

**UNITED STATES BANKRUPTCY COURT**  
Eastern District of California

**Honorable Ronald H. Sargis**  
Chief Bankruptcy Judge  
Modesto, California

**July 14, 2022 at 10:30 a.m.**

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1. <a href="#"><u>21-90484</u></a> -E-11 <a href="#"><u>BSH-6</u></a>	<b>TWISTED OAK WINERY, LLC</b> <b>Brian Haddix</b>	<b>CONTINUED OBJECTION TO CLAIM OF MECHANICS BANK, CLAIM NUMBER 2 4-26-22 [97]</b>
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**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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Local Rule 3007-1 Objection to Claim—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Debtor, Subchapter V Trustee, and Office of the United States Trustee on April 26, 2022. By the court's calculation, 30 days' notice was provided. 30 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(2).

The Objection to Claim was properly set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(2). Debtor, creditors, the Subchapter V 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.

<b>The Objection to Proof of Claim Number 2-1 is <span style="color:red">XXXXXXXXXX</span></b>
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**REVIEW OF OBJECTION TO CLAIM**

Twisted Oak Winery, LLC, Debtor/Debtor in Possession, ("Objector") requests that the court disallow the claim of Mechanics Bank ("Creditor"), Proof of Claim No. 2-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of \$2,540,119.29. Objector asserts that Creditor does not have an interest in Debtor's personal property because the Deed of Trust expressly

contemplates a separate UCC security interest which as never perfected. Additionally, the Proof of Claim fails to comply with Federal Rules of Bankruptcy Procedure 3001(c)(1) because the UCC security interest is not attached to the Proof of Claim. Objector seeks to “expunge” the Proof of Claim to the extent that it is unenforceable against any alleged UCC security interest in personal property.

Objector also seeks attorney’s fees for bringing this objection.

### Creditor’s Response

Creditor filed a response (Dckt. 109) on May 13, 2022 stating that California Civil Code § 2938(b) provides perfection of a security interest is made by recording a Deed of Trust. Creditor states there is no requirement to file a UCC Financial Statement when a deed of trust is properly recorded.

### DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial evidence to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor’s proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires financial information and factual arguments. *In re Austin*, 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). Notwithstanding the prima facie validity of a proof of claim, the ultimate burden of persuasion is always on the claimant. *In re Holm*, 931 F.2d at p. 623.

Upon the court’s review of California Civil Code § 2938(b), an assignment in leases, rents, issues, or profits of real property is (emphasis added):

fully perfected as of the time of recordation with the same force and effect as any other duly recorded conveyance of an interest in real property, notwithstanding a **provision of the assignment or a provision of law that would otherwise preclude or defer enforcement of the rights granted** the assignee under the assignment until the occurrence of a subsequent event, including, but not limited to, a subsequent default of the assignor, or the assignee’s obtaining possession of the real property or the appointment of a receiver.

Here, Debtor/Debtor in Possession implies there is a provision in the Deed of Trust in which there is required to be a separate UCC security interest. Upon review of the Deed of Trust, the language provides, “Grantor authorizes Lender to file a UCC financing statement, or alternatively, a copy of this Agreement to perfect Lender's security interest.” Deed of Trust, Exhibit B, Dckt. 100 at 38. This appears to be the only language referencing any financing statement. Additionally, it appears that “this Agreement,” the Deed of Trust, was sufficient to perfect the security interest. Therefore, it appears a UCC filing was not required.

The court has reviewed the copy of the Deed of Trust that secures Creditor's Claim which is attached to Proof of Claim 2-1. With respect to the scope of the security interest, it states (the court reformatting the sentence so that each item of collateral can be cleanly identified:

CONVEYANCE AND GRANT. For valuable consideration, Trustor irrevocably grants, transfers and assigns to Trustee in trust, with power of sale, for the benefit of Lender as Beneficiary. all of Trustor's right, title, and interest in and to the following described

real property,

together with

all existing or subsequently erected or affixed buildings,  
improvements and fixtures;

all easements, rights of way, and appurtenances;

all water, water rights and ditch rights (including stock in utilities with ditch  
or irrigation rights);

and

all other rights, royalties, and profits relating to the real property, including  
without limitation all minerals, oil, gas, geothermal and similar matters,

With respect to such security interest covered by a deed of trust, the following excerpt from Miller & Starr provides an overview of the property interests that are lienable under a mortgage or deed of trust (footnote references removed and emphasis added):

§ 13:18. Property interests that are lienable

Generally. Any interest in real property that is transferable may serve as the security for a deed of trust. Only the property interest of the trustor can be subjected to the lien, but this interest need not be the complete fee title. A security interest can be given by the owner on property adversely possessed by another. The lien of a deed of trust also can attach to the separate interest of a tenant in common or joint tenant.

Miller and Starr California Real Estate, 5 Cal. Real Estate § 13.18 (4th ed.)

Lien on appurtenances, fixtures, easements and water rights. As with any conveyance of land, a deed of trust includes any appurtenance that passes with the land, whether or not it is specifically mentioned in the legal description. **Thus, the lien of a deed of trust attaches to all appurtenant easements, even though they are not specifically referenced in the deed of trust.** On a foreclosure sale, the purchaser receives the title to both the property described in the deed of trust and all of the easements appurtenant to that property. **The same principle applies to water rights appurtenant to the land described in the deed of trust.**

Lien on an easement, whether express or implied. The lien of a deed of trust can be imposed on an easement, whether the easement is express or implied. When the deed of trust describes the dominant tenement as security and also describes an appurtenant easement across another parcel of property owned by the trustor, the lien attaches to the easement, even though the trustor could not have an easement across his or her own property.

*Id.*

**Lien of a deed of trust includes personal property that has become a fixture.** A deed of trust that encumbers real property also encumbers fixtures that have become a part of the realty. A fixture is an appurtenance to land and passes with a transfer of the land without express reference. **Between the parties to the deed of trust, personal property that becomes affixed to the land in such a manner as to become a fixture is collateral for the lien of the deed of trust in the same manner as any other permanent improvement placed on the property, even if the fixture is attached after the execution of the deed of trust.**

**Lien of a deed of trust may also include personal property that is not a fixture.** The lien of a deed of trust on real property does not include a lien on personal property that is not a fixture unless it expressly provides for a lien on personal property. **Under current law, this means that the deed of trust must satisfy the requirements of the Uniform Commercial Code to create a security interest in the collateral;** these requirements are not difficult to achieve and essentially require that the security agreement satisfy the requirements for formation of a contract, describe the collateral and the obligation secured, and be agreed to by the debtor. A mortgage or **deed of trust that expressly includes a security interest in personal property items that are not fixtures** creates an enforceable security interest between the parties, but it is not perfected against other creditors of the trustor unless it is also sufficient as a **financing statement and is filed in the manner required to perfect a security interest in personal property. Usually this means that the beneficiary must file a UCC-1 financing statement** in the appropriate state office, in addition to recording the deed of trust in the local recorder's office.

Deed of trust must actually describe the personal property collateral. In order for a deed of trust to operate as a security agreement that creates a UCC security interest in particular personal property, it must actually describe the personal property that is intended as additional collateral in addition to the real property security.

*Id.* § 13:20.

§ 13:60. Assignments of rents—In general

Assignment of rents may be contained in the deed of trust or a separate instrument. **Whether contained in a separate recorded instrument executed by the trustor as assignor, or included as part of the mortgage or deed of trust, an assignment of rents is enforceable by the beneficiary-assignee.** Most printed forms and institutional deeds of trust include an assignment of rents, but an absolute deed taken

as a mortgage or other hidden security transaction will not include an assignment. Also, occasionally the parties by intention or inadvertence will omit the assignment of rents from the security instrument. In the absence of an assignment of rents, the mortgagee or beneficiary has no right to possession or to collect the rents merely by virtue of a mortgage or deed of trust.

**Assignment creates immediate, perfected security interest.** A written assignment of an interest in leases, rents, issues, or profits of real property made in connection with an obligation secured by real property, upon execution and delivery by the assignor, is effective to create a present security interest in existing and future leases, rents, issues, or profits of that real property. This is so irrespective of whether the assignment is denoted as absolute, absolute conditioned upon default, additional security for an obligation, or otherwise.

“Rents” defined. For purposes of the statute, **“leases, rents, issues, and profits of real property” includes the cash proceeds thereof, and “cash proceeds” means “cash, checks, deposit accounts, and the like.”**

Comment:

**Revenue or receipts from a business operated on the property is not “rents” and is subject to the Commercial Code rather than the assignment of rents statute.**

§ 13:60. Assignments of rents—In general, 5 Cal. Real Est. § 13:60 (4th ed.)

### **Value of Secured Claim**

In connection with this Objection to Claim and its Opposition to Debtor/Debtor in Possession’s Subchapter V Plan, while originally stating under penalty of perjury that its collateral had a value of \$4,641,208 (Proof of Claim 2-1, Part 2, § 9), Creditor now admits that its collateral has a value of only \$2,226,400 and that such value must be considered as the value of its collateral in this bankruptcy case. Supp. Opposition, ¶ e, Dckt. 109; Dec. Nicola Merrifield-Olivia, Sr. V.P. Mechanics Bank, ¶ e, Dckt. 110. In light of Creditor arguing for the higher interest rate and advancing an asserted “As Is” and “Liquidation Value,” the court accepts Creditor’s assertion of these lower values, and taking the lowest, as the admission as to value by Creditor.

**June 16, 2022**

At the hearing, counsel for the Debtor in Possession believes that the issue outstanding on the Objection is the scope of the collateral, and for confirmation is the interest rate. As addressed above, the court concluded that there were unaddressed legal issues, which if addressed, could clearly show the parties the answer to their believed dispute.

The parties appear to be missing and coming up short in identifying the statutory law governing liens on agricultural product. Mechanics Bank make reference to general Civil Code sections, but does not address the California Commercial Code provisions relating to agricultural liens. Neither party provides the court with case law and statutes defining what the term “profits” means in a deed of trust.

The court continued the hearing to allow for the Parties to properly brief the issues.

**July 14, 2022**

As of the court's July 12, 2022 review of the Docket in this case, no supplemental pleadings had been filed by the Parties. The court's order required that such supplemental pleadings be filed on or before July 11, 2022. Order, Dckt. 127.

In conducting a final review of the Calendar on July 13, 2022, the court identified a supplemental pleading filed by the Debtor in Possession. Dckt. 128. A quick review of the Supplemental Pleading discloses the following authorities and arguments concerning the security interest of Creditor:

- A. Crops are not real property and not treated like fixtures, but movable personal property.
  - 1. California Civil Code § 657, § 658
  - 2. California Civil Code § 658 provides:  
  
§ 658. Definition of real property; Severance by agreement  
  
Real or immovable property consists of:
    - 1. Land;
    - 2. That which is affixed to land;
    - 3. That which is incidental or appurtenant to land;
    - 4. That which is immovable by law; except that for the purposes of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods.
- B. Division 9 of the California Commercial Code includes agricultural liens.
- C. Miller & Starr, § 13.20, p. 13-115, 116. The lien created by a deed of trust does not create a lien on personal property that is not a fixture, unless the deed of trust complies with the requirements of the Commercial Code.
- D. The term "Profits" does not include proceeds from crops. Citations by Debtor in Possession include:
  - 1. Assignment of Rents Clauses under California Law and in Bankruptcy: Strategy for the Secured Creditor (Hastings Law Journal, Vol 31, Issue 6, July 1980, R. Rogers, p. 1433-1467), stating that for assignment of rents clauses in a deed of trust, "Crops, however, are subject to different rules and the principles discussed in this Note [scope of creditor's lien under a deed of trust] do not

necessarily apply to crops. *See United States v. Giragossiantz*, 488 F.2d 358 (9th Cir. 1973); *Pollack v. Sampsell*, 174 F.2d 415 (9th Cir. 1949); *Smith, Security Interests in Crops*, 10 HASTINGS L.J. (pts. 1-2) 23, 156 (1958).”

2. *Miller & Starr*, § 13:60, p. 13-260. “‘Rents’ defined. For purposes of the statute, ‘leases, rents, issues, and profits of real property’ includes the cash proceeds thereof, and ‘cash proceeds’ means ‘cash, checks, deposit accounts, and the like.’ Comment: Revenue or receipts from a business operated on the property is not ‘rents’ and is subject to the Commercial Code rather than the assignment of rents statute.”

A supplemental pleading having been filed, the court conducted a quick swing through some California law treatises and notes the following:

D. [§ 72] Real Mortgage and Secured Interest in Personal Property.  
Correlation Table | Tables and Index

(1) Growing Crops. Growing crops are classified as goods, and therefore are subject to the filing provisions of the Uniform Commercial Code, Division 9. (See 4 Summary (11th), Secured Transactions in Personal Property, § 21.) However, until 2001, Division 9 did not provide a rule of priority between a real mortgage and a security interest in growing crops. (See C.E.B., *Secured Transactions* 2d, § 8.4 et seq.; 68A Am.Jur.2d (2014 ed.), *Secured Transactions* §§ 711, 712.)

The Commercial Code now provides that a “perfected security interest in crops growing on real property has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in, or is in possession of, the real property.” (U.C.C. 9334(i).)

4 Witkin, Summary 11th Sec Trans--Real § 72 (2022)

(aa) [§ 131] In General.

(1) Scope of Statute. U.C.C. 9334 contains rules governing the priority of security interests in fixtures and crops as against persons who claim an interest in real property. Priority contests with other Division 9 security interests are governed by the other priority rules of Division 9. (Assembly Committee Comment 2.) Division 9 does not prevent creation of an encumbrance on fixtures under real property law. (U.C.C. 9334(b); see C.E.B., *Secured Transactions* 2d, § 4.31 et seq.)

4 Witkin, Summary 11th Sec Trans--PP § 131 (2022).

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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 Objection to Claim of Mechanics Bank (“Creditor”), filed in this case by Twisted Oak Winery, LLC, Debtor/Debtor in Possession, (“Objector”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Objection to Proof of Claim Number 2-1 is  
**XXXXXXXXXX**

2. <a href="#"><u>21-90484</u></a> -E-11 <a href="#"><u>CAE</u></a> -1	<b>TWISTED OAK WINERY, LLC</b>	<b>CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 10-4-21 <a href="#"><u>1</u></a></b>
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Debtor’s Atty: Brian S. Haddix

Notes:

Continued from 6/16/22 to be heard in conjunction with the continued Objection to Claim Number 2

<b>The Status Conference is <b>XXXXXXX</b></b>
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# FINAL RULINGS

3. [13-90153-E-7](#)  
[MDA-2](#)

TERRY/VALERIE LEWIS  
Mary Anderson

MOTION TO AVOID LIEN OF  
PROVIDENT CREDIT UNION  
6-14-22 [\[26\]](#)

**Final Ruling: No appearance at the July 14, 2022 Hearing is required.**  
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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on June 14, 2022. By the court's calculation, 30 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.

<b>The Motion to Avoid Judicial Lien is granted.</b>
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This Motion requests an order avoiding the judicial lien of Provident Credit Union ("Creditor") against property of the debtor, Terry Lewis and Valerie Lewis ("Debtor") commonly known as 4885 Railroad Flat Road, Mountain Ranch, California 95246 ("Property"). Additionally, Debtor seeks attorney's fees in the amount of \$2,500 for "reopening the case and filing this motion with the court that did not need to be filed." Motion, Dckt. 26 ¶ 18.

## **Judicial Lien**

A judgment was entered against Debtor in favor of Creditor in the amount of \$19,008.35. Exhibit B, Dckt. 29. An abstract of judgment was recorded with Calaveras County on December 13, 2012, that encumbers the Property. *Id.*

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of \$132,882.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total \$359,227.35 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 § 703.140(b)(5) of \$10,000.00 on Amended 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).

### **Attorney's Fees**

Federal Rule of Civil Procedure 54, as incorporated into the Federal Rule of Bankruptcy Procedure 7054 and 9014, permits the court to award attorney's fees to the prevailing party in a motion. However, Federal Rules of Civil Procedure 54(d)(2)(A) requires claims for attorney's fees to be made by motion "unless substantive law requires those fees to be proved at trial as an element of damages." Additionally, Rule 54(d)(2)(D) allows local rules to "establish special procedures to resolve fee-related issues without extensive evidentiary hearings."

Debtor has not provided any statutes or local rules that would allow Debtor to bypass requesting attorney's fees by separate motion.

In reviewing the present Motion, which joins in it a request for attorney's fees, the grounds stated with particularity include:

- A. Debtor's Counsel attempted to resolve this matter prior to filing the Motion. Motion, ¶ 14; Dckt. 26.
- B. After reviewing the facts and requesting a voluntary release of the lien, Creditor's counsel declined the consensual resolution of the matters, with Creditor's Counsel communicating that he believed that he had an "excellent chance" of defending a motion to avoid Creditor's judicial lien. *Id.*
- C. The Motion states that Creditor's Counsel also stated that Creditor intended to renew the judgment prior to its ten year expiration in 2023.
- D. Attorney's fees in the amount of \$2,500.00 are requested in connection with the necessary reopening of this Bankruptcy Case, filing of this Motion, and having to prosecute this Motion. *Id.*, ¶ 18.
- E. The Motion also states that the ordering of attorney's fees should be made because such would make "this Creditor . . . think twice in the future before denying a Debtor their rights through the Bankruptcy Code." *Id.* In making this statement, Debtor appears to view the award of attorney's fees as a corrective sanction and not fees Debtor has a right to under either contract or applicable law.

The Motion does not state the basis for awarding Debtor prevailing party attorney's fees.

No declaration is provided by Debtor's Counsel stating the computation of attorney's fees, and whether it was a flat fee or hourly billings.

Unauthenticated copies of emails are filed as Exhibit C. Dckt. 29. The email exchange between the persons is polite and professional. One person is Creditor's Counsel and the other is an "Office Assistant" for Debtor's Counsel. While copied on the emails, Debtor's counsel is not the person communicating with Creditor's Counsel.

The court has not been provided with, or see a basis for, waiving the requirement that such a motion for attorney's fees (which are not recoverable by damages as part of the claim itself being litigated) be made by post-judgment (an order constituting a "judgment" for purposes of the Bankruptcy and Civil Rules of Procedure; Fed. R. Bankr. P. 9001(7), 9002(5), 7054, and Fed. R. Civ. P. 54(a)) motion.

In the post-judgment motion, Debtor can assert the basis for the right to recover attorney's fees as the prevailing party, or the basis for the award of attorney's fees as a corrective sanction.

If Debtor has the right to recover the attorney's fees, then presumably Debtor will seek not only the attorney's fees relating to the Motion to Avoid Judicial Lien, but the required post-judgment motion for the award of such attorney's fees.

Therefore, attorney's fees and costs, if any, shall be requested as provided by Federal Rule of Civil Procedure 54 and Federal Rules of Bankruptcy Procedure 7054 and 9014.

## **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 Terry Lewis and Valerie Lewis ("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 Provident Credit Union, California Superior Court for Calaveras County Case No. 12CF10508, recorded on December 13, 2012, Document No. 2012 16259, with the Calaveras County Recorder, against the real property commonly known as 4885 Railroad Flat Road, Mountain Ranch, California 95246, 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.

**IT IS FURTHER ORDERED** attorney's fees and costs, if any, shall be requested as provided by Federal Rule of Civil Procedure 54 and Federal Rules of Bankruptcy Procedure 7054 and 9014; which request for such attorney's fees would include those related to the filing of the required post-judgment motion for the award of attorney's fees. This is without prejudice to any other, non-prevailing party basis for an award of attorney's fees Debtor determines is permissible by law.

4. [21-90566-E-7](#)  
[HCS-3](#)

**DARLENE ALAMEDA**  
**Seth Hanson**

**MOTION FOR COMPENSATION BY THE  
LAW OFFICE OF HERUM, CRABTREE,  
SUNTAG TRUSTEES ATTORNEY(S)  
6-8-22 [34]**

**Final Ruling:** No appearance at the July 14, 2022 hearing is required.  
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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on June 8, 2022. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

<p><b>The Motion for Allowance of Professional Fees is granted.</b></p>
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Herum\Crabtree\Suntag, the Attorney ("Applicant") for Gary Farrar, the Chapter 7 ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period January 14, 2022, through June 3, 2022. The order of the court approving employment of Applicant was entered on January 20, 2022. Dckt. 19. Applicant requests fees in the amount of \$9,059.50 and costs in the amount of \$80.77.

## **APPLICABLE LAW**

### **Reasonable Fees**

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

- A. Were the services authorized?
- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the attorney exercise reasonable billing judgment?

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

### **Lodestar Analysis**

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

### **Reasonable Billing Judgment**

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

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

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

A review of the application shows that Applicant's services for the Estate include rendering legal services to Trustee regarding a transfer of real property Debtor engaged in prior to filing their petition. The Estate has \$40,000.00 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

## **FEES AND COSTS & EXPENSES REQUESTED**

### **Fees**

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 6.70 hours in this category. Applicant reviewed Debtor's petition and schedules, and prepared motions to employ and compensate.

Efforts to Assess and Recover Property of the Estate: Applicant spent 16.40 hours in this category. Applicant requested and reviewed various documents from Debtor's counsel regarding the history of the potential fraudulent conveyance. Applicant also prepared both settlement agreement and declaration for the Debtor to sign regarding the potential fraudulent conveyance.

The fees requested 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:

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
Dana Suntag: Admitted to California Bar in 1986	19.70	\$415.00	\$8,175.50
Amy Seillere: Admitted to California Bar in 2021	3.40	\$260.00	<u>\$884.00</u>
<b>Total Fees for Period of Application</b>			\$9,059.50

### **Costs & Expenses**

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$80.77 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage		\$36.37
Photocopying	\$0.10	\$44.40
<b>Total Costs Requested in Application</b>		<b>\$80.77</b>

## **FEES AND COSTS & EXPENSES ALLOWED**

### **Fees**

#### **Hourly Fees**

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$9,059.50 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

### **Costs & Expenses**

First and Final Costs in the amount of \$80.77 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees	\$9,059.50
Costs and Expenses	\$80.77

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

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

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

The Motion for Allowance of Fees and Expenses filed by Herum/Crabtree/Suntag (“Applicant”), Attorney for Gary Farrar, the Chapter 7 Trustee, (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Herum/Crabtree/Suntag is allowed the following fees and expenses as a professional of the Estate:

Herum/Crabtree/Suntag, Professional employed by the Chapter 7 Trustee

Fees in the amount of \$9,059.50

Expenses in the amount of \$80.77,

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

**IT IS FURTHER ORDERED** that the Chapter 7 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.