% deduction in his case value. And although general causation in these cases could be established, Debtor would still have to survive a *Daubert* challenge to the specific causation of his tort claim, and ultimately the jury would have to decide if he had met the burden of proof on specific causation. This market uncertainty surrounding specific causation in his case, combined with the fact that Debtor was diagnosed with neuropsychiatric disorder and did not contemplate suicide, makes the prosecution of the liability litigation difficult and favors settlement of Debtor's claims.

Expense, Inconvenience and Delay of Continued Litigation

Trustee states that the subject matter of the product liability

litigation was indeed complex. It involved a large pharmaceutical company as well as a significant number of individual claimants, all alleging various injuries arising from their use of the drug in question. The medical aspects of the case were very complex, and would have required the significant expenditure of funds to retain experts for trial to testify regarding both general and specific causation. The liability aspects of the case were also complex and involved millions of pages of documents covering many years from numerous file custodians including employees and agents of the defendant pharmaceutical company.

Paramount Interest of Creditors

The Trustee argues that settlement is in the paramount interests of creditors since as the compromise provides prompt payment to creditors which could be consumed by the additional costs and administrative expenses created by further litigation. Trustee asserts that taking into consideration the results achieved by the settlement, monetary benefit to the bankruptcy estate, and uncertainty as to whether the Trustee could prevail in a very complex and protracted products liability litigation, the proposed settlement is fair and equitable to the estate, the Debtors, and is in the best interest of all creditors, Trustee concludes that the settlement of Debtor's claims in this claim will lead to a faster and more efficient administration of the Debtors' estate.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate. The Motion to Approve the Compromise reached by Special Counsel in Debtor's state court products liability case, with an amount arrived at according to an allocation model developed by the Claims Administrator in the case and a third-party neutral in the litigation, the Garretson Resolution Group.

FEES REQUESTED

This application also seeks final compensation and reimbursement of expenses incurred by the Special Counsel in this case, Richardson, Patrick, Westbrook & Brickman, LLC and Goldwater Law Firm, for professional services rendered to the Trustee pursuant to a fee agreement approved by the court. The fees awarded and costs reimbursed are based upon the court's prior approval of the contingency fee agreement between Special Counsel and the bankruptcy estate under 11 U.S.C. § 328(a).

The Trustee took steps to appoint the firm of Richardson, Patrick, Westbrook & Brickman, LLC and the Goldwater Law Firm by order of this court on October 31, 2013, to represent Jett in the state court case. Dckt. No. 39. The contingency fee contract for special counsel provides a 40% fee to counsel from the gross settlement amount obtained, with any litigation costs and expenses incurred to be deducted from the settlement. According to the terms of the appointment of special counsel, contingency fee of 40% between the two firms will be split as follows: the Richardson firm will receive 90% of the 40% fee award, and the Goldwater firm a 10% fee of the 40% fee award. Trustee's Application to Appoint Special Counsel Nunc Pro Tunc to Prosecute Pharma/Medical Claim, fn.2, Dckt. No. 30. All services for which compensation is requested were in connection with the prosecution of

Debtor's products liability matter, and were not for services rendered in any other matter.

Debtor's product liability case was settled as part of an overall, aggregate settlement along with 693 other similarly situated claimants. Based on Debtor's allocation of 67.5 total award points by the Claims Administrator, his final gross settlement amount totaled \$43,165.41. Out of this final gross settlement amount, Special Counsel is hereby due \$17,266.16, which represents the 40% contingency fee payable to Special Counsel per the terms of the agreement.

Of this total fee amount, \$1726.62 or (4%) has already been allocated by order of the MDL judge to cover Special Counsel's portion of the MDL Common Benefit Assessment of Fees for fees associated with Debtor's case. This 4% fee is chargeable to all plaintiffs' counsel who have filed individual cases within the MDL, and is used to cover fees and services performed by attorneys acting on behalf of all plaintiffs who filed claims in the MDL.

Special Counsel and Claims Administrator are also due a total of \$3,033.74 for costs/expenses associated with the litigation of Debtor's product liability claims. These costs/expenses associated are compromised of the Special Counsel's case-specific expenses (\$675.94), a pro-rata share of Special Counsel's costs associated with the overall litigation (\$275.60), the Debtor's pro rata portion of the Multi-District Litigation (MDL) Common Benefit Fund Assessment of Costs (3% or \$1,294.96), and deductions by the Claims Administrator for various settlement administration expenses (\$787.24). Statement Breakdown of Fees and Costs, Exhibit D, Dckt. No. 56.

Though a separate motion for approval of fees is generally required, in this unique situation where the current settlement is part of a larger settlement and the court has previously approved the contingent fees, the court will consider the request – In This Very Unique Situation Only.

The total attorney fees due to Special Counsel per the terms of the fee agreement equal \$17,266.16. Additionally, costs and expenses due to Special Counsel under the agreement amount to \$2,246.60, and residual deductions for Settlement Administration total \$787.24. No agreement or understanding exists between Special Counsel and any other person for the sharing of compensation to be received for services in connection with this case exists, except for the Goldwater Law Firm, which is entitled to a ten percent (10%) fee from the gross attorney's fees awarded to the Richardson, Patrick law firm.

Pursuant to 11 U.S.C. § 330, the estate is requesting authorization of payment to Special Counsel for fees and costs, in addition to residual deduction for settlement administration. The net residual funds of \$22,865.51 will remain with the Trustee pending further hearing and/or administration in the bankruptcy matter.

According to the Settlement Statement attached as Exhibit B, Dckt. No. 56 at pg. 21, the requested attorney's fees of \$17,266.16 consists of the Attorneys' Portion of the Multi-District Litigation (MDL) Common Benefit Fund Assessment of Fees (4%), and the Net Attorney Fees (36% of the gross

settlement amount). The attorney's portion of the MDL assessment was chargeable to all plaintiff's counsel, and consists of a 4% deduction of the gross settlement amount generated in the state court litigation. The assessment covers the costs of services performed by attorneys acting on behalf of the plaintiffs in the Multi District Litigation, and in the Debtor Steven Jett's case, totals \$1,726.62. The net attorney fees (40% of the gross settlement recovery, minus the Common Benefit Assessment of 4%, which amounts to 36% of the gross settlement amount), totals \$15,539.54.

The total attorney's fees requested are **\$17,266.16**.

The costs and expenses associated with the services provided in the state court litigation includes \$675.94 in attorney case-specific expenses, which included filing fee, research, medical records, postage, copying, and scanning charges, and \$275.60 in RPWB Pro-Rata Share legal research, liability expert, travel, postal, copy charges, and other charges that were not client specific but benefitted all clients, and were apportioned between all clients.

The Client's portion of the Multi-District Litigation (MDL) Common Benefit Fund Assessment of Costs, for which Debtor was billed \$1,294.96, is an MDL assessment that was chargeable to all clients, and was 3% of the gross settlement amount. That amount covers the costs of services performed by attorneys acting on behalf of the plaintiffs in the MDL. The Debtor was also billed for \$787.24 in combined costs for Settlement Administration by the Claims Administrator (Garretson Resolution Group) for claims administration, postage, printing, and other "pass through" expenses.

These expenses (2,246.50 in expenses and \$787.24 for deductions) and costs add up to the total amount of \$3,033.74.

The court finds that the services of Special Counsel, which represented Debtor and 693 other similarly situated claimants in the pharmaceutical/medical product liability litigation conducted in state court, were beneficial to the estate and reasonable under 11 U.S.C. § 330.

The court will therefore authorize the payment of \$17,266.16, plus \$2,246.50 in costs and expenses (for a total payment of \$19,512.66) to Special Counsel, and allow for residual deductions of \$787.24 to facilitate settlement administration as requested by Special Counsel. These payments and deductions follow the terms of Attorney-Client Fee Agreement filed on the docket as an Exhibit in Support of the Trustee's Application to Appoint Special Counsel, Dckt. No. 35.

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 Compromise 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 to Compromise Controversy is granted and the respective rights and interests of the parties are settled on the terms set forth in a confidential agreement reached by Debtor reached, with the assistance of the Special Counsel in this case, Richardson, Patrick, Westbrook & Brickman, LLC and Goldwater Law Firm, with the undisclosed pharmaceutical that Debtor Steven Jett and other similarly situated claimants sued in state court litigation, for symptoms resulting from the ingestion of a prescription drug.

IT IS FURTHER ORDERED that Special Counsel be paid fees in the sum of \$17,266.16, plus \$2,246.50 in costs and expenses, for a total payment of \$19,512.66, and allow residual deductions for settlement administration of \$787.24 as set forth in the Settlement Statement, Exhibit D, Dckt. No. 56 at 21-22.

20. [13-90888-E-7](#) **MICHAEL/ANN BADIOU**
[13-9027](#) **RBS-1**
SENTRY SELECT INSURANCE
COMPANY ET AL V. BADIOU

MOTION FOR SUMMARY JUDGMENT
5-12-14 [[34](#)]

Tentative Ruling: The Motion for Summary Judgment 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) or (f)(2) Motion - Hearing Required.

Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant, the Chapter 7 Trustee, and Office of the United States Trustee on May 16, 2014. By the court's calculation, 27 days' notice was provided.

The Motion for Summary Judgment has not been properly set for hearing. No Notice of Hearing was filed pursuant to the requirements of 9014-1(d)(2)-(3). The court cannot determine whether the present Motion is being set for hearing on 28 days' notice under Local Rule 9014-1(f)(1), or at least 14 days' notice Local Rule 9014-1(f)(2), in which case written opposition by the Defendant in this case would not be required.

The Motion for Summary Judgment is denied without prejudice.

Plaintiff Sentry Select Insurance Company, moves for an order granting Sentry's Motion for Summary Judgment as to the Complaint against Debtor-Defendant Michael W. Badiou, pursuant to Federal Rule of Civil Procedure 56 and Federal Rule of Bankruptcy Procedure 7056.

Defendant Michael W. Badiou ("Defendant") and his wife, Ann M. Badiou, filed a voluntary petition for Chapter 7 relief. Plaintiffs Sentry and American Chevrolet-GEO, Inc. ("Plaintiffs") filed an adversary complaint seeking to declare certain debts owed by Badiou to Plaintiffs as nondischargeable pursuant to 11 U.S.C. § 523(a)(2), (a)(4), and (a)(6). Defendant filed an answer that contained a counterclaim for fraud, which was dismissed on October 31, 2013.

On November 27, 2013, Plaintiffs served Defendant targeted requests for admissions pursuant to Federal Rule of Civil Procedure 56. Defendant did not provide a timely response to these targeted requests for admissions, which Plaintiffs claims establishes liability in favor of Plaintiffs. This matter arises out of a personal and professional relationship Defendant had with American Chevrolet and its officers. Defendant bought and sold used vehicles wholesale for American Chevrolet. American Chevrolet gave Defendant considerable autonomy to perform his services, and unrestricted access to its records and computer systems.

In early January, 2013, David Halvorson discovered a discrepancy in American Chevrolet's records. Upon further investigation, Halvorson realized that at least 34 American Chevrolet vehicles had been secretly sold by Defendant in 2012, without the knowledge or consent of American Chevrolet, that had never been designated to be sold wholesale, and that Defendant kept all the proceeds. Halvorson met with Defendant to discuss the vehicle inventory reports, where Defendant admitted that he fraudulently removed the vehicles from the reports so that American Chevrolet could not see them and would lose track of them. Defendant also admitted that he sold the vehicles and never paid American Chevrolet its portion of the sale proceeds, and had taken steps to conceal his fraud.

American Chevrolet submitted a claim to its insurance carrier, the Plaintiff, Sentry, for the loss of the 34 vehicles that Defendant had stolen. Plaintiff reimbursed American Chevrolet \$349,899.75 per the terms of their policy.

SUMMARY JUDGMENT STANDARD

In an adversary proceeding, summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Bankr. P. 7056. The key inquiry in a motion for summary judgment is whether a genuine issue of material fact remains for trial. Fed. R. Civ. P. 56(c), *incorporated by* Fed. R. Bankr. P. 7056; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); 11 James Wm. Moore et al., *Moore's Federal Practice* § 56.11[1][b] (3d ed. 2000) ("Moore").

"[A dispute] is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute [over a fact] is 'material' only if it could affect the outcome of the suit under the governing law." *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 707 (9th Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The party moving for summary judgment bears the burden of showing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To support the assertion that a fact cannot be genuinely disputed, the moving party must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A), incorporated by Fed. R. Bankr. P. 7056.

In response to a properly submitted motion for summary judgment, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine dispute for trial. *Barboza*, 545 F.3d at 707 (citing *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055-56 (9th Cir. 2002)). The nonmoving party cannot rely on allegations or denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery materials, to show that a dispute exists. *Id.* (citing *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In ruling on a summary judgment motion, the court must view all of the evidence in the light most favorable to the nonmoving party. *Barboza*, 545 F.3d at 707 (citing *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001)). The court "generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented." *Agosto v. INS*, 436 U.S. 748, 756 (1978). "[A]t the summary judgment stage[,] the judge's function is not himself to weigh the evidence and determine the truth of the matter[,] but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

UNANSWERED REQUESTS FOR ADMISSION

The Ninth Circuit has held that unanswered requests for admissions may be exclusively relied on as basis for granting summary judgment. *Conlon v. United States*, 474 F.3d 616 (9th Cir. 2007). The failure to respond to request to admit will permit court to enter summary judgment if facts deemed admitted are dispositive; a court is not required to do so, and the court has discretion to allow untimely answers to request for admissions when such amendment will not prejudice the other party. Fed. R. Civ. P. 36; Fed. R. Bankr. P. 7036, 11 U.S.C.A. *In re Lucas*, 124 B.R. 57 (Bankr. N.D. Ohio 1991).

Fed. R. Civ. P. Rule 36(a) states that a matter is deemed admitted "unless, within 30 days after service of the request ... the party to whom the request is directed serves upon the party requesting the admission a

written answer or objection addressed to the matter, signed by the party or by the party's attorney." Fed. R. Civ. P. 36(a). Once admitted, the matter "is conclusively established unless the court on motion permits withdrawal or amendment of the admission" pursuant to Rule 36(b). *Conlon v. United States*, 474 F.3d 616, 621 (9th Cir. 2007).

Unanswered requests for admissions may be relied on as a basis for granting summary judgment. *Id.*

DISCUSSION

Plaintiffs state that Defendant failed to respond to the following propounded requests for admission, asking him to admit that:

1. He was entrusted with American Chevrolet's vehicles;
2. He was entrusted with access to American Chevrolet's vehicle management system;
3. He coded vehicles not to appear in the American Chevrolet's vehicle management system;
4. He removed at least 34 vehicles from American Chevrolet's vehicle management reports without American Chevrolet's consent;
5. He kept the entire proceeds of the sales from at least 34 vehicles from American Chevrolet;
6. He admitted to removing the vehicles from American Chevrolet's vehicle management reports so that American Chevrolet would not be able to track the vehicles;
7. He told David Halvorson about selling the vehicles and keeping the entirety of the proceeds;
8. He obtained title of the vehicles under false pretenses;
9. He manipulated American Chevrolet's computer systems to keep the sales of the proceeds of the vehicles for himself; and,
10. He had an intent to deceive, American Chevrolet justifiably relied on Defendant's conduct and statements, and American Chevrolet, by subrogation, Sentry, suffered damage as a result of Defendant's conduct.

On the basis of these facts, Plaintiffs assert that pursuant to 11 U.S.C. § 523(a)(4)(A), a fiduciary relationship existed, wherein Defendant entered into a business relationship with the president of American Chevrolet, whom he had a long term personal relationship with. Defendant was entrusted with American Chevrolet's property, assets, and profits, and given daily access to the dealership and its computer systems. Defendant then began fraudulently misappropriating American Chevrolet's property, assets, and profits.

Defendant also argues that pursuant to 11 U.S.C. § 523(a)(6)(A), Defendant engaged in willful and malicious conduct by virtue of his conversion of American Chevrolet's property; Defendant acted willfully, deliberately removing American Chevrolet's vehicles from the computer system, so they would not appear on vehicle management reports.

Defendant then allegedly knowingly sold American Chevrolet's property and knowingly retained all the proceeds for himself, causing substantial harm to American Chevrolet and by subrogation, Sentry. Plaintiffs request monetary damages against Defendant on the basis that Defendant has committed willful malicious acts, and punitive damages should be awarded.

OPPOSITION AND REQUEST FOR CONTINUANCE BY DEFENDANT

Pursuant to LBR Rule 9014-1(j) Defendant, Michael W. Badiou, applies to this court for an order continuing the hearing date for plaintiff Sentry Select Insurance Company's motion for summary judgment for a period of at least 30 days and preferably 60 days, on the following grounds:

1. Until very recently, Defendant was *pro se*.
2. Plaintiffs' notice of motion does not comply with LBR Rule 9014-1(d)(3), which is particularly pertinent when the notice was served on a *pro se* party;
3. Plaintiffs' motion for summary judgment is based almost entirely on deemed admissions, which defendant, if given the opportunity by the court, will seek to withdraw;
4. Defendant attempted to obtain an extension of time to respond to discovery. He was unsuccessful and served responses eighteen days late in January of this year;
5. Defendant will file a motion to amend the scheduling order to allow him to bring a nondispositive motion;
6. If the court grants defendant's motion to amend the scheduling order, defendant will file a motion for an order withdrawing his deemed admissions;
7. Defendant's counsel asked plaintiff's counsel, Robert Salley, to voluntarily continue the hearing for one month. The request was declined. Chevrolet-GEO, Inc., represented by Michael Ijams, is also opposed to the continuance;
8. Continuing the hearing will not prejudice plaintiff and will allow for orderly judicial review of defendant's motions and, ultimately, will avoid a serious miscarriage of justice.

Dckt. No. 44.

The Defendant files another specific objection to plaintiff Sentry Select Insurance Company's notice of motion and motion for summary judgment,

on the ground that it does not comply with Local Bankruptcy Rule 9014-1(d)(3), which requires that the notice of hearing shall advise potential respondents whether and when written opposition must be filed, the deadline for filing and serving, etc. Pursuant to Local Bankruptcy Rule 9014-1(1), the Defendant requests that the court either strike plaintiff's motion in its entirety or continue the motion an appropriate period of time. Dckt. No. 47.

REPLY BY PLAINTIFFS

Plaintiffs argue that Defendant's *pro se* status is not excusable neglect in failing to timely respond to a motion for summary judgment, and that a technical defect in the Summary Judgment Notice of Motion does not warrant Defendant's requested relief. Plaintiffs argue that Defendant has crafted a declaration that is silent regarding the contents of the notice of the motion, and that Defendant should be expected to know and appreciate the contents of the Federal Rules of Civil Procedure, and the deadline to oppose a motion for summary judgment as set forth in Federal Rule of Civil Procedure 56. Plaintiffs claim that if the defect did in fact prejudice the Defendant, he would have stated such in the declaration.

Plaintiffs further argue that ultimately, Defendant wants to be excused from his failures to comply with the time to respond for a request for admissions, to timely file a discovery motion, and to oppose the Motion for Summary Judgment without any showing of good cause. Plaintiffs assert that Defendant's *pro se* status does not entitle him to relief from the scheduling order, setting firm deadlines for the discovery process, and that notwithstanding the *pro se* excuse offered by Defendant, Defendant consulted with an attorney five days before the deadline to submit an opposition to the motion for summary judgment. Nothing was filed within that time frame, and still no opposition has been filed.

Additionally, Plaintiffs argue that the request for continuance violates Federal Rule of Civil Procedure 56(f), which require that a party requesting a continuance present affidavits which set forth particular facts expected to be discovered or proved, and to be used to oppose the summary judgment motion.

PROCEDURAL ISSUES

No notice of hearing was filed for this Motion pursuant to Local Bankruptcy Rule 9014-1(f) and 9014-1(d)(2)-(3). 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 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. A review of the docket shows that no Notice of Hearing was filed with Plaintiffs' Motion for Summary Judgment. Since a Notice of Hearing was not filed, none of these requirements were met.

Although the Plaintiffs' arguments regarding the Defendant's failure to timely respond to its Requests for Admissions, and how Defendant's previously *pro se* status should not excuse Defendant's failure to timely submit his discovery responses, are assertions that are most certainly worthy of this court's consideration, the Plaintiffs have not complied with the requirements of what the components expected in pleadings submitted in this bankruptcy court.

The Local Bankruptcy Rules exist, in part, to ensure that all individuals and entities who are party to actions in this district give and are extended due process rights in this court. 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 two rules at issue embody the simplicity of the Local Rules, and desire of the rule's drafters to maintain the integrity and procedural fairness of law and motion practice in the Eastern District court. Local Bankruptcy Rules 9014-1(d)(2), which requires that all moving parties provide a Notice of Hearing clearly stating 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, merely makes the minor demand of all moving parties to properly inform opposing parties where, when, and why a hearing will be held. Local Bankruptcy Rule 9014-1(d)(2) requires the moving party to advise potential respondents on whether written opposition must be filed, and other details of the procedure for presenting opposition.

Local Rule 9014-1(e)(2) requires that a proof of service, in the form of a certificate of service, shall be filed with the Clerk concurrently with the pleadings or documents served, or not more than three (3) days after they are filed. Here, it appears that the Certificate of Service was filed four days after Plaintiffs' Motion, Memorandum of Points and Authorities, Declarations, and other supporting pleadings were filed with the court on May 12, 2014.

These rules should not be particularly onerous on litigants who appear this court, and all parties are expected to adhere to the rules; a denial of the instant Motion would not be an automatic victory on the merits for the Defendant, as Plaintiffs' Reply seems to suggest, but rather a proper denial of Plaintiffs' Motion as procedurally defective.

The Motion is denied without prejudice. FN.1.

FN.1. Presumably the Defendant has already prepared and is filing the necessary pleadings for relief from his failure to respond to discovery. While the current motion is not being granted, the court infers that Plaintiff will be filing and properly noticing a new motion for summary judgment if Defendant is not diligent in seeking relief from his prior failures in discovery.

Plaintiff can determine what it believes is a reasonable time for Defendant and his new counsel to promptly act for obtaining relief from the

failure to comply with the discovery rules - taking into account the judicial preference to determine matters on their merits rather than by default or with evidence presented by only one party.

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 Summary Judgment filed by Plaintiff, 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 Summary Judgment is denied without prejudice.

21. 14-90266-E-7 **CAROLINE CLINK-CRAWFORD** **MOTION TO AVOID LIEN OF UNIFUND**
JDP-1 **Christian J. Younger** **CCR PARTNERS**
5-6-14 [[22](#)]

Final Ruling: No appearance at the June 12, 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, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on May 6, 2014. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

The Motion to Avoid 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Unifund

CCR Partners ("Creditor") against property of Caroline Crawford ("Debtor") commonly known as 1225 Vito Avenue, Modesto, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of \$2,373.78. An abstract of judgment was recorded with Stanislaus County on September 09, 2010 which encumbers the Property.

The Motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$137,000.00 as of the date of the petition. The unavoidable consensual liens total \$74633.93 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of \$70,676.59 on Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) 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 judgment lien of Unifund CCR Partners, California Superior Court for Stanislaus County Case No. 646025, recorded on September 09, 2010, Document No. 2010-0080344-00 with the Stanislaus County Recorder, against the real property commonly known as 1225 Vito Avenue, Modesto, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

22. [14-90266-E-7](#) CAROLINE CLINK-CRAWFORD MOTION TO AVOID LIEN OF
JDP-2 Christian J. Younger PROFESSIONAL COLLECTION
CONSULTANTS
5-6-14 [\[28\]](#)

Final Ruling: No appearance at the June 12, 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, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on May 6, 2014. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

The Motion to Avoid 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Professional Collection Consultants ("Creditor") against property of Caroline Crawford ("Debtor") commonly known as 1225 Vito Avenue, Modesto, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of \$2,700.54. An abstract of judgment was recorded with Stanislaus County on January 10, 2008 which encumbers the Property.

The Motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$137,000.00 as of the date of the petition. The unavoidable consensual liens total \$74633.93 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of \$70,676.59 on Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) 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 judgment lien of Professional Collection Consultants, California Superior Court for Stanislaus County Case No. 616479, recorded on January 10, 2008, Document No. 2008-0002788-00 with the Stanislaus County Recorder, against the real property commonly known as 1225 Vito Avenue, Modesto, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.