UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

June 30, 2022 at 10:30 a.m.

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1. **19-90464-E-7** **RICHARD RICKS** **MOTION TO MODIFY OR VACATE AND ISSUE NEW COURT ORDER APPROVING ATTORNEYS' FEES**
MAS-1 **Pro Se** **4-26-22 [190]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, creditors, and Office of the United States Trustee on April 25, 2022. By the court's calculation, 66 days' notice was provided. 14 days' notice is required.

The Motion to Modify or Vacate Order was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 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 offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The Motion to Modify or Vacate Order is granted.

Serlin & Whiteford, LLP, special counsel for the Chapter 7 Trustee, ("Special Counsel") has filed a Motion seeking the court "modify" or "vacate" its prior order granting Special Counsel compensation

in this case. Special Counsel seeks court approval of payment by way of contingency fees in this matter. Motion, Dckt. 190. The court's order granting Special Counsel fees in the amount of $23,905.00 and expenses in the amount of $377.80 was entered on June 24, 2021. Dckt. 134. As grounds for this Motion, Special Counsel states they are entitled to relief pursuant to Federal Rules of Civil Procedure 60(a); Rule 60(b)(1), (2), and (6), and 11 U.S.C. § 105(a).

The Motion to Modify or Vacate was filed on April 26, 2022, which is 10 months and 2 days after the entry of the Order allowing Special Counsel fees and costs.

REUSED DOCKET CONTROL NUMBER

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. That 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).

REVIEW OF ORDER ALLOWING COMPENSATION, RULING, AND MOTION

Special Counsel is correct that the Motion for Compensation states that compensation for Special Counsel is requested to be in the amount of 35% of the net proceeds from the sale of the Oklahoma Property, in addition to 35% of other amounts stated in the Motion. Motion, ¶ B; Dckt. 123. In the Motion, the Trustee states that the final amount of net proceeds has not been determined, the property not having been sold, but the Trustee estimates for purposes of the Motion for Compensation that the 35% would be $13,755.00. That would be 35% of net proceeds of $39,330.00.

In the Motion to Modify or Vacate, Special Counsel states that the actual net proceeds received by the Trustee are $87,387.24 – which is 222.2% greater than the amount stated to the court in requesting a contingent percentage amount.

Further, in the Trustee's Motion for Special Counsel Compensation, the Trustee asserts that a total of $24,282.80 (which is comprised of 35% of all the component monies recovered and expenses) is "reasonable compensation for services rendered to the bankruptcy estate." *Id*., p. 5:9-12; Dckt. 124.

In connection with the Motion to Modify or Vacate, Trustee does not provide a declaration stating why there was a 222.2% miscalculation of the net sales proceeds. Additionally Trustee does not state whether she concurs that a 222.2% increase in the attorney's fees for Special Counsel are reasonable compensation.

Reviewing the court's Ruling on the Motion for Compensation as stated in the Civil Minutes, the Ruling includes the following:

> Serlin & Whiteford, LLP, the Special Counsel ("Applicant") for Irma C. Edmonds, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period October 2, 2020, through May 25, 2021. The order of the court approving employment of Applicant was entered on October 2, 2020. Dckt. 115. **Applicant requests fees in the amount of $24,282.80 and costs in the amount of $377.80.**

Civil Minutes, p. 2; Dckt. 132 (emphasis added).

Contingency Fee: Litigation

Applicant computes the fees for the services provided as a percentage of the monies recovered for Client. Applicant represented Client in litigation to recover voidable and/or fraudulent transfers of property of the bankruptcy estate, for which Client agreed to a contingent fee of 35% of the Defendant's initial payment per the Settlement Agreement, 35% of net proceeds of sale of real property, and 35% of the Defendant's 24 monthly payments per the Settlement Agreement. In approving the employment of applicant, the court approved the contingent fee, subject to further review pursuant to 11 U.S.C. § 328(a). **An estimated $68,300 of net monies (exclusive of these requested fees and costs) was recovered for Client.**

Id., p. 4 (emphasis added).

FEES AND COSTS & EXPENSES ALLOWED

Fees

Percentage Fees

The court finds that the fees computed on a percentage basis recovery for Client are reasonable and a fair method of computing the fees of Applicant in this case. Such percentage fees are commonly charged for such services provided in non-bankruptcy transactions of this type. **The court allows Final Fees of $24,282.80 pursuant to 11 U.S.C. § 330 for these services provided to Client by Applicant.** The Chapter 7 Trustee is authorized to pay from the available funds of the Estate.

Id., p. 5 (emphasis added).

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

Fees $23,905.00
Costs and Expenses $ 377.80

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

Id., (emphasis added).

Looking at the court's ruling, which was posted prior to the hearing, read by General Counsel for the Trustee and Special Counsel (Applicant) for the Trustee prior to the hearing, which was then the subject of the hearing, and which was adopted and states the court's Ruling – it clearly states that the court's Ruling is that Special Counsel is allowed $23,905 in fees.

June 24, 2021 Hearing on Motion for Compensation -
No Statement of Error or Request for Correction Made by Special Counsel or General Counsel for the Trustee (who filed the Motion) With Respect to the Stated Ruling Allowing $24,282.80 in Legal Fees and Costs

The hearing on the Motion for Compensation for Special Counsel was held on June 24, 2021. Civil Minutes; Dckt. 132. Both the Trustee's General Counsel and Trustee's Special Counsel appeared at the hearing. *Id*.

The court's posted tentative ruling for the June 24, 2021 hearing on the Motion for Compensation stated allowing Special Counsel the $23,905.00 in fees and $377.80 in expenses as set for in the court's final ruling (Civil Minutes and Order; Dckts. 132, 133). No opposition to the court's tentative ruling was stated by the Trustee's General Counsel or Special Counsel, no corrections were requested, and it was not presented to the court that allowing the specific amount of attorney's fees was an error of some sort. No appeal was taken from the court's final order on the Motion for Compensation for Special Counsel.

It appears that Special Counsel's contention is that the court erred in granting the Motion for Compensation for specific dollar amounts as to fees, and should have approved the fees on a contingent basis, subject to the provisions of 11 U.S.C. § 328(a) allowing the court to modify such an allowance if subsequent information is presented to the court showing that the allowance of such fees was improvident in light of developments not capable of being anticipated a the time the order was entered. However, such was not communicated at the hearing on the Motion for Compensation.

Legal Authority to Modify or Amend Final Orders and Judgments

Clerical Error
Federal Rules of Civil Procedure 60(a)

Federal Rule of Civil Procedure 60, as incorporated into Federal Rule of Bankruptcy Procedure 9024 permits parties to seek relief from a final judgment or order. Under Federal Rule of Bankruptcy Procedure 60(a), if the court made a clerical error in issuing the order or judgment, then it may be corrected. There is no stated time period for such a correction to be made.

As show in the court's ruling on the Motion for Compensation, the court was clearing awarding a specific dollar amount of fees, not a percentage of some future amount of money obtained. Civil Minutes, Dckt. 132. That specific dollar amount stated in the Ruling is the same as in the court's order (Dckt. 134).

Special Counsel asserts that the dollar amount stated in the court's Order is a "clerical error" of what is stated in the court's Ruling and a "simple" correction is merely required.

Fur such a correction of a "clerical error" to be made, it cannot be asserted that the mistake is one of substance in the ruling. As discussed in 12 Moore's Federal Practice - Civil § 60.11, a "clerical mistake" is one described as (emphasis added):

> [a] Mistake Is "Clerical" if it Misrepresents Court's Actual Intention
>
> **Rule 60(a) applies when the record indicates that the court intended to do one thing but, by virtue of a clerical mistake or oversight, did another.** The mistake to be corrected must be clerical or mechanical, because **Rule 60(a) does not provide relief from substantive errors in judgment** (see [3], below). The Seventh Circuit expressed this idea clearly when it observed that:
>
> If the **flaw lies in the translation of the original meaning to the judgment, then Rule 60(a) allows a correction**; if the judgment captures the original meaning but is infected by error, then the parties must seek another source of authority to correct the mistake.
> . . .
>
> [b] Transcription Errors and Mathematical Mistakes Are Typical "Clerical" Mistakes
>
> The typical clerical mistake is one that occurs in transcribing the judgment. For example, one court intended, in its original judgment, to simply recite the stipulation of the parties concerning attorney's fees but, in doing so, misstated the amounts agreed to for fees. That type of error in expression was remediable under Rule 60(a).
>
> Computational errors are another classic example of a mechanical or clerical mistake. One employment discrimination judgment was erroneous because the judgment inadvertently undercounted the plaintiff's period of unemployment by two weeks and three days. This counting error resulted in a considerably smaller damage award than the court intended, and the court properly used Rule 60(a) to correct its error.
>
> **Simple transposition errors resemble computational mistakes, and are almost always correctable as clerical mistakes under Rule 60(a)**. An illustrative example of transpositional error appeared in a case in which all of the documentary evidence and testimony referred unambiguously to damages in the amount of $296,686.89. However, a special interrogatory submitted by the court to the jury asked about damages in the sum of $269,689.89. This was a simple, unintended transposition of the second and third digits. The court was within the scope of Rule 60(a) when it corrected the verdict in its judgment to reflect the correct amount of damages.

Numerous other examples of these types of "clerical" mistake could be cited:

•If a consent decree calls for interest at the legal rate, and the clerk inadvertently fills in the blank for the legal rate of interest with what is, in fact, the contract rate, that mistake may be corrected under Rule 60(a).

•An inaccurate description of the metes and bounds of property to which an easement applied may be corrected under Rule 60(a) when the record indicates that terms of the order were different from the relief that the bankruptcy court intended to award when it entered the order.

•If a judgment should, as an undisputed matter of law and fact, reflect that the defendants are jointly liable for the entire amount of the judgment, and the verdict fails to reflect that only because the court's jury instructions were ambiguous on point, the court may correct the verdict in the judgment under Rule 60(a).

•If a summary-judgment order in a class action inadvertently refers to the wrong subpart of Rule 23 applicable to the plaintiff class, this may be corrected by means of Rule 60(a).

•When the clerk fails to timely docket one party's opposition to a motion to dismiss, thus resulting in the issuance by the court of an erroneous order of dismissal, that dismissal order may be set aside under Rule 60(a).

•A district court may, under Rule 60(a), correct its clerical error in designating a post-summary-judgment dismissal as "without prejudice," to reflect that the dismissal is actually "with prejudice."

. . .

[b] Error of Omission Correctable Only if Omission Misrepresents Court's Intentions

Although Rule 60(a) clearly reaches errors of omission, **it will not reach an omission that accurately reflects what the court decided**. **Even omissions that are legally incorrect, but that nonetheless accurately reflect what the court intended, are not reachable by Rule 60(a). . .**

. . .

The distinction between a correctable error of omission that simply conceals a court's true intentions, and a noncorrectable omission that reflects the court's true intent but is legally erroneous, is not an easy one to draw. There are many cases dealing with the situation of a court's failure to award prejudgment interest. When there is no indication in the record that the issue of prejudgment interest was discussed or that the court intended to award it to a successful plaintiff, the omission of prejudgment interest in the judgment may not be "corrected" under Rule 60(a). **Resolution of a dispute over correctability of an error of omission usually turns on what evidence there is in the record as to the court's actual intent at the time of the original judgment or order.**

There are, however, times when the law itself establishes that an omission is an indisputably clerical mistake. If, for example, a statute requires the clerk to add prejudgment interest from the time of the verdict to the time that the judgment is entered, there is a mandatory, clerical duty to add that interest. If the clerk omits this interest in the judgment, the intent of the court is irrelevant, and the omission may be remedied under Rule 60(a). However, if a statute merely provides that a prevailing party is entitled to an award of prejudgment interest, and does not provide for the clerk to automatically enter the amount, an omission of prejudgment interest in the judgment may be either inadvertent clerical error or a substantive legal error that may not be remedied under Rule 60(a). **The record will have to be examined to determine the court's intent at the time of the judgment.** There are a few courts that have held that if, for example, a statute entitles a plaintiff to recover interest and it is omitted from the judgment, that interest may be added to the judgment by means of Rule 60(a); but this is a decidedly minority view.

[3] Substantive Legal Errors Not Correctable Under Rule 60(a)

Rule 60(a) does not apply if the change sought would affect substantive rights of the parties. As summarized by the Fifth Circuit:

> In sum, the relevant test for the applicability of Rule 60(a) is whether the change affects substantive rights of the parties and is therefore beyond the scope of Rule 60(a) or is instead a clerical error, a copying or computational mistake, which is correctable under the Rule. … . If … cerebration or research into the law or planetary [sic] excursions into facts is required, Rule 60(a) will not be available to salvage … blunders. Let it be clearly understood that Rule 60(a) is not a perpetual right to apply different legal rules or different factual analyses to a case. **It is only mindless and mechanistic mistakes, minor shifting of facts, and no new additional legal perambulations which are reachable through Rule 60(a).**

As phrased by the Ninth Circuit, in deciding whether a trial court may correct a judgment under Rule 60(a), the focus is on what that court originally intended:

> The basic distinction between "clerical mistakes" and mistakes that cannot be corrected pursuant to **Rule 60(a) is that the former consist of "blunders in execution"** whereas that **latter consist of instances where the court changes its mind, either because of a legal or factual mistake in making its original determination**, or because on second thought is has decided to exercise its discretion in a manner different from the way it was exercised in the original determination. *See United States v. Griffin*, 782 F.2d 1393, 1397 (7th Cir. 1986) (emphasis in original).

> **Even when there is a clear and obvious legal error in a ruling, Rule 60(a) is not a proper vehicle for correcting that error if the error was what the court intended at the time it made the ruling**. For example, when a court simply overlooked a recent statutory change in the rate of judgment interest from six percent to eight percent, Rule 60(a) could not be used to change the judgment's erroneous specification of the interest rate. Similarly, when a judgment wholly omits prejudgment interest, the proper vehicle for augmenting the judgment to include prejudgment interest is a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), rather than a motion to correct the judgment pursuant to Rule 60(a).

The order granting compensation clearly states that the fee granted was a fixed amount. Dckt. 132. This is evidence of the court's intention to grant a fixed fee, an intent which garnered no opposition at the June 24, 2021 Motion for Compensation hearing. "Whether 60(a) is available depends upon whether the judgment said what the judge actually meant: 'if the flaw lies in the translation of the original meaning to the judgment, then Rule 60(a) allows a correction; if the judgment captures the original meaning but is infected by error, then the parties must seek another means of authority to correct the mistake.'" *Klingman v. Levinson*, 877 F.2d 1357, 1360-61 (7th Cir. 1989). From a review of the Civil Minutes, which are consistent with the posted tentative ruling for which neither Trustee's General Counsel or Special Counsel identified any error, mistakes, or items in need of correction, the Order granting compensation for Special Counsel is consistent with the court's Ruling. The order captured the original intent of the court, and Movant must utilize an alternate avenue to redress their failure to oppose the court's ruling at the time of the hearing. Therefore, Special Counsel is not entitled to relief under a Rule 60(a) clerical error.

The authorities cited by Movant are not contrary to the above. In *Klingman v. Levinson*, 877 F.2d 1357, 1361 (7th Cir. 1989), while saying that a Rule 60(a) correction can include an "oversight or omission," such must be one in which the court intended to so something but just failed to do it. In *Huey v. Teledyne, Inc.*, 608 F.2d 1234, 1237 (9th Cir. 1979), the Ninth Circuit states that the Rule 60(a) "correction" is to make the order "conform to its [the court's] earlier ruling."

More recently, in *Tattersalls, Ltd. v. Dehaven*, 745 F.3d 1294, 1298 (9th Cir. 2014), the Ninth Circuit discussed the scope of Rule 60(a) being broader than mere "quintessential 'clerical' errors where the court errs in transcribing the judgment or makes a computational mistake." These are to make corrections in what was intended by the trial judge, but just not said clearly in the order/judgment. Examples provided by the Ninth Circuit in Tattersalls include: (1) the record and the judge's recollection show that a dismissal was intended to be without prejudice, though not clearly stated such in the ruling; (2) correct a blanket order dismissing twenty-two cases where the record showed that the judge intended to dismiss just one, (3) to correct and clarify that the judge's ruling was to cancel three trademarks and not just one that was stated in the judgment, and (4) allowing a trial judge to "correct" a ruling to include sufficient details as to the basis of the ruling. *Id*. At 1298. The Ninth Circuit than summarizes the scope of Rule 60(a) relief as:

> Surveying our and other courts' decisions relating to the allowable uses of Rule 60(a), we concluded that the Rule "allows a court to clarify a judgment in order to correct a failure to memorialize part of its decision, to reflect the necessary implications of the original order, to ensure that the court's purpose is fully

> implemented, or to permit enforcement." *Id.* at 1079 (internal quotation marks omitted). The "touchstone" of Rule 60(a) in all these cases is "fidelity to the intent behind the original judgment." *Id.* at 1078.

Id.

While Special Counsel, now for a second time, has argued that changing the order from a dollar amount of fees to a percentage of a future amount is a mere "clerical in nature error" that may be corrected in the order to reflect the court's ruling, the record clearly shows that the Ruling was for the dollar amount, not a percentage of a future amount.

While Special Counsel may assert that this is a substantive error of the court in misunderstanding the Motion for Compensation and then issuing the Ruling and Order in error based on the relief requested and the evidence presented, such is a substantive error that cannot be merely "correction" with an eraser and some additional ink pursuant to Federal Rule of Civil Procedure 60.

Relief From Prior Order or Judgment

The U.S. Supreme Court provides an avenue for relief from a prior judgment or order, even when such is final, in Federal Rule of Civil Procedure 60(b). Relief from such judgment or order may be made for the specified grounds, which includes "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). The enumerated grounds include "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). 12 Moore's Federal Practice - Civil § 60.41 provides a discussion of what types of conduct are sufficient to grant relief pursuant to Federal Rule of Civil Procedure 60(b), noting that there is not a simple punch list test.

While generally the mistake must be made by a party or party's counsel, it has been recognized that there can be a mistake of the court for which relief may be granted. However, when one is asserting a "judicial mistake," the Ninth Circuit Court of Appeals has required that the motion seeking relief pursuant to Federal Rule of Civil Procedure 60(b)(1) be filed before the time expires for filing an appeal on the judgment or order. *Gila River Ranch, Inc. v. United States*, 368 F.2d 354, 357 (9th Cir. 1966). This use of Rule 60(b)(1) in lieu of an appeal was discussed in the unpublished Ninth Circuit Decision *Sattler v. Russell (In re Sattler)*, 840 Fed. Appx. 214 (9th Cir. 2021), stating:

> "[U]nder Rule 60(b)[,] the [lower court] can, within a reasonable time not exceeding the time for appeal, hold a rehearing and change [its] decision." *Gila River Ranch, Inc. v. United States*, 368 F.2d 354, 357 (9th Cir. 1966) (emphasis added). While this rigid timeliness requirement does not apply to "mistakes" other than mistakes of law that go to the merits of a case, *see Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 387 F.3d 1021, 1024 (9th Cir. 2004) (mistake in post-judgment interest rate), that does not help Sattler here, *see, e.g., SEC v. Seaboard Corp.*, 666 F.2d 414, 415-16 (9th Cir. 1982) (courts should not grant a Rule 60(b) motion based only on alleged legal errors, if the motion comes after the time to appeal has expired). Granting motions to vacate orders involving alleged legal errors on the merits, "after a deliberate choice has been made not to appeal, would allow litigants to circumvent the appeals process and would undermine greatly the policies supporting finality of judgments." *Plotkin v. Pac. Tel. & Tel. Co.*, 688

F.2d 1291, 1293 (9th Cir. 1982) (alleged mistake in granting summary judgment). "The uncertainty resulting from such a rule would be unacceptable." Id. [the court then discusses when there can be an exception to the appeal period deadline based on "existence of extraordinary circumstances with prevented or rendered him [person filing the Rule 60(b)(1) motion based on judicial mistake] unable to prosecute an appeal."

Id., 214-215. Unfortunately, the time to appeal this court's order on the Motion for Compensation expired fourteen (14) days after it was entered on the Docket on June 24, 2021. Fed. R. Bankr. P. 8002(a). Under this standard, if Movant's arguments rely on "judicial mistake," under Rule 60(b) they are not timely. However, if the mistake was based on a party's mistake, Special Counsel would not be time barred and would satisfy. From reading the Motion, it appears to the court that the mistake is on behalf of Special Counsel for not noticing the fixed fee and not knowing the actual sale price. As such, Special Counsel's Motion is timely, being brought within one year of the June 24, 2021 order.

Rule 60(b)(1)

Under Rule 60(b)(1), "[o]n motion and just terms, the court **may relieve a party** or **its legal representative** from a final judgment, order, or proceeding for . . . **mistake, inadvertence, surprise, or excusable neglect**" (emphasis added). "Although 'mistake, inadvertence, surprise, or excusable neglect' are recognized as grounds for relief from a final judgment by Rule 60(b)(1), the Rule is completely silent on what these terms mean. Court language does not precisely define these terms, either. What is or is not sufficient to justify relief under Rule 60(b)(1) is best understood by analyzing the fact patterns, rather than the language, of the cases." 12 Moore's Federal Practice - Civil § 60.41 (2022).

In analyzing excusable neglect, the Supreme Court developed a four factor test which has been adopted by the Ninth Circuit. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388-394 (1993); *Pincay v. Andrews*, 389 F.3d 853, 855-895 (9th Cir. 2004)(*en banc*). The Supreme Court held the court must take into account all relevant circumstances including:

(1) the danger of prejudice to the opposing party;

(2) the length of the delay and its potential impact on the proceedings;

(3) the reason for the delay; and

(4) whether the movant acted in good faith.

Pioneer 507 U.S. at 395; *Bateman v. United States Postal Serv.*, 231 F.3d 1220, 1223-24 (9th Cir. 2000) (emphasis added).

Moore's Federal Practice describes some fact patterns justifying relief from judgment:

1. The record shows that one of the **parties** proceeded to trial under an understandable but **mistaken assumption** concerning the issues to be tried.

2. Settlement was made by an **attorney** who **lacked authority**.

3. An appeal was not timely because **errors of court clerk contributed to appellant's lack of notice** that final judgment had been entered.

4. An untimely appeal was dismissed because the court **clerk's error deprived the appellant of an opportunity to** identify and **correct the defect.**

5. An **ambiguous local rule misled a party** as to the time required to act in order to secure trial on the merits.

6. **Ignorance of unfamiliar local procedures** may be excused when additional facts and circumstances contribute to the ignorance.

7. **Failure to appear at trial** may be excused when **court created confusion** in process of setting trial date.

8. **Misunderstanding** over terms of an **agreed extension** to plead may constitute mistake or excusable neglect.

9. **Inability of party to hire counsel** or otherwise communicate with court may be excusable neglect.

10. **Procedural errors made by lay parties** that attempt to represent themselves and who are given confusing instructions may justify relief from the consequences of understandable errors.

12 Moore's Federal Practice - Civil § 60.41 (2022) (emphasis added). Additionally, Moore's states inadvertent conduct is not automatically a mistake or excusable neglect sufficient to justify relief from judgment under Federal Rules of Civil Procedure 60(b)(1). A claim of mistake or excusable neglect will always fail if facts demonstrate a lack of diligence. *Id.* Scenario in which relief has failed due to a lack of diligence include inadequate trial preparation or simple carelessness in failing to read legal papers. *Id.* In particular, Moore's states a failure to read a court's order "is even more true of carelessness." *Id.* (citing *In re Four Seasons Sec. Laws Litig.*, 502 F.2d 834, 839 (10th Cir. 1974)).

Grounds Asserted by Special Counsel

The facts at hand do not appear to fall in line with the fact patterns above justifying relief from an order. Special Counsel states there was mistake due to the "mistaken belief that the Oklahoma property would sell for about $40,000 when in fact it later sold for $100,000." Motion at 4:4-7. Special Counsel has provided zero evidence for why they underestimated the value of the Property by 222%. Although it is not uncommon for parties to underestimate the value of property, Special Counsel underestimated what the Oklahoma property would sell for an amount that was less than half as much of what it actually sold for. This "mistake" and "surprise" does not appear excusable. Rather, it demonstrates a lack of diligence and preparedness for the sale.

In addition, Movant states they "simply did not notice that the prior fee award contained a fixed number based on an assumed sale price rather than a percentage of net proceeds." Motion, Dckt. 190 at 4:6-10; Declaration, Dckt. 192 at ¶ 6. Additionally, Special Counsel admits they "did not pay much attention to the fact that the Court approved a fixed fee rather than a percentage fee because of the Trustee's projections as to the likely sale price of the Oklahoma property in the summer of 2021." Declaration, Dckt. 192 at ¶ 6. Special Counsel's admissions demonstrate a clear, careless, failure to read the court's order.

Movant had ample opportunity to read the tentative ruling and order prior to the hearing, which, according to the court's Pre Hearing Disposition Archives, was posted on June 23, 2021 at 7:53 PM, the night before the hearing. See *Pre-Hearing Disposition Archive*, United States Bankruptcy Court Eastern District of California, http://www.caeb.circ9.dcn/Calendar/PreHearingDispositions.aspx. Movant failed to raise any issue with the order at the June 24, 2021 hearing. This lack of diligence is not excusable.

The court finds that Movant is not entitled to relief from mistake, surprise, or excusable neglect pursuant to Federal Rules of Civil Procedure 60(b)(1).

Rule 60(b)(2)

Special Counsel additionally argues, in the alternative, relief should be granted pursuant to Federal Rules of Civil Procedure 60(b)(2). Under Rule 60(b)(2), "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." "[T]he movant must show the evidence (1) existed at the time of the trial, (2) could not have been discovered through due diligence, and (3) was 'of such magnitude that production of it earlier would have been likely to change the disposition of the case.'" *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990).

Newly discovered evidence does include evidence that was otherwise unavailable at trial. 12 Moore's Federal Practice - Civil § 60.42 (2022). However, the Motion may not be based on evidence that could have been discovered earlier had moving party been diligent. *Id.*; *Frederick S. Wyle P.C. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985). The moving party must show why they were unable to present evidence that provides the basis for the motion either in time for use at trial or in time for filing a motion for new trial. 12 Moore's Federal Practice - Civil § 60.42 (2022). Additionally, a party may not assert, without explanation, that they were unaware that certain evidence existed at all. *Id.* There must be facts showing why the party was unaware that the evidence existed, which shows their ignorance was excusable. *Id.*

Here, Special Counsel argues "the newly discovered evidence is the actual sale amount obtained by the Trustee just this year for the Oklahoma property." Motion, Dckt. 190 at 4:23-25. Additionally, Special Counsel states the new evidence was "obviously not available in June of 2021, months before the property was sold." *Id.* at 4:26-28.

The court recognizes the actual sale price was not available at the time of the Motion for Compensation. However, here Special Counsel does not present the court with any evidence of a realtor's opinion as to value and does not provide evidence of any good faith basis for somehow just

"discovering" after the fact the value of the Property constitutes newly discovered evidence. The "newly discovered evidence" of the property actually selling for $100,000, without an explanation for why it was severely underestimated, demonstrates to the court a lack of diligence that does not make their ignorance excusable.

Rule 60(b)(6)

Rule 60(b)(6) is a catch-all provision stating, "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief." The Supreme Court has ruled Rule 60(b)(6) "grants federal courts broad authority to relieve a party from a final judgment 'upon such terms as are just,' provided that the motion is made within a reasonable time **and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5).** *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988) (emphasis added). Furthermore, Rule 60(b)(6) does not "give courts unlimited authority to fashion relief as they deem appropriate." *In re Zimmerman*, 869 F.2d 1126, 1128 (8th Cir. 1989) (citations omitted). Such relief is granted only when exceptional circumstances prevented the moving party from seeking redress through the usual channels. *Id.*

Special Counsel asserts that relief under Rule 60(b)(6) "is equitable because the relief sought simply allows the parties to obtain the benefit of their Court approved contingency fee arrangement." Motion, Dckt. 190 at 5:8-17. However, Special Counsel's arguments for why relief should be granted (mistake in the sale price and failure to read the court's order) falls within the purview of "mistake, inadvertence, surprise, or excusable neglect." Movant has not demonstrated they are entitled to relief under Rule 60(b)(6) due to "extraordinary circumstances" outside the normal scope of Rules 60(b)(1)-(5).

Because Rule 60(b)(6) relief and Rule 60(b)(1)-(5) relief are mutually exclusive, Movant's argument fails under (b)(6) as a matter of law.

11 U.S.C. § 105(a)

Special Counsel, having failed on the first two swings of Rule 60(a) and 60(b), then asserts the bankruptcy incantation of 11 U.S.C. § 105(a), asserting:

> Finally, the requested relief is appropriate under 11 U.S.C. section 105(a). In particular, the **requested relief simply seeks a correction to conform to the expectations and contractual arrangements** between the Trustee and S&W which were specifically approved by this Court after notice and a hearing. S&W is simply requesting that it be given the benefit of its Court approved bargain, no less and no more. That is, had the Hughes adv. pro. generated less money, S&W was prepared to live with that result—such is the nature of contingency fee arrangements. Here, S&W asks the Court to approve nothing more than what S&W earned under its agreement, which is equitably appropriate under 11 U.S.C. section 105(a).

Motion, p. 5:18-26; Dckt. 190 (emphasis added). Special Counsel cites to 11 U.S.C. § 105(a) as an equitable wand for the court to waive to "do what is right," without respect to the Federal Rules of Civil Procedure and Federal Rule of Bankruptcy Procedure.

Going to 11 U.S.C. § 105(a) as written by Congress and the power given to the court to issue orders, this section provides (emphasis added):

> The court may issue any **order**, process, or judgment that is **necessary or appropriate to carry out the provisions of this title.** No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

The use of 11 U.S.C. § 105(a) to "do whatever the judge thinks should be done" is a legal concept long rejected by the Ninth Circuit and throughly rejected by the United States Supreme Court.

> It is hornbook law that §105(a) "does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code." 2 Collier on Bankruptcy ¶105.01[2], p. 105-6 (16th ed. 2013). Section 105(a) confers authority to "carry out" the provisions of the Code, but it is quite impossible to do that by taking action that the Code prohibits. That is simply an application of the axiom that a statute's general permission to take actions of a certain type must yield to a specific prohibition found elsewhere. *See Morton v. Mancari*, 417 U. S. 535, 550-551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974); *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U. S. 204, 206-208, 52 S. Ct. 322, 76 L. Ed. 704 (1932).

Law v. Siegel, 571 U.S. 415, 421 (2014).

Plaintiff-Debtor states no legal grounds or authority for why they are entitled to "equitable relief" under 11 U.S.C. § 105(a) as to carry out a provision of the Bankruptcy Code. Rather, Plaintiff-Debtor simply states the court has equitable powers to grant relief, notwithstanding Special Counsel not being entitled to relief under the Bankruptcy Code and that such requested relief conflicts with the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure enacted by the United States Supreme Court. Plaintiff-Debtor does not include case law showing why or how the court can wave its "equitable wand" and grant relief such relief. The court does not find relief under § 105(a) is equitably appropriate.

IDENTIFICATION OF POSSIBLE GROUNDS

Special Counsel begins with, the Federal Rule of Civil Procedure 60(a), and ends with, the 11 U.S.C. § 105(a), legal theories that are clearly without merit. Basic pleading strategy is to start with one's strongest argument and then proceed in descending order of strength other valid, *bona fide*, of legal and factual merit arguments. Beginning with the Federal Rule of Civil Procedure 60(a) argument as the strongest would indicate that there can be no basis with any merit.

Here, Special Counsel was provided with the court's tentative ruling and form of the order granting the dollar amount attorney's fees in writing. Special Counsel read the court's tentative ruling and order form granting the dollar amount of attorney's fees. Special Counsel attended the hearing at which the court announced, after affording Special Counsel to address any issues concerning the ruling and order form, the Ruling to allow the dollar amount of attorney's fees.

Possibly, Special Counsel read the tentative ruling and heard the court adopt that as the Ruling, and mistakenly concluded that by getting the dollar amount, Special Counsel may well have been better off dollar-wise than if the court allowed "only a percentage of the actual sales proceeds," Special Counsel concerned that the Property would actually sell for less.

With respect to a mistake, Special Counsel chose/missed timely filing a motion to amend, and appeal, or motion to correct an error by the court. However, if the court can colorably find a mistake by Special Counsel (other than what is asserted in the present Motion), and the court ignoring the meritless arguments advanced by Special Counsel, there may be a way to rectify the situation and save Special Counsel from what it concludes is a wrong substantive prior final order.

Motion for Fees

In looking at the Motion for Compensation for Special Counsel's fees, it was not drafted by Special Counsel but the General Counsel for the Chapter 7 Trustee. Dckt. 123. The Motion for Compensation (¶ 2) does say that the Trustee estimates that the fees will be approximately $13,755.00, and that the final amount has not yet been determined.

The Motion for Compensation continues stating that Special Counsel was originally counsel for a creditor of Debtor and prosecuted an adversary proceeding against the Debtor. Special Counsel, in the course of representing that creditor learned of undisclosed transfers of property by the Debtor, and reporting that to the Chapter 7 Trustee. Motion for Compensation, ¶¶ 3, 4.

The Trustee, Special Counsel, and Special Counsel's creditor client agreed that Special Counsel could be hired by the Chapter 7 Trustee to prosecute the Trustee's avoiding powers claims against the transferee of the property transferred by Debtor. *Id*., ¶ 4.

For the services to the Chapter 7 Trustee, Special Counsel and the Trustee agreed to compensation on a contingent fee basis. *Id*., ¶ 5. The continent fee amount is stated to be computed as 30% for serving the Complaint and then 35% beginning 30 days after the Complaint was served. *Id*.

In the Motion to Employ Special Counsel, this 30% contingent fee for serving a complaint and then 35% beginning 30 days after the Complaint was served is clearly stated. Motion to Employ, ¶ 5; Dckt. 110. The Motion to Employ does not provide an estimate of the dollar amount of the property sought to be recovered.

As addressed above, to the extent that the court's Ruling and Order entered with respect to the Ruling on Motion for Compensation (Dckts. 132, 134) contains a substantive legal error, no opposition was stated at the hearing on the Motion for Compensation.

In Special Counsel's Declaration in support of the Motion for Compensation, Special Counsel testifies that there was substantial litigation in the Adversary Proceeding for the Chapter 7 Trustee, Special Counsel proposed a settlement which resolved the matter. Dec., ¶ 5; Dckt. 125.

The Adversary Proceeding, *Edmonds v. Hughs*, 20-9013; was commenced on November 19, 2020. The Answer was filed on December 15, 2020. On February 11, 2021, Special Counsel for the Trustee filed a Motion for Summary Judgment. In the context of that Motion, and the court hearings thereon, the Parties focused on the economics of the litigation and the relatively undisputed facts concerning the transfer of the Property (though Defendant attempted to assert "disputed facts" that conflicted with prior statements under penalty of perjury).

A very positive result was obtained for not only the Trustee and Bankruptcy Estate, but for the Defendant through the Settlement that was approved by this court. Stipulation for Entry of Judgment; Exhibit C, Dckt. 121.

The problem for Special Counsel arises given that the Property that was sold to generate the proceeds from which the contingent fee is computed sold for a significant amount more than what was projected by the Trustee (and possibly Special Counsel).

Mistake 1.

What could be identified as Mistake 1 by Special Counsel was concluding that the Property had a value of only $45,000.00, rather than the $87,387.24 which was the actual sales price. While Special Counsel does not provide evidence of his due diligence and investigation of the fair market value fact, it is not an illogical inference to draw that Special Counsel relied upon his client, the Chapter 7 Trustee, providing Special Counsel with the anticipated value of the Property.

- ♦ Colorable Mistake 1 - Factual Error With Respect to the Value of the Property From Which the Contingent Fee Would be Computed.

Mistake 2.

Possible colorable Mistake 2 could be Special Counsel's reading of the court's posted tentative ruling and discussion thereof at the hearing on the Motion for Compensation. The court's posted tentative ruling and the Ruling of the Court as set forth in the Civil Minutes and stated at the hearing, clearly states that a specific dollar amount in fees is allowed – not a percentage of a future to be determined dollar amount.

However, the Ruling does reference in the section titled "Contingency Fee: Litigation" that the fees are computed based upon them being 35% of specific dollar amounts to be recovered by the Chapter 7 Trustee for the Bankruptcy Estate. Civil Minutes, p. 4; Dckt. 132. The word "estimated" in used in that paragraph stating the monies identified to be recovered by the Trustee from which the 35% would be computed.

Though the Ruling expressly and clearly states a specific dollar amount of fees to be allowed, and in only one paragraph makes reference to the 35%, it could well be that in Special Counsel's exuberance over there being a settlement and the Chapter 7 Trustee getting control of the Property to be

liquidated, his eyes flew over the tentative ruling, saw that the numbers matched up to the value of the Property on which he relied (Mistake 1), and just assumed that all was right in the world.

- ♦ Colorable Mistake 2 - Incorrect reading of the substance of the tentative ruling, and then not reading the Civil Minutes to make sure the right ruling was entered by the court.

Mistake 3.

Possible colorable Mistake 3 relates to the attorney who appeared at the hearing for Special Counsel. The attorney appearing in the Adversary Proceeding and attorney identified as having represented the creditor client is Mark Serlin, Esq. Mr. Serlin has decades of experience in the federal court and in bankruptcy cases.

However, Mr. Serlin was not in attendance at the June 24, 2021 hearing on the Motion for Compensation for Special Counsel. Rather, another attorney from his firm appeared, Kevin Whiteford, Esq. Mr. Whiteford does show up as counsel on a number of cases in this District, but it is a limited number of times, spread over three decades, the first being in 1993 and the last in 2020 - for a total of 36 adversary proceedings and bankruptcy cases. All but six of these are after 2005, and there are 25 (69.5%) prior to 1997.

It is not clear whether Mr. Serlin reviewed the tentative ruling and consulted with Mr. Whitehead, the attorney making the appearance for Special Counsel, or whether Mr. Whitehead was told that "yeah, the contingent fee amount, based on what the Trustee tells us the value of the Property is, should be around $24,200." It may have been that Mr. Serlin was called away and Mr. Whitehead, with little knowledge of the Motion for Compensation and not prepped by Mr. Serlin, was relying on the Trustee General Counsel to make sure that the court ruled correctly.

- ♦ Colorable Mistake 3 - Attorney from Special Counsel's Office appearing at the hearing on the Motion for Compensation was in error believing that the Motion was for a dollar amount of fees and not a contingent fee amount of a future number.

As discussed by the U.S. Supreme Court, in determining whether relief pursuant to Rule 60(b) should be granted, there are some general principles to consider:

(1) the danger of prejudice to the opposing party;

For this factor, there is no prejudice to the opposing party - either the Chapter 7 Trustee on behalf of the Bankruptcy Estate or creditors. There is no change of conduct in reliance on the court's prior order, and the focus of these issues are on the proper allowance of attorney's fees for what has been a very financially advantageous litigation for the Bankruptcy Estate.

(2) the length of the delay and its potential impact on the proceedings;

The Order allowing compensation was entered on June 24, 2021 (Dckt. 134). The Order authorizing the Chapter 7 Trustee to sell the Property for a much greater amount that Special Counsel and the Trustee stated in the Motion for Compensation was entered on January 31, 2022 (Dckt. 160). Thus, with the

close of escrow in February 2022, it could be said that Special Counsel "learned" of the error as to the actual value of the Property.

Special Counsel then filed the first Motion to Modify the court's Order for Compensation on March 29, 2022, a month after the real value of the Property was documented. While improperly filed as a Motion to Modify (well outside the deadline imposed by Fed. R. Civ. P. 59, as incorporated into Fed. R. Bankr. P. 9023), within a month of the Trustee getting the monies from the sale, Special Counsel had an error issue before the court and the Chapter 7 Trustee.

There was no significant delay and the pendency of these motions by Special Counsel has not negatively impacted this Chapter 7 case.

(3) the reason for the delay; and

As to documentation of a "valuation mistake," there is little delay to the extent that Special Counsel was relying on the expertise of a bankruptcy trustee in obtaining a good faith valuation of the Property that was the target of the Adversary Proceeding.

(4) whether the movant acted in good faith.

On this final point, Special Counsel stumbles on the good faith is seeking to correct this error. As the court notes above, there could be inferred (Special Counsel choosing not to provide testimony about Special Counsel's error, but just that it would be "fair" to pay fees in a different amount then stated in the court's Ruling and Order on the Motion for Compensation (which the court notes could be in error from what was intended in the Motion for Compensation, but no timely motion was filed to correct an error by the court).

This failure to address a Rule 60(b)(1) error by counsel is consistent with Special Counsel asserting meritless grounds that the order may be "corrected" pursuant to Rule 60(a) as a clerical error (misstatement of what the court was actually ruling) or that 11 U.S.C. § 105(a) allows the court to act contrary to Federal Rules of Civil Procedure 59 and 60, as incorporated into the Federal Rules of Bankruptcy Procedure. One could conclude that these various Motions have not been brought in good faith.

The court steps back to look at the Motion for Compensation and the three Colorable Mistakes that the court infers from the present Motion, Declaration in support thereof, and the prior pleadings. Here, the Chapter 7 Trustee and Special Counsel agreed to employ Special Counsel to seek to avoid transfers of property and recover them for the Bankruptcy Estate in this Bankruptcy Case. Special Counsel agreed to accept such employment on a contingent fee basis. In her Declaration in support of the Motion to Employ Special Counsel, the Chapter 7 Trustee provided her analysis as to why a contingent fee arrangement, not committing the existing limited assets of the Estate, was in the best interests of the Bankruptcy Estate. Dec., ¶ 3; Dckt. 111.

Special Counsel has provided those services and ultimately a settlement was reached and substantial assets recovered for the Bankruptcy Estate. [Fn.1.] The litigation spanned a period of twelve months from the filing of the Complaint to the Settlement being reached. In the Adversary Proceeding,

Special Counsel prosecuted a Motion for Summary Judgment, which was opposed, that because the focus upon which the Settlement was achieved.

FN. 1. The court notes that of the ($140,000) in general unsecured claims file, Special Counsel's creditor client holds ($135,204.15) of the claims. There are no priority unsecured claims filed or secured claims file. Thus, in substance, whatever fees Special Counsel is being paid, 96.5% of it is being paid out of what could be the distribution to the creditor client.

Though Special Counsel's conduct, and failure to comply with the legal requirements for the relief requested, in addition to requesting relief that cannot be given as a matter of law, could be a basis for concluding that this relief is not sought in good faith, the court errs in favor of Special Counsel.

First, the services were rendered and the Bankruptcy Estate has obtained a substantial recovery. There are no other grounds for a good faith finding, but the court concludes that is sufficient.

RULING

The court concludes that there are adequate colorable mistakes made by Special Counsel sufficient for the court to grant relief pursuant to Federal Rule of Civil Procedure 60(b)(1), as incorporated into Federal Rule of Bankruptcy Procedure 9024. The attorney actively representing the Chapter 7 Trustee as Special Counsel was not able to attend the hearing on the Motion for Compensation and may have, in his haste, just given it a quick, "yeah, the number looks like read." The attorney who appeared, most likely was not familiar with the Motion for Compensation and erred in just "going with the flow." Finally, and most significantly, assuming that Special Counsel recognized that the order was for a dollar amount and not a percentage, may well has "just let it go" in reliance on what the Trustee said the value of the Property was – this being a key factual mistake.

Thus, the court grants relief pursuant to Federal Rule of Civil Procedure 60(b)(1) and Federal Rule of Bankruptcy Procedure 9024 and vacates the prior Order Allowing Compensation, DCN: BLF-4; Dckt. 134.

FURTHER PROCEEDINGS
ON MOTION FOR COMPENSATION

The court having vacated the Order Allowing Compensation, the court now has an Motion for Compensation; DCN: BLF-4, Dckt. 123. No opposition was filed to the present Motion to Vacate the prior Order Allowing Compensation. As the court notes, for creditors, the only one who has any significant financial stake in how much in fees Special Counsel is allowed is Special Counsel's creditor client - the Hirst Law Group, P.C. (Proof of Claim 3-1). The court infers that Special Counsel and his attorney creditor client have addressed issues relating to this request and any potential conflict of interest that could exist.

The Order Authorizing the Employment of Special Counsel, Dckt. 115, does not specify that the employment is authorized to be made on a contingent fee, percentage of the recovery basis. It appears that the form of the order used by the Chapter 7 Trustee's General Counsel was a "standard

order form" for counsel who seek to be compensated hourly. That does not preclude the court from determining that a percentage compensation is proper. The Motion to Employ, supporting Declarations, and Exhibits make it clear that the compensation was sought to be on a contingent fee compensation basis. Dckts. 110, 111, 112, and 113.

Even if the court had authorized the employment on a contingent fee basis, it is subject to consideration pursuant to 11 U.S.C. § 328, which provides in pertinent part:

> Notwithstanding such terms and conditions [in the order authorizing employment], the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

Here, which the court did not have to address at the time of employment in light of the proposed order not authorizing a contingent fee, is that the contingent fee is starts high and then immediately jumps up.

Read literally, if the Complaint is filed and then a settlement is paid within thirty days of the Complaint being filed (which could indicate that there was an undisclosed settlement in the background when Special Counsel was being hired), then for merely signing a complaint and settlement agreement, Special Counsel would get almost a 1/3 of the recovery (30%). This is a shockingly high number. Avoidance litigation is not an overly complicated, highly sophisticated area of the law for which there are only a handful of competent attorneys.

Next, if the signing of the settlement and payment was received on the thirty-first day or later after the Complaint was served, Special Counsel's percentage jumps to more than a third of what is recovered - thirty-five percent (35%). Again, this increase to more than a third of the recover bears no relationship to any identifiable, rational business terms – especially for a fiduciary, such as a Chapter 7 trustee.

Thus, it is likely that the court would have approved a percentage fee structure tiered to work being done in the case (and properly taking into account that it was a contingent fee percentage where Special Counsel was risking getting $0.00 - though not likely as fraudulent conveyance and other avoiding actions can be quickly sized up by experienced attorneys such as Special Counsel).

Here, there was about a year of litigation, which was brought to a head only after the opposed Motion for Summary Judgment was briefed, argued, and the decision thereon left hanging over the heads of the Chapter 7 Trustee, Defendant, and their respective counsel like the Sword of Damocles.

In substance, the Motion for Summary Judgment was the equivalent (in that Adversary Proceeding) of Special Counsel taking the matter to trial.

Thus, the court concludes that taking all of the factors known at the time of the Motion for Employment and after acquired knowledge of the litigation, a thirty-five percent (35%) contingent fee is appropriate for Special Counsel.

RULING ON MOTION FOR COMPENSATION
WITHOUT FURTHER HEARING

This Rule 60(b)(1) Motion and the hearing thereof afforded any and all parties in interest to come forward, oppose the court vacating the prior Order Allowing Fees, and then ruling on the Motion for Compensation. No opposition has been made by the Chapter 7 Trustee and the Trustee's General Counsel. Nor has any opposition been filed by any creditor or the U.S. Trustee.

Further, in substance, it is Special Counsel's law firm client creditor who is paying 96.5% of the contingent fee. The other creditors have very small claims and the impact is minimal on them. For the court to set a further hearing on the Motion for Compensation would be a waste of time for Special Counsel and the Chapter 7 Trustee. The multiple Motions for Relief sought pursuant to Rule 60(a) and 60(b), and 11 U.S.C. § 105(a) have already caused Special Counsel to expend significant non-reimbursed time (which for an attorney equates to money not earned).

Therefore, the court having vacated the Order Allowing Fees (Dckt. 132), having throughly reviewed the proceedings in the Adversary Proceeding and the recovery by the Bankruptcy Estate through the representation of the Chapter 7 Trustee by Special Counsel, there being no need for any further hearings on the Motion for Compensation, the court grants the Motion for Compensation, allowing Special Counsel a contingent fee of thirty-five percent (35%) of the gross recovery of the following amount computed as:

1. Thirty-Five Percent (35%) of Defendant Joy Hughes' initial Settlement Payment of $1,500.00 to the Chapter 7 Trustee;

2. Thirty-Five Percent (35%) of the Net Proceeds of the Sale of the real property commonly know as 1957 N. Boston Pl., E. Tulsa, Oklahoma received by the Bankruptcy Estate; and

3. Thirty-Five Percent (35%) of Defendant Joy Hughes' 24 months payments of $1,000.00 each received by the Chapter 7 Trustee.

Additionally, Special Counsel is allowed costs and expenses of $337.80 for representation of the Chapter 7 Trustee.

The court shall issue a separate order granting the Motion for Compensation, DCN: BLF-4.

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 Modify or Vacate Prior Order filed by Serlin & Whiteford, LLP ("Special Counsel") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, the court determining that sufficient mistake was made by Special Counsel in connection with the court's prior Order Allowing Compensation (DCN: BLF-4; Order, Dckt. 134) and good cause appearing,

IT IS ORDERED that the Motion to Vacate the Prior Order is granted, and the Order Allowing Compensation for Special Counsel; DCN: BLF-4, Dckt. 134; is vacated in its entirety.

The court shall issue a separate order granting the Motion for Compensation (DCN: BLF-4, Dckt. 123).

SEPARATE ORDER ON MOTION FOR COMPENSATION
DCN: BLF-4, DCKT. 123

ORDER GRANTING MOTION FOR COMPENSATION
MARK A. SERLIN, ESQ. AND SERLIN & WHITEFORD, LLP

On July 1, 2022, this court entered an order vacating the prior Order Allowing Compensation (Dckt. 134) for Mark Serlin, Esq. and his law firm Serlin and Whitehead, LLP. As addressed by the court in that order, sufficient mistake for relief being granted pursuant to Federal Rule of Civil Procedure 60(b)(1) and Federal Rule of Bankruptcy Procedure 9024 was shown by Mr. Serlin and Serlin and Whitehead, LLP.

As the court addressed in the ruling on the Motion to Vacate, proper grounds were show for allowance of a percentage contingent fee in the amount of thirty-five percent (35%) to Mr. Serlin and Serlin & Whiteford, LLP for the legal services provided the Chapter 7 Trustee as Special Counsel. The court incorporates herein by reference that analysis set forth in the Civil Minutes for the June 30, 2022 hearing on the Motion to Vacate (DCN: MAS-1).

Therefore, upon review of the Motion for Compensation, supporting Declarations and Exhibits, the recovery by the Bankruptcy Estate in the matters in which the Chapter 7 Trustee was represented by Mark Serlin, Esq. and Serlin and Whitehead, LLP ("Special Counsel"), the legal services provided, and good cause appearing;

IT IS ORDERED that Serlin & Whiteford, LLP is allowed the following fees and expenses as Special Counsel to the Chapter 7 Trustee:

1. Thirty-Five Percent (35%) of Defendant Joy Hughes' initial Settlement Payment of $1,500.00 to the Chapter 7 Trustee;

2. Thirty-Five Percent (35%) of the Net Proceeds of the Sale of the real property commonly know as 1957 N. Boston Pl., E. Tulsa, Oklahoma received by the Bankruptcy Estate;

3. Thirty-Five Percent (35%) of Defendant Joy Hughes' 24 months payments of $1,000.00 each received by the Chapter 7 Trustee; and

4. Costs and expenses in the amount of $377.80

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as Special Counsel for the Chapter 7 Trustee.

IT IS FURTHER ORDERED that the Chapter 7 Trustee is authorized to pay 100% of the fees and 100% of the costs allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

FINAL RULINGS

2.	18-90029-E-11 FWP-13	JEFFERY ARAMBEL Pro Se	CONTINUED MOTION TO ABANDON 4-8-21 [1410]

Final Ruling: No appearance at the June 30, 2022 Hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on April 8, 2021. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The hearing on the Motion to Abandon is continued to 10:30 a.m. on August 4, 2022.

REVIEW OF MOTION

The Motion filed by Focus Management Group USA, Inc. ("the Plan Administrator") requests that the court authorize the Plan Administrator to abandon the following properties commonly known as:

1. the Arambel Business Park,
2. the Begun Ranch,
3. the Lismer Ranch,
4. the Carlilie Ranch,
5. the Judy Gail Ranch,
6. the Rogers Road property, and
7. the Gravel Pit property
8. the Murphy Ranch 756,
9. the Murphy 240 Rangeland,

(the "Properties").

The Declaration of Juanita Schwartzkopf has been filed in support of the Motion. Dckt. 1412. Ms. Schwartzkopf provides testimony that while the Properties have substantial market value, they are of inconsequential value as there is no realizable equity because the debt secured by the Properties exceeds the value of the real properties. *Id.*, ¶ 24. Moreover, according to the Plan Administrator, the properties are burdensome because the Estate does not have the funds to continue paying the costs of carrying the Properties including insurance, real property taxes, and other charges or the costs of administration of such properties. *Id.*, ¶36.

Ms. Schwartzkopf testifies that the Properties have been actively marketed by the Reorganizing Debtor and by the Plan Administrator for over 16 months during the Negotiated Period (Plan provision during which Debtor was to perform certain duties regarding plan assets) and for years prior to the Plan confirmation but that unfortunately they were not sold. *Id.*, ¶18. The Plan Administrator being unable to obtain offers in an amount that was sufficient to pay the secured claims on and tax liabilities related to the Properties. *Id.* Additionally, the Plan Administrator explains that SBN V Ag I LLC ("Summit") as one of the primary sources of funds for the post-confirmation administration of the Estate has indicated they will no longer consent to further use of their cash collateral for pursuing short sales of its collateral. *Id.,* ¶ 37. Ms. Schwartzkopf also testifies that Summit has informed the Plan Administrator that it intends to proceed promptly with non-judicial foreclosure of the Properties. *Id.*, ¶35.

Creditor's Opposition

Creditor with secured claim, American AgCredit does not object in its entirety to the abandonment of the Properties, instead Creditor American AgCredit objects specifically as to the timing of the abandonment of the Murphy Ranch Property. Dckt. 14216. American AgCredit explains that for the last five months they have been engaged in the Lot Line Adjustment ("Adjustment") process with the County of Stanislaus related to the Murphy Ranch 756 and the Murphy 240 Rangeland. Thus, American AgCredit requests that the abandonment not occur until the County of Stanislaus approves the adjustment, the adjustment is fully recorded and the appropriate quitclaim deeds by and between the Plan Administrator and American AgCredit are approved by the parties' title companies and successfully recorded..

Plan Administrator's Reply

The Plan Administrator filed a Reply indicating they are amenable to deferring the effective date of the abandonment of the Murphy Ranches for a reasonable time during which the Adjustment may be and should be completed; but asks the court for the authority to effectuate the abandonment of the Murphy Ranches at such future time as the Plan Administrator determines in its business judgment that the abandonment should be effective, even if the Adjustment has not been fully completed. Dckt. 1434..

The Plan Administrator believes this a reasonable request on the basis that the Plan Administrator seeks to avoid capital gains taxes in the event that Summit proceeds with foreclosure remedies; the Plan Administrator will continue to work diligently with Creditor to get the Adjustment resolved; an d even after abandonment, the Adjustment process mat still continue after the abandonment where Debtor has pledged to continue working with Creditor to complete the Adjustment process.

SBN V Ag I LLC ("Summit") Response

Summit filed a Response in support of the Motion on May 7, 2021 stating that they support the abandonment of the Properties and the Plan Administrator's proposal of temporary deferral of the Murphy Properties to a later date to as to allow for the Adjustment process but they continue to reserve their right to commence non-judicial foreclosure proceedings and request that any order approving the abandonment make it clear that any delay in abandonment is without prejudice to Summit's rights to provide notice of relief from stay and commence its foreclosure rights and remedies. Dckt. 1438.

DISCUSSION

After notice and hearing, the court may order a 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(a). 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).

The court finds that the Property secures claims that exceed the value of the Property, and there are negative financial consequences for the Estate if it retains the Property. The court determines that the Property is of inconsequential value and benefit to the Estate and authorizes the Plan Administrator to immediately abandon the following properties:

1. the Arambel Business Park,
2. the Begun Ranch,
3. the Lismer Ranch,
4. the Carlilie Ranch,
5. the Judy Gail Ranch,
6. the Rogers Road property, and
7. the Gravel Pit property

With respect to the Murphy Ranch 756 and the Murphy 240 Rangeland, completion of the lot line adjustment to correct for the Debtor having recorded Certificates of Compliance, without Creditor's consent that negatively impact its collateral, which Creditor has now foreclosed on.

Rather than having a vague "the Plan Administrator can abandon at some point in the future, and then potentially having emergency motions to modify that authorization," the court bifurcates the orders on the relief requested and issues a final order for abandonment of seven properties above, and continues the hearing on the request to abandon the Murphy Ranch 756 and the Murphy 240 Rangeland properties to 10:30 a.m. on August 12, 2021.

In addition to helping the parties avoid "abandonment anxiety," the properties being in the Plan Estate, this federal court has jurisdiction to address the issue of the adjustments by Debtor to the property that is currently in the Plan Estate through an adversary proceeding that Creditor may believe necessary with third-parties (not the Plan Administrator) to correctly identify the property foreclosed on through these bankruptcy proceedings.

August 12, 2021 Hearing

The Plan Administrator filed an updated Status Report on August 10, 2021, Dckt. 1498, concerning this Motion. The Plan Administrator advises the court that additional time is needed and a continuance of this hearing is requested to late September 2021. A non-judicial foreclosure sale of the Murphy Ranches could be conducted in mid-October 2021, and the Plan Administrator wants to insure that the abandonment occurs before that time.

September 30, 2021 Hearing

No further documents have been filed in this Contested Matter as of the court's September 28, 2021 review of the Docket. At the hearing, counsel for the Plan Administrator reported that the lot line adjustments have not yet been completed, and the Parties agreed to a further continuance of this hearing.

October 21, 2021 Hearing

At the hearing, the Parties requested a continuance to allow for all of the preliminary steps to be taken so that the abandonment may occur.

November 16, 2021 Status Report

The Plan Administrator filed an updated Status Report on November 16, 2021, reporting that the abandonment cannot be completed at this time and a further continuance was necessary. Dckt. 1585.

December 16, 2021 Hearing

Attorneys for the Plan Administrator filed a Status Report requesting a further continuance as further negotiations were conducted.

March 10, 2022 Hearing

At the hearing counsel for the Plan Administrator reported that all documents have been received for the lot line adjustment and it may now be completed. There still remain some quit claim deeds required, but the parties are waiting on information from the County as to what, if any, quit claims will be required.

April 18, 2022 Status Report

On April 18, 2022, the Plan Administrator filed a status report requesting the Abandonment Motion be further continued to May 26, 2022. Dckt. 1672. The Plan Administrator states there are final steps needed to complete the lot line adjustment while preserving the potential abandonment prior to the foreclosure sale.

CONTINUANCE OF MAY 26, 2022 HEARING

The Plan Administrator filed a Status Report requesting that the hearing be continued to June 30, 2022. Dckt. 1692. The proposed lot line adjustment is to be presented to the Board of Supervisors on May 24, 2022, and the parties continue in their significant good faith efforts to conclude this matter.

The court continues the hearing, first as requested by the Plan Administrator and American AgCredit (Status Report, Dckt. 1690); and second, the judge to whom this case is assigned not being available (due to disrupted travel plans by Midwestern storms) to conduct a hearing on May 26, 2022.

CONTINUANCE OF JUNE 30, 2022 HEARING

Focus Management Group, the Plan Administrator, and American AgCredit have filed Updated Status Reports (Dckts. 1707, 1709) information the court that the parties are now working of the deeds for the lot line adjustments that have been approved, and a further continuance is requested.

The Hearing is continued to 10:30 a.m. on August 4, 2022.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon filed by Focus Management Group USA, Inc., the Plan Administrator, 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 Abandon is continued to **10:30 a.m. on August 4, 2022**.

3. 22-90151-E-7 MSN-1 | **EMMANUEL GOMEZ** Mark Nelson | **MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA), N.A.** **5-17-22 [12]**

Final Ruling: No appearance at the June 30, 2022 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Creditor, and Office of the United States Trustee on May 17, 2022 By the court's calculation, 44 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Capital One Bank (USA), N.A. ("Creditor") against property of the debtor, Emmanuel Gomez ("Debtor") commonly known as 1909 St. Sebastian Way, Modesto, California, 95358 ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $5,805.23. Exhibit A, Dckt. 14. An abstract of judgment was recorded with Stanislaus County on April 12, 2022, that encumbers the Property. *Id.*

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $491,400.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total $150,823.22 as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 1. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of $350,000.00 on Schedule C. Dckt. 1.

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 the judicial lien impairs 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 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 Emmanuel Gomez ("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 judgment lien of Capital One Bank (USA), N.A., California Superior Court for Stanislaus County Case No. CV-21-001357, recorded on April 12, 2022, Document No. 2022-0026844, with the Stanislaus County Recorder, against the real property commonly known as 1909 St. Sebastian Way, Modesto, California, 95358, 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.