

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Sacramento, California

August 13, 2015 at 10:30 a.m.

1. [14-91633](#)-E-11 SOUZA PROPANE, INC. MOTION TO SELL FREE AND CLEAR
FWP-7 David C. Johnston OF LIENS
7-16-15 [[183](#)]

No Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 16, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Sell Property is xxxxxx.

David Flemmer, the Chapter 11 Trustee filed the instant Motion to Sell Property on July 16, 2015. Dckt. 183. The Bankruptcy Code permits the Trustee to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. The Trustee requests the court to:

1. Approve the sale of substantially all of the assets of the

August 13, 2015 at 10:30 a.m.

Debtor's propane business to Aasim Propane and Gas Corporation ("Buyer") for \$2,400,000.00, free and clear of liens, claims, encumbrances, or other interests

2. Determine that the Trustee has complied with a purported right of first refusal held by Kiva energy, Inc. to match an offer for the business
3. Authorize the Trustee to pay certain secured claims from the sale proceeds
4. Authorize the Trustee to pay all costs of sale and expenses allocated to the seller under the proposed sale agreement
5. Authorize the Trustee to pay the broker's commission from the sale proceeds
6. Adopt the proposed bidding procedures at the beginning of the hearing and conduct an auction in court if there are overbidders
7. Approve the sale of the purchased assets to the highest and best bidder

TERMS OF SALE

The Trustee is seeking to sell the following assets:

1. All machinery, equipment, tanks, furniture, furnishings, vehicles and other similar tangible personal property (exclusive of the excluded assets)
2. All inventories of propane, supplies and operating supplies, including the items listed on Exhibit B to the APA
3. All customer accounts, rights to service customers, customer lists, customer contact information, customer tank rental agreements, and databases and documentation related to the Fixed Assets and Other Personal Property
4. The executory contracts and unexpired leases listed on Exhibit C to the APA
5. Certain books, files, and other data of Seller (including those stored electronically) relating to any of the Purchased Assets or the Business
6. All permits and licenses issued or granted to Seller relating to the Business, whether governmental or otherwise, including those set forth on Exhibit D to the APA, to the extent they are assignable or transferable in connection with the Transaction; and
7. The trade name, all telephone numbers and the website currently used for the Business.

August 13, 2015 at 10:30 a.m.

(The above collectively "Property.")

Part of the Asset Purchase Agreement includes assets that are not part of the property being sold. These assets are:

1. All corporate minute books, corporate seals, stock books, charter documents and other corporate books and records pertaining to the existence and organization of the Debtor or any and all documents that relate to discovery and/or investigation necessary for future litigation
2. Cash, cash equivalents, investments, accounts receivable, notes receivable, and funds payable to Seller under pending credit and debit card transactions.
3. All bank and investment accounts maintained by or for the Debtor
4. All tanks covered under the Lease Agreement with Financial Pacific Leasing, LLC dated November 30, 2010 (unless released by agreement of Financial Pacific Leasing, LLC and Buyer and traded for tanks of equal value not previously covered under such Lease Agreement)
5. All right of the Debtor in, to, and under any and all contracts or agreements of any nature for which the obligations of the Debtor party thereto are not expressly assumed by Buyer pursuant to Section 2.1, including such contracts, licenses, permits and approvals relating to the Business that by their terms are nontransferable or not assignable (and are not capable of being transferred by order of the Bankruptcy Court, notwithstanding such terms), or for which Seller has elected not to obtain a consent or approval, in his sole and reasonable discretion, so long as the Transaction is capable of being consummated notwithstanding such election.
6. All claims, rights, proceeds, pr recoveries arising out of any actual, pending, threatened or potential litigation or cause of action to which the Debtor is, or may in the future be, a party, including but not limited to any and all known and/or unknown claims of the Debtor or Seller against any third party on any theory of any kind, which includes any known or unknown claims against the Buyer. Executing this Agreement does not in any way constitute a release satisfaction accord and/or merger of any claims between the Buyer an the Debtor or seller.
7. All rights, claims, refunds, adjustments, recoveries, payments from, and/or proceeds of any insurance policies to the extend they relate to the excluded property
8. All preference or avoidance claims and actions of Seller or the Debtor, including without limitation, any such claims ans actions arising under Sections 510, 544, 545, 547, 548, 549, and/or 550 of the Bankruptcy Code

August 13, 2015 at 10:30 a.m.

- Page 3 of 55 -

9. Any rights to refunds for taxes and assessments, of any kind whatsoever, paid on or with respect to the Business and attributable to any period prior to the closing date, including but not limited to refunds based on reassessments, or with respect to any excluded property.
10. Any and all claims, credits, refunds, abatements, allocations, causes of action, claims for relief, choses in action, rights of recovery, rights of set-off, rights of indemnity, contribution or recoupment, counter-claims, cross-claims and defenses of Seller or the Debtor to the extent related to any excluded property or attributable to any period prior to the closing date; and
11. All rights of Seller under this Agreement or any agreement entered into in connection with this Agreement or any of the transactions contemplated hereby.

Pursuant to the Motion and the Asset Purchase Agreement, the terms of the sale are as follows:

1. Aasim Propane and Gas Corporation ("Buyer") is the buyer.
2. Purchase price of \$2,400,000.00, as adjusted by any inventory adjustment (not expected to exceed \$5,000.00) and reduced by the customer Tank Repayment Credit (approximately \$11,000.00).
3. Initial deposit of \$200,000.00. A second deposit of \$1,300,000.00 is to be wired one business day after court approval. The remaining \$900,000.00 due by noon on closing date.
4. The buyer shall assume the obligations of the Debtor to Vision Financial Group secured by liens on two Freightliner bobtails, with an estimated balance as of the closing date of \$142,020.00.
5. The purchase is to be "as is" "where is" all cash to seller.

SALE FREE AND CLEAR OF LIENS

The Motion seeks to sell Property free and clear of the liens of the following creditors and the grounds in which the Trustee alleges they can be sold free and clear:

Creditor	Amount	Reason	Proof of Claim
Leaf Funding, Inc.	\$0.00	Bona fide dispute. Underlying obligation has been paid in full. Validity of the lien is disputed. Trustee does not believe any purchased assets covered by the lien to be sold to Buyer. if property subject to the alleged lien is sold as part of the sale, such property to be sold free and clear of the lien with any such lien attaching to the net sale proceeds to the extent applicable.	
Town & Country Leasing LLC	\$0.00	Bona fide dispute. Underlying obligation has been paid in full. Validity of the lien is disputed; if property subject to he alleged lien is sold as part of the sale, such property to be sold free and clear of the lien with any such lien attaching to the net sale proceeds to the extent applicable.	
Shasta Gas Propane, Inc.	\$37,500.00	Bona fide dispute. No legal basis for a secured claim. Property to be sold fee and clear of the lien with any such lien attaching to the net sale proceeds to the extent applicable.	Proof of Claim No. 9

The Bankruptcy Code provides for the sale of estate property free and clear of liens in the following specified circumstances,

"(f) The trustee [debtor in possession or Chapter 13 debtor] may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if-

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such

August 13, 2015 at 10:30 a.m.

property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."

11 U.S.C. § 363(f)(1).

For this Motion, the Movant has established that there are bona fide disputes over the above referenced liens, namely either they having been paid in full. The Trustee is proposing creating a blocked account with the funds necessary for the liens. Based on the information provided for in the Motion and the supplemental papers, the court finds that there is a bona fide dispute to justify the sale of the Property free and clear of the loans.

DISTRIBUTION

The Trustee provides a proposed distribution of the \$2,400,000.00 sale proceeds as follows:

SOURCE/USES	ASSET ENCUMBERED	AMOUNT TO BE PAID	Proof of Claim
Customer Prepayment Credit		\$11,888.00	
Inventory Adjustment		\$0.00	
Closing Costs and Broker Fees		\$100,00.00	
Turner Gas Company	Debtor's accounts receivable, inventory and equipment	\$478,900.00, pursuant to Turner's conditional consent (Dckt. 239)	15
State Board of Equalization	All of Debtor's personal property subject to tax liens under California law	\$29,000.00	6

Kiva Energy, Inc.	Debtor's accounts receivables, goods, inventory, equipment, and other assets as described in security agreement and financing statement	\$755,000.00, pursuant to Kiva's Non-Opposition (Dckt. 243)	22
Ferrellgas, L.P.	All personal property to which judgment lien attaches under California law	\$614,653.00, pursuant to Ferrellgas Conditional Non-Opposition (Dckt. 227)	22
Leaf Funding, Inc.	126TE 250AG tan white/yellow CA; 250 gal AG H tank white/yellow CA; A36 TE 5000AG white/yellow CA; 500 gal AG H tank white/yellow CA	\$0.00	
Town & Country Leasing LLC	Personal property leased from Town & Country	\$0.00	
Financial Pacific Leasing, LLC/Wells Fargo Bank, N.A.	Propane tanks leased from Financial Pacific	\$0.00, not to be sold as part of the sale and lease to be rejected and creditor to collect tanks	3
Shasta Gas Propane, Inc.	Unknown	\$37,500.00, Trustee disputes validity of claim. Any lien to attach to net proceeds blocked account	8, 9
Stanislaus County Tax Lien	All Debtor personal property subject to the unpaid personal property tax	\$0.00, POST-PETITION LIEN. Lien released on August 4, 2015 by creditor	17

Administrative Claim Reserve		\$330,750.00, Projected Trustee fees, Trustee's professions, and US Trustee fees through close. Surcharge rights to attach to net proceeds blocked account	
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TRUSTEE'S REQUEST FOR SURCHARGE

In the Motion, the Trustee requests that the court authorize the right of the Trustee to surcharge collateral included in the sale to transfer to the proceeds of the sale.

The Trustee, in essence, is requesting that his right, as trustee, to surcharge on tangible property to attach to the sale proceeds of the liquidated Property, especially in light of the Property being sold free and clear of liens, with a bona fide dispute potentially being present. As such, the court grants such request and the Trustee's right to surcharge collateral is transferred to the proceeds of the sale.

OVERBIDDING PROCEDURES

Additionally, in the Motion, the Trustee requests that the court adopt certain bidding procedures. The following procedures are adopted for the hearing at which the court will call for any other potential purchases to appear in open court:

1. The initial and subsequent overbids must be at least \$20,000.00 higher than the proposed \$2,400,000.00 sales price;
2. Any person or entity seeking to be considered to be permitted to bid at the sale hearing on August 13, 2015 at 10:30 a.m. at the hearing must:
 - a. Pre-Hearing Trustee Certification:
 - i. By 5:00 p.m. on Tuesday, August 11, 2015, deliver to the Trustee in the offices of his counsel documentation identifying the overbidder and any principals, owners, members, or shareholders of the bidder and evidencing the prospective overbidder's source of capital, other financial ability to complete the contemplated transactions, and confirming the ability to conform to federal requirements if the funds are obtained offshore and/or by a non-U.S. citizen;
 - ii. Prior to commencement of the sale hearing at 10:30 a.m. on August 13, 2015, hand to the Trustee:

August 13, 2015 at 10:30 a.m.

- (1) A cashiers' check payable to the Trustee in an amount equal to the \$200,000.00 initial deposit and an initial overbid increment of at least \$20,000.00 and
 - (2) An Overbidder Asset Purchase Agreement signed by the overbidder (the form of which will be filed with the court no later than July 30, 2015 and will be available from the Trustee as of that date); or
- b. Day of Hearing Permission to Participate in Public, Open Court Auction:
 - i. The court requires that any potential bidder present the court with a cashier's check or other certified funds, or an equivalent demonstration of ability to pay, in an amount not less than \$xxxxx, and demonstrates having the cash resources or access thereto to timely close the sale, as determined sufficient by the court.
3. If Kiva does not timely and properly exercise its' right of first refusal with respect to the Buyer, Kiva will have the right to qualify to overbid, but will not have any right of first refusal with respect to any overbids
4. If Kiva timely and properly exercises its right of first refusal with respect to the Buyer, Kiva will have the right to match any overbid and overbidders will subsequently have the right to overbid Kiva's match
5. One business day after the court approves the sale to a successful overbidder in open court, the successfully overbidder will be required to wire to the escrow holder the \$1,300,000.00 second deposit as well as the amount of the overbid that exceeds \$2,400,000.00, which funds will be immediately, nonrefundable absent material breach of the overbidder Asset Purchase Agreement by the Trustee
6. A backup buyer also may be designated and become the buyer in the even that the successful overbidder does not complete the sale transaction
7. Closing costs and a broker's commission of up to \$90,000.00 (depending upon the identity of the successful overbidder) to be paid to Westwood Benson from the sale proceeds, with no commission paid by the Trustee to any other broker representing an overbidder; and
8. All overbidders understand that there will be no further due diligence period and closing time periods contained in the overbidder Asset Purchase Agreement shall apply to any overbid and any overbidder must agree to performance of such terms

August 13, 2015 at 10:30 a.m.

BROKER'S COMMISSION

In the Motion, the Trustee also requests that the court authorize the payment of the broker's commission from the sale proceeds of \$90,000.00 from the sales proceeds. The court authorized the employment of Westwood Benson Business Broker as broker for the Trustee on April 30, 2015, which included the \$90,000.00 flat fee contemplated in the employment agreement. Dckt. 142. The agreement contained contingencies on what the exact fee for the broker would be depending on the buyer of the Property.

As such, the court authorizes the Trustee to pay the broker's commission of \$90,000.00 from the sale proceeds if the purchaser is the buyer, or up to \$90,000.00 from the sale proceeds depending upon the identity of the successful overbidder.

KIVA ENERGY, INC'S RIGHT OF FIRST REFUSAL

The Trustee further requests that the court determine that Trustee has complied with the Kiva's right of first refusal.

On July 20, 2015, Kiva filed a conditional non-opposition. Dckt. 243. Kiva states that it does not oppose the Motion provided that:

1. The Trustee pays Kiva the sum of \$775,000.00 on its claim, plus interest at the rate provided in the Wholesale Customer Agreement and Security Agreement supporting Kiva's claim from September 8, 2015 until the date of closing if the sale does not close on September 8, 2015.
2. Kiva will not exercise its right of first refusal with respect to the sale as presently contemplated in the Trustee's pending motion for an order authorizing the sale of substantially all business debts of the Debtor. However, Kiva's right will remain intact and Kiva may exercise its right of first refusal
 - a. In the event that the sale does not close by October 8, 2015 or
 - b. Within 30 days of notice of any change in terms of the sale that is less advantageous to the estate than the sale presently contemplated.
3. Kiva's offer to accept the aforementioned sums in compromise of its claim is revoked if the sale does not close by October 8, 2015.

The Trustee's omnibus reply, filed on August 6, 2015, affirms that Kiva has waived the right of first refusal based on the terms set forth above. As such, the court will not make the determination on whether the Trustee has satisfied Kiva's right of first refusal.

DETERMINATION PURSUANT TO 11 U.S.C. § 363(m)

The Trustee requests that the court establishes that the Buyer of the purchased assets is a good faith purchaser under 11 U.S.C. § 363(m).

August 13, 2015 at 10:30 a.m.

- Page 10 of 55 -

11 U.S.C. § 363(m) states:

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

However, the Trustee has not provided sufficient information, justification, or evidence for the court to make such a factual and legal determination. While the Trustee does provide a section for such argument in his "Mothorities," the court does not find that sufficient information has been provided to make a factual determination under 11 U.S.C. § 363(m). Therefore, the request is denied.

WAIVER OF FEDERAL RULE OF BANKRUPTCY PROCEDURE 6004(h)

Lastly, the Trustee requests that the court waive the 14-day stay on an order authorizing the sale of property under Fed. R. Bankr. P. 6004(h). Pursuant to Rule 6004(h), the court has the authority to waive the 14-day stay. In light of the complex and unique circumstances surrounding this case as well as the instant sale of essentially all assets of the business, the court finds cause to waive the 14-day stay of Fed. R. Bankr. P. 6004(h). Therefore, the request is granted and the 14-day stay is waived.

RULING

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

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

While to some the circumstances surrounding this case may appear to be nothing short of extra-ordinary, such are the dynamics of a Chapter 11 case. (This is not intended to minimize the efforts of the Trustee, counsel, creditors, and the various other attorneys. Such extraordinary efforts are required in business Chapter 11 cases.) Between the appointment of a Chapter 11 trustee, disputes over the validity of certain liens, and the attempt to sell the Debtor's business, the case has been riddled with lengthy and complicated issues. The proposed sale provides for the payments of liens encumbering the assets and also for the transfer of the right to surcharge to the liquidated assets. The proposed sale, while complicated, provides for an organized and streamlined means of winding down the business. As such, the court finds that the sale is beneficial to the estate, Debtor, and creditors.

Therefore, incorporating the above, the Motion is granted. In light of the complicated sale, the Trustee shall prepare the order approving the sale and lodge the order with the court.

2. [14-91633](#)-E-11 SOUZA PROPANE, INC.
FWP-8 David C. Johnston

MOTION TO ASSUME LEASE OR
EXECUTORY CONTRACT
7-16-15 [[188](#)]

No Tentative Ruling: The Motion for Authority to Assume and Assign Certain Unexpired Leases and Executory Contracts in Connection with the Proposed Sale of Substantially All of the Debtor's Business Assets was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 16, 2015. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

The Motion for Authority to Assume and Assign Certain Unexpired Leases and Executory Contracts in Connection with the Proposed Sale of Substantially All of the Debtor's Business Assets was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----
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<p>The Motion for Authority to Assume and Assign Certain Unexpired Leases and Executory Contracts in Connection with the Proposed Sale of Substantially All of the Debtor's Business Assets is -- -----.</p>
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David Flemmer, Chapter 11 Trustee, filed the instant Motion for

Authority to Assume and Assign Certain Unexpired Leases and Executory Contracts in Connection with the Proposed Sale of Substantially All of the Debtor's Business Assets on July 16, 2015. Dckt. 188.

The Trustee is seeking the following:

1. Authorize, but not direct, the Trustee to assume and assign to Buyer the following unexpired leases or executory contracts related to the purchased assets to be sold to Buyer and/or ultimate successful purchaser in connection with the sale
 - a. Commercial Lease Agreement between Souza Properties, Inc. And Souza Propane, Inc. for real property located at 826 Souza Street, Turlock, California. ("Souza Street Lease")
 - b. Lease - Airport property between Turlock Air Park, Inc. and Souza Propane, Inc. for real property located on Greenway Avenue, Turlock, California ("Airport Lease")
 - c. Lease with Maintenance Agreement between Toshiba Financial Service and Souza Propane, Inc. (serviced through De Lage Landen Financial Services Inc.) Or Toshiba e-Studio 3040c (with service), Lexmark XS463, and Lex mark XS736DE
 - d. Advertising Contract dated June 18, 2015, with YP for internet and point ads in Yellow Pages; and
 - e. Software Maintenance and Software License Agreement dated June 2011 with Rural Computer Consultants, Inc. for Fuel Distribution Systems software.
2. Determine what cure amount, if any, must be satisfied under each Assumed Contract as required by 11 U.S.C. § 365(a). The following chart lists the amounts the Trustee submits are necessary for the estate to pay for all defaults under each of the Assumed Contracts to be assumed and assigned. If \$000 is listed, the Trustee submits that there is no cure amount with respect to such assumed contract. The Trustee believes that any and all defaults (other than the filing of this bankruptcy case) and the actual pecuniary losses under the assumed contracts can be cured by the payment of the cure amount:

Other Party to Contract	Type	Contract Date	Cure Amount
Souza Properties, Inc.	Lease for real property located at 826 Souza Street, Turlock, California	February 1, 2010	\$25,000.00 plus transfer of two barter accounts

Turlock Air Park, Inc.	Lease of real property located on Greenway Avenue, Turlock, CA	December 30, 1974	\$200.00
Toshiba Financial Services (serviced thorough De Lage Landen Financial Services, Inc.)	Lease and maintenance agreement for three copiers	May 30, 2012	\$5,211.41
YP	Advertising contract	June 18, 2015	\$0.00
Rural Computer Consultants, Inc.	Software Maintenance and licence agreement	June 2011	\$0.00

3. Authorize the Trustee to pay the cure amounts at the closing of the sale
4. To the extent disputed, determine that each assumed contract is an executory contract
5. Waive any stay under Fed. R. Bankr. P. 6006(d) of immediate enforceability of the order approving the Motion when entered.

SOUZA PROPERTIES LEASE

Souza Properties filed a Proof of Claim No. 18 asserting \$539,665.00 was due on account of unpaid rent and other charges for the Souza Street Lease. The Trustee has been informed by Souza Properties that the outstanding amount owed to Souza Properties on account of the Souza Street Lease is not accurate. The Trustee states that he is negotiating to cure the amount.

The Trustee states that the Debtor apparently holds rights in IMS Barter Account No. 16606. The IMS Account has just under \$62,000.00 in trade credits. The Debtor also apparently holds rights in ITEX Corporation Account No. XXXX7630. The ITEX Account has just under \$37,000.00 in trade credits. The Trustee believes that the cash value of the IMS Account is at most \$6,200.00, which would make the cash value of the ITEX Account to be \$3,700.00 at most.

The Trustee believes a transfer of the IMS Account and the ITEX Account to Souza Properties in exchange for a reduction in the asserted cure amount of over \$500,000 is worth more to the Debtor's estate than possibly receiving approximately \$10,000.00 in case for the two barter accounts.

Lawrence and Judith Souza ("Souzas") filed a replacement response on August 7, 2015 (the Souzas originally filed a response on July 30, 2015 but the court will view the instant response as the controlling one). Dckt. 260. The Souzas, purporting to be "acting on behalf of Souza Properties," state that they are willing to allow the Trustee to assume the real property lease by and

between Souza Properties and Debtor pertaining to the real property located at 826 Souza Street, Turlock, California, provided all of the following occurs:

1. Upon the close of the sale, the Trustee shall pay Souza Properties a lease cure payment consisting of \$40,000.00 in cash and also assign the two "barter accounts" the Trustee proposed to transfer pursuant to the original assumption motion.
2. In addition, in the event of an overbid at the sale, Souza Properties will receive 25% of the net overbid funds actually received up to an additional \$100,000.00, payable upon close of the Debtor's asset sale.
3. Prior to the close of the Debtor's asset sale, the proposed purchaser of the Debtor's assets must enter into a lease of the office property owned by Souza Propane located on a portion of Stanislaus County APN No. 042-009-31, contingent upon the proposed purchaser actually purchasing substantially all of the Debtor's assets. Under this lease, the proposed purchaser would lease the office property from the date escrow closes on the sale through April 30, 2016, at the rate of \$2,750.00 per month. Counsel for the proposed purchaser has stated that the proposed purchaser is willing to enter into such a lease and a draft of the lease has been circulated for comment
 - a. Ferrellgas and Kiva Energy must agree to waive their claims in the Souza personal chapter 11 case in the event the sale closes before September 30, 2015 and they are paid as set forth in the Trustee's sales motion.

The Souzas state that the terms above were negotiated with the Trustee and that they believe the Trustee supports the assumption of the shop lease.

In considering this pleading, the first question facing the court is why and how are these two individuals appearing in this federal court proceeding and purporting to act in the place of a separate legal entity - Souza Properties, Inc. They do not purport to be acting in any legal capacity as an officer or representative of Souza Properties, Inc. They do not purport to be acting in the name of Souza Properties, Inc. pursuant to a power of attorney. Rather, they, as their parties, purport to be showing up and litigating in the place of Souza Properties, Inc.

Prior to the amended response, the Trustee filed a response on August 6, 2015. Dckt. 254. The Trustee's response is reflected in the Souza's amended response and the terms purported by the Trustee are incorporated into it.

AIRPORT LEASE

The Trustee, in his Motion, discusses the history of the Airport Lease and the current contention with Turlock Air Park, Inc. over the assertion that the Debtor never renewed the lease in 2003. The Trustee states that Turlock Air Park is asserting a claim based on California Corporations Code § 310 to invalidate any lease renewal. The Trustee argues that California Code of Civil Procedure § 338 has a three year statute of limitation which applies to any

claim to invalidate a transaction under § 310. Therefore, the Trustee argues that any claim to invalidate the lease has been barred by the statute of limitations

TURLOCK AIR PARK, INC. LIMITED OPPOSITION

Turlock Air Park, Inc. ("Turlock") filed an opposition on July 30, 2015. Dckt. 242. Turlock states that it is the former owner of the property but recently sold it to a third party. As such, Turlock does not hold any interest in the leased real property. However, Turlock argues that it is involved in an ongoing dispute related to the validity of the lease with Lawrence Souza.

Turlock opposes the Motion to the extent that the Motion seeks to determine that the lease is an executory contract. Turlock argues that this is improper as under Fed. R. Bankr. P. 7001(2) an adversary proceeding "to determine the validity, priority or extent of a lien or other interest in property" is required. Turlock states that the court "should not prejudice the due process rights of others" and grant the Motion.

TRUSTEE'S REPLY TO TURLOCK

The Trustee filed a reply to Turlock's opposition on August 6, 2015. Dckt. 253. In short, the Trustee argues that, since Turlock sold the property, Turlock has no standing to oppose the Motion or the assumption. Further, the Trustee argues that the airport lease has not expired or been terminated pre-petition because it was timely renewed pursuant to the terms of the contract. The Trustee argues that the court can make a determination that the lease was an unexpired lease at the time of the petition date that can be assumed by the buyer in the sale.

DISCUSSION

11 U.S.C. § 365 provides for the ability for the Trustee to assume and assign executory contracts and unexpired leases. Specifically, 11 U.S.C. § 365 provides the following:

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee--

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the

time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to-

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

....

(f)(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if--

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

In determining whether a court should allow a trustee to assume a lease, the court uses a business judgment standard. G.I. Indus., 204 F.3d 1276 (9th Cir. 2000).

Here, the Trustee is seeking to assume and assign the leases of: (1) Souza Properties, Inc.; (2) Turlock Air Park, Inc.; (3) Toshiba Financial Services; (4) YP; and (5) Rural Computer Consultants. FN.1.

FN.1. The court notes that, facially, the Trustee's Motion is improper as he is requesting multiple forms of relief, namely the assumption and assignment of multiple leases in a single motion. The Federal Rules of Bankruptcy Procedure did not incorporate Fed. R. Civ. P. 18 to allow a single motion to request multiple forms of relief. However, due to the extenuating and unique circumstances of the instant case, the court waives this defect.

Leases of Souza Properties, Inc., Toshiba Financial Services, YP, and Rural Computer Consultants

As to the leases of Souza Properties, Inc., Toshiba Financial Services, YP, and Rural Computer Consultants, the court finds that it the assumption of these leases are in the best interest of the estate, Debtor, and creditors and is sound business judgment. The assumption of these leases allow for the Trustee to consummate the sale of the Debtor's assets and further provide an organized liquidation of the estate. The proposed sale of the assets provide for the cure of the contracts that may be in default and, for Souza Properties, provides adequate assurance of payment based on the additional terms.

The court having already found that the assumption of the four leases is proper, for the assignment of these four leases, the Trustee argues that, in light of the proposed sale of the assets, there is adequate assurance of future performance. The buyer has demonstrated its ability to perform all the obligations and the overbidding procedures proposed in the Motion to Sell also provides for the assurance.

Lease of Turlock Air Park, Inc.

The "hiccup" in the instant Motion is the Turlock Air Park, Inc. assumption and assignment. As admitted by Turlock and the Trustee, the property has been sold to a third party. On August 3, 2015, the Trustee filed an application for an order to extend deadline for Mark Ahlem to file a response to the instant Motion. Dckt. 249. In that application, Mark Ahlem is listed as the successor in interest to Turlock, and is presumably the new owner of the property. However, in the Motion, the Trustee still lists Turlock as the holder of the lease that the Trustee wishes to assume and assign.

To first address Turlock's opposition, Turlock plainly admits that it is no long a real party in interest. Pursuant to U.S. Constitution Article III, Sec. 2, there must be a real party in interest before the court. Turlock, through its own admission, is no longer a party in interest to the validity of the lease or to any other part of the sale. Turlock states that it has sold its interest in the property to a third party, presumably Mr. Ahlem, therefore leaving Turlock no standing to object to the assumption, assignment, or sale of the Debtor's assets. This is only further emphasized by 11 U.S.C. § 1109(b)

which limits the rights of those to be heard to include "party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee". Turlock no longer falls into any of those categories.

However, while Turlock does not have standing to bring an objection, the fact remains that there appears to be a dispute over whether the Debtor actually renewed the lease and whether it is actually able to be assumed and assigned. With the sale of the Debtor's assets hindering, in part, on the assumption and assignment of this lease, the "house of cards" can come tumbling down if there is, in fact, no lease to be assumed and assigned.

At the hearing, xxxxxx

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

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

The Motion for Authority to Assume and Assign Certain Unexpired Leases and Executory Contracts in Connection with the Proposed Sale of Substantially All of the Debtor's Business Assets filed by Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is xxxx.

3. [14-91633](#)-E-11 SOUZA PROPANE, INC.
FWP-9 David C. Johnston

MOTION TO REJECT LEASE OR
EXECUTORY CONTRACT
7-16-15 [[198](#)]

Tentative Ruling: The Motion for Authority to Reject Certain Unexpired Leases and Executory Contracts in Connection with the Proposed Sale of Substantially all of the Debtor's Business Assets has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 16, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Authority to Reject Certain Unexpired Leases and Executory Contracts in Connection with the Proposed Sale of Substantially all of the Debtor's Business Assets has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Authority to Reject Certain Unexpired Leases and Executory Contracts in Connection with the Proposed Sale of Substantially all of the Debtor's Business Assets is granted.
--

David Flemmer, the Chapter 11 Trustee, filed the instant Motion for Authority to Reject Certain Unexpired Leases and Executory Contracts in

Connection with the Proposed Sale of Substantially all of the Debtor's Business Assets on July 16, 2015. Dckt. 198. The Trustee requests the following:

1. Authorization, but not direct, the Trustee to reject the following unexpired leases or executory contracts effective immediately after the close of the sale of the Debtor's assets to a buyer, which is expected to close on September 8, 2015:
 - a. Commercial Lease Agreement dated February 1, 2010, between Souza Properties, Inc. and Souza Propane, Inc. for real property located at 199 W. Canal Drive, Turlock, California.
 - b. Lease Agreement dated November 30, 2010, between Financial Pacific Leasing, LLC and Souza Propane, Inc. for 102 used propane tanks.
 - c. Lease Agreement dated October 22, 2010 between De Lage Landen Financial Services Inc. and Souza Propane, Inc. for Konica Minolta copier model C451.

The Trustee argues that pursuant to 11 U.S.C. § 365, he has the authority to reject the above referenced leases.

11 U.S.C. § 365(a) states:

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

In determining whether a court should allow a trustee to assume a lease, the court uses a business judgment standard. G.I. Indus., 204 F.3d 1276 (9th Cir. 2000).

The Trustee argues that after review of the contracts and the estate, the above-referenced leases will no longer be necessary for nor beneficial to the Debtor and will create unnecessary and burdensome expenses for the estate. The Trustee also asserts that there would be no meaningful value would be realized by the estate.

Upon review of the Motion and the leases, the court concurs with the Trustee that the above-referenced leases are not beneficial to the estate and that the Trustee's business judgment is sound. As such, the Motion is granted and the following leases are authorized to be rejected:

- a. Commercial Lease Agreement dated February 1, 2010, between Souza Properties, Inc. and Souza Propane, inc. for real property located at 199 W. Canal Drive, Turlock, California.
- b. Lease Agreement dated November 30, 2010, between Financial Pacific Leasing, LLC and Souza Propane, Inc. for 102 used propane tanks.

August 13, 2015 at 10:30 a.m.

- c. Lease Agreement dated October 22, 2010 between De Lage Landen Financial Services Inc. and Souza Propane, Inc. for Konica Minolta copier model C451.

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 Reject Unexpired Leases and Executory Contracts filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and, pursuant to 11 U.S.C. § 365(a), the Trustee is authorized to reject the following unexpired leases:

- a. Commercial Lease Agreement dated February 1, 2010, between Souza Properties, Inc. and Souza Propane, inc. for real property located at 199 W. Canal Drive, Turlock, California.
- b. Lease Agreement dated November 30, 2010, between Financial Pacific Leasing, LLC and Souza Propane, Inc. for 102 used propane tanks.
- c. Lease Agreement dated October 22, 2010 between De Lage Landen Financial Services Inc. and Souza Propane, Inc. for Konica Minolta copier model C451.

4. [14-23471](#)-E-11 ERROL/SUZANNE BURR
DNL-11 Iain A. MacDonald

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF WALTZ LAW FIRM
FOR PATRICK J. WALTZ, SPECIAL
COUNSEL
7-16-15 [[279](#)]

Final Ruling: No appearance at the August 13, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, parties requesting special notice, and Office of the United States Trustee on July 16, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

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

The Waltz Law Firm, Special Counsel ("Applicant") for Susan K. Smith, the Chapter 11 Trustee ("Client"), makes a Second and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period April 10, 2014 through February 23, 2015. The order of the court approving employment of Applicant was entered on January 11, 2015, Dckt. 226. Applicant requests fees in the amount of \$48,000.00 and costs in the amount of \$209.39, less fees in the amount of \$7,710.00 and costs in the amount of \$51.59, which were previously awarded for work done on Debtors' Chapter 13 case.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

August 13, 2015 at 10:30 a.m.

- Page 23 of 55 -

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(I) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Benefit to the Estate

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

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

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including representation in malpractice litigation and adversary proceedings. The estate has \$326,439.71 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES 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.

Litigation of the Malpractice Case: Applicant spent 70.4 hours in this category. Applicant assisted Client with organizing a general strategy for Debtor's malpractice case by meeting with involved parties, assessed the merits of allegation made by the defendant in Debtor's malpractice case, researched issues presented by the malpractice case, and reviewed relevant expert opinions. Applicant also negotiated the settlement of the malpractice case after assessing the case's strengths and weaknesses, and the potential damages that could be awarded.

Litigation of Adversary Proceedings: Applicant spent 33.5 hours in this category. Applicant discussed the removal and remand of Debtors' malpractice case with the Debtor's counsel, with Defendant's counsel in that case, and with the Trustee's general counsel. After preparing and serving notice for the removal motion and reviewing defendant's remand motion, Applicant prepared the opposition to defendant's remand motion.

Bankruptcy Proceedings: Applicant spent 15.9 hours in this category. Applicant assisted with the motion for relief of automatic stay with regards to prosecuting Debtors' malpractice case by communicating with both Debtors' counsel and the defendant in that case's counsel. Applicant also assisted the with the applications for approval of employment for both Debtors' counsel and Trustee's counsel. Applicant also assisted Trustee's counsel with the application for approval of Special Counsel's compensation.

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 damages for malpractice, adversary proceedings, and dealt with related bankruptcy issues, for which Client agreed to a contingent fee of 40% of the net. In approving the employment of applicant, the court approved the

contingent fee, subject to further review pursuant to 11 U.S.C. § 328(a). \$120,000.00 of net monies (exclusive of these requested fees and costs) was recovered for Client.

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

Application	Interim Approved Fees and Costs	Interim Fees and Costs Paid
First Interim	\$7,710.00	\$7,710.00
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	\$7,710.00	\$7,710.00

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$209.39 pursuant to this applicant. Pursuant to prior interim applications, the court has allowed costs of \$157.80.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Long Distance		\$24.40
Postage		\$21.99
Photocopy	\$0.10	\$163.00
Total Costs Requested in Application		\$209.39

FEES AND COSTS & EXPENSES ALLOWED

Fees

Percentage Fees

The court finds that the fees computed on a percentage basis recovery for Client to be 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 \$48,000.00 pursuant to 11 U.S.C. § 330 for these services provided to Client by Applicant, with credit for the fees already awarded in the amount of \$7,710.00, totaling \$40,290.00 remaining to be paid. The Trustee from the available funds of the Plan Funds in a manner consistent for a Chapter 11 case.

Costs and Expenses

The Second Interim Costs in the amount of \$209.39, less prior Interim Costs in the amount of \$157.80, total \$51.59 and are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available Plan Funds in a manner consistent with the order of distribution in a Chapter 11 case under the confirmed Plan. The court is authorizing that Trustee under the confirmed plan pay 100% of the fees and costs allowed by the court.

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

Fees	\$48,000.00
Costs and Expenses	\$ 51.59

pursuant to this Application, with credit for the prior interim fees of \$7,710.00 and interim costs of \$157.80, as final fees pursuant to 11 U.S.C. § 330 in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by The Waltz Law Firm ("Applicant"), Special Counsel for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that The Waltz Law Firm is allowed the following fees and expenses as a professional of the Estate:

The Waltz Law Firm, Professional Employed by Trustee

Fees in the amount of \$ 48,000.00
Expenses in the amount of \$ 51.59,

The Fees and Costs pursuant to this Applicant, and Fees in the amount of \$48,000.00 and costs of \$51.59 are approved as final fees and costs pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that the Trustee is authorized to pay, after applying the interim fees of \$7,710.00 and interim costs of \$157.80 previously paid to Applicant, the balance of the fees and costs allowed by this Order from the in a manner consistent for a Chapter 11 case.

5. [14-23471](#)-E-11 ERROL/SUZANNE BURR
DNL-13 Iain A. MacDonald

MOTION FOR COMPENSATION FOR
GONZALES & SISTO LLP,
ACCOUNTANT(S)
7-16-15 [[285](#)]

Final Ruling: No appearance at the August 13, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, parties requesting special notice, and Office of the United States Trustee on July 16, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

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

Gonzales & Sisto LLP, the Accountant ("Applicant") for Susan K. Smith the Chapter 11 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period August 7, 2014 through June 30, 2015. The order of the court approving employment of Applicant was entered on August 29, 2014, Dckt. 150. Applicant requests fees in the amount of \$21,220.50 and costs in the amount of \$6.70.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(I) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Benefit to the Estate

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

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

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits include preparing the estate's income tax returns and monthly operating reports, reviewing documents, reconciling banking activity for the Trustee and the Debtors, and conferring with the Trustee and Trustee's counsel regarding income tax returns. The court finds the services were beneficial to the Client and bankruptcy estate and 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.

Monthly Operating Reports and Related Accounting: Applicant spent 85.5 hours in this category. Applicant assisted Client with preparing the monthly operating reports from July 2015 through June 2015; reviewing receipts, disbursements, funds, and other relevant documents; and corresponding with the Trustee.

Tax Consultations, Tax Return Preparation and Administration: Applicant spent 15.4 hours in this category. Applicant prepared the estate's 2014 income tax returns; corresponded with the Debtor's accountant; and conferred with the Trustee and Trustee's counsel regarding income tax returns, a settlement agreement, and closing a case.

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:

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Gene A. Gonzales, CPA	23.2	\$330.00	\$7,656.00
Gene A. Gonzales, CPA	2.9	\$325.00	\$942.50
Lori A. Cima, Tax Manager	30.3	\$200.00	\$6,060.00
Lori A. Cima, Tax Manager	22.2	\$195.00	\$4,329.00
Cynthia T. Mortensen, CPA	0.6	\$180.00	\$108.00
Erica L. Tooker, Accountant	12.7	\$100.00	\$1,270.00
Erica L. Tooker, Accountant	9.0	\$95.00	<u>\$855.00</u>
Total Fees For Period of Application			\$21,220.50

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$6.70 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage		\$6.70
Total Costs Requested in Application		\$6.70

FN.1. Many attorneys and professionals have adopted a billing system that uses different methods to code the billing statements for the time period for the fee application. Tasks are divided into various categories, for example, general administrative matters, sales of property, adversary proceedings, and so on. Subsequently, the billing procedure advanced so that each adversary proceeding was provided a separate billing number so that it would generate a separate billing. Within the bankruptcy case billing number the time entries were given a code on which the billing system could sort the entries and automatically produce a billing report which separates the activities into the different tasks. Counsel may find it helpful to incorporate such a billing system, so as to facilitate the court's understanding of the its tasks.

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$21,222.50 pursuant 11 U.S.C. § 330 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent for a Chapter 11 case.

Costs and Expenses

The First and Final Costs in the amount of \$6.70 pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case under the confirmed Plan. The court is authorizing that Trustee pay 100% of the fees and costs allowed by the court.

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

Fees	\$ 21,220.50
Costs and Expenses	\$ 6.70

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

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

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

The Motion for Allowance of Fees and Expenses filed by Gonzales & Sisto LLP("Applicant"), Accountant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Gonzales & Sisto LLP is allowed the following fees and expenses as a professional of the Estate:

Gonzales & Sisto LLP, Professional Employed by Trustee

Fees in the amount of \$ 21,220.50

Expenses in the amount of \$ 6.70,

The Fees and Costs pursuant to this Applicant, and Fees in the amount of \$ 21,220.50 and costs of \$6.70 are approved as final fees and costs pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent for a Chapter 11 case..

6. [14-23471](#)-E-11 ERROL/SUZANNE BURR
DNL-16 Iain A. MacDonald

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF DESMOND, NOLAN,
LIVAICH & CUNNINGHAM FOR J.
RUSSELL CUNNINGHAM, TRUSTEE'S
ATTORNEY(S)
7-16-15 [[295](#)]

Final Ruling: No appearance at the August 13, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, parties requesting special notice, and Office of the United States Trustee on July 16, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

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

Desmond, Nolan, Livaich & Cunningham, the Attorney ("Applicant") for Susan K. Smith the Chapter 11 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period July 2, 2014 through July 14, 2015. The order of the court approving employment of Applicant was entered on August 29, 2014, Dckt. 149. Applicant requests fees in the amount of \$111,853.00 and costs in the amount of \$1,743.40.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the

August 13, 2015 at 10:30 a.m.

- Page 33 of 55 -

extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(I) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Benefit to the Estate

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

(a) Is the burden of the probable cost of legal [or other

professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits includes preparing applications to employ, preparing for - and attending - status conferences, drafting substitution of attorney applications, preparing settlement agreements for the various cases involved in the matter, drafting memorandum, reviewing Debtor's schedules and other related documents, advising the Trustee regarding course of action for proceeding with case, assessing potential Chapter 11 plan options, conducting legal research regarding the claims asserted in the various cases involved in the matter, inspecting the disputed boundary line, preparing various applications to compensate, and negotiating settlement agreements. The court finds the services were beneficial to the Client and bankruptcy estate and 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.

A. Boundary Case

Investigation, Research, and Analysis of Boundary Case and Related Issues: Applicant spent 80.5 hours in this category. Applicant assisted Client with conducting research regarding the claims asserted in and the issues related to the boundary case (e.g., validity of attorney's fees provision, reviewing survey maps, etc), meeting with the interested parties, inspecting the disputed boundary line, reviewing relevant documents, preparing for and appearing at status conference, and corresponding with interested parties.

Issues Related to Appeals: Applicant spent 42.3 hours in this category. Applicant prepared and filed a substitution of attorney, conducted legal research, reviewed and prepared for the appeal of the boundary case, drafted memorandum to the Trustee regarding issues with the Appeals and whether to proceed, corresponded with opposing counsel, prepared and filed necessary documents for the appeal, and prepared stipulation to stay appeals.

Negotiations, Settlement, and Approval: Applicant spent 78.3 hours in this category. Applicant prepared and appeared at a settlement conference, reviewed settlement offers, advised the Trustee with respect to settlement discussions and bankruptcy related issues, negotiated the settlement agreement, prepared a motion to approve the settlement agreement, reviewed the lis pendens recorded against the real properties, corresponding with opposing counsel to

resolve issues that arose subsequent to the setelement agreement.

B. Non-Boundary Case

Shine Litigation and Related Matters: Applicant spent 45.4 hours in this category. Applicant assisted Client with researching the claims asserted in the Malpractice Case and the Adversary Proceeding, reviewing the motion for remand, corresponding with interested parties, advising the Trustee, preparing the settlement agreement, preparing the motion to approve the settlement agreement, and appearing at the hearing on the motion to approve the settlement agreement.

Stoel Rives Litigation and Related Matters: Applicant spent 29.4 hours in this category. Applicant investigated the claims asserted against Stoel Rives, reviewed Stoel Rives' billing records, negotiated a settlement, prepared a settlement agreement, prepared the motion to approve the settlement agreement, corresponded with interested parties, and advised the Trustee.

Asset Investigation: Applicant spent 15.7 hours in this category. Applicant reviewed documents in order to advise the Trustee as to the course of action for proceeding with the case, prepared demand letters requesting the turn over of gifts, assessed potential Chapter 11 plan options, reviewed insurance policies and assessed the estate's interest in insurance policies.

Employment/Fee Applications: Applicant spent 82.9 hours in this category. Applicant prepared applications to employ, advised the Trustee with respect to employing various individuals (e.g., accountant, special counsel, appraiser, etc.), appeared at the various hearings regarding the applications to employ, corresponded with parties of interest, prepared applications to compensate, and conducted research reglated to the Trustee's cap and effect of dismissal.

General Case Administration: Applicant spent 18.5 hours in this category. Applicant prepared the application to remove documents from the public record, corresponded with the Debtor's and the Trustee, prepared living expense stipulation, and prepared the stipulation to dispose of records.

Dismissal: Applicant spent 8.9 hours in this category. Applicant advised the Trustee regarding dismissal and related issues, and prepared the motion to dismiss the case.

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:

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
J. Russell Cunningham	84.8	\$400.00	\$33,920.00
Brian Manning	107.8	\$300.00	\$32,340.00

J. Luke Hendrix	66.7	\$275.00	\$18,342.50
Gabriel P. Herrera	108.4	\$195.00	\$21,138.00
Jeffrey Nordlander	7.5	\$150.00	\$1,125.00
Lauren Manning	8.8	\$225.00	\$1,980.00
Nabeel Zuberi	16.9	\$175.00	\$2,957.50
Courier	1	\$50.00	<u>\$50.00</u>
Total Fees For Period of Application			\$111,853.00

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$1,743.40 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage		\$362.61
Photocopies	\$0.10 per page	\$269.60
Advances (i.e., parking, filing fees, Appeal filing fee)		\$1,111.19
Total Costs Requested in Application		\$1,743.40

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$111,853.00 pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent for a Chapter 11 case.

Costs and Expenses

The First and Final Costs in the amount of \$1,743.40 pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case under the confirmed Plan. The court is authorizing that Trustee pay 100% of the fees and costs allowed by the court.

Applicant is allowed, and the Trustee is authorized to pay, the following

August 13, 2015 at 10:30 a.m.

amounts as compensation to this professional in this case:

Fees	\$ 111,853.00
Costs and Expenses	\$ 1,743.40

pursuant to this Application as First and Final fees of \$111,853.00 and First and Final costs of \$1,743.40 as final fees pursuant to 11 U.S.C. § 330 in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Desmond, Nolan, Livaich & Cunningham ("Applicant"), Attorney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Desmond, Nolan, Livaich & Cunningham is allowed the following fees and expenses as a professional of the Estate:

Desmond, Nolan, Livaich & Cunningham, Professional Employed by Trustee

Fees in the amount of \$ 111,853.00
Expenses in the amount of \$ 1,743.40,

The Fees and Costs pursuant to this Applicant, and Fees in the amount of \$111,853.00 and costs of \$1,743.40 approved pursuant to prior Interim Application are approved as final fees and costs pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent for a Chapter 11 case.

7. [13-27672-E-7](#) DAVID FLORK
SNM-1 Stephen N. Murphy

EVIDENTIARY HEARING SCHEDULING
CONFERENCE RE: MOTION TO AVOID
LIEN OF GEORGE W. MERRILL
3-25-15 [[38](#)]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 25, 2015. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Evidentiary Hearing on the Motion to Avoid Judicial Lien shall be conducted at xxxxxx __.m. on xxxxxxx, 2015.
--

This Motion requests an order avoiding the judicial lien of George Merrill ("Creditor") against property of David Flork ("Debtor") commonly known as 7022 Leisure Town Road, Vacaville, California (the "Property"). The Motion was filed on March 25, 2015.

The Motion states that a judgment was entered against Debtor in favor of Creditor in the amount of \$690,835.92. An abstract of judgment was recorded with **Solano** County on September 25, 2012, which encumbers the Property.

Pursuant to the Debtor's statement of value on Schedule A, the subject real property is asserted to have an approximate value of \$265,000.00 as of the date of the petition. The unavoidable consensual liens total \$2,335.00 as of

the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of \$175,000.00 on Schedule C. Thus, in the Motion Debtor seeks to avoid, pursuant to 11 U.S.C. § 522(f) the judgment lien creditor to the extent it exceeds \$87,665, computed as follows:

Fair Market Value.....	\$265,000
FTB Senior Tax Lien.....	(\$ 2,335)
Claimed Exemption.....	<u>(\$175,000)</u>
Net Value for judgment lien.....	\$ 87,665

OPPOSITION

Creditor filed an opposition to the instant Motion on April 8, 2015. Dckt. 43. The first basis is contesting that the California Code of Civil Procedure § 704.710(c), 704.730 homestead exemption may be claimed for purposes of avoiding this lien. California Code of Civil Procedure §704.710(c) requires that the judgment debtor reside in the property in which the automatic homestead exemption is claimed on the date the judgment creditor's lien attaches to the dwelling, and in which the judgment debtor has resided continuously thereafter until the date of the court determination that the dwelling is a homestead.

Creditor asserts that when he obtained a Right to Attach Order for an attachment lien to be placed against the Property on or about May 16, 2012, the state court determined that the Property was not to be exempt from attachment. Dckt. 45. Exhibit D. The findings of the court in issuing the Right to Attach Order include:

- a. "Defendant [Debtor] failed to prove that all the property described in plaintiff's [Creditor's] application is exempt from attachment."
- b. "☒ The following property of defendant, described in plaintiff's application

(2) ☒ is not exempt from attachment (*specify*): 7022

Leisure

Town Rd. Vacaville, CA.

Exhibit D, Dckt. 45.

Creditor further asserts that (based on information and belief) that Debtor did not continuously reside in the Subject Property as his homestead from May 16, 2012, the date the Writ of Attachment was recorded, until June 4, 2013, the date on which his bankruptcy petition was filed. FN.1. As a result, Debtor is not entitled to claim a homestead exemption under California Code of Civil Procedure §704.730 and Creditor's judicial lien may not be avoided.

FN.1. The court notes that Creditor attempts to testify under penalty of perjury based on his "information and belief" on several of these points. Unless an expert who may provide an opinion, a witness must base his testimony on personal knowledge, not guess or supposition. F.R.E. 601, 602. While not

August 13, 2015 at 10:30 a.m.

fatally defective for the current pleadings, such "information and belief testimony," even if not objected to by the opposing party, would have little credibility with the court as the finder of fact.

On the issue of whether the property can qualify for a homestead exemption, Creditor directs the court to California Code of Civil Procedure § 484.070 for the proposition that "where the Defendant actually litigates and fails to prove the property is exempt from attachment, the defendant may not later claim that the property is exempt." Opposition, FN.1. p.3:27-28; Dckt. 43.

Creditor asserts in the Opposition that he is informed and believes and based thereon alleges that the actual value of the Subject Property on the date of filing was far in excess of \$265,000, and that Creditor's judicial lien may not be avoided except to the extent that it exceeds the total value of the property less non-avoidable liens and the Debtor's allowable homestead exemption. Creditor requests that the evidentiary hearing in this matter be set sufficiently far in the future to allow Creditor to obtain an appraisal of the Subject Property.

APRIL 23, 2015 HEARING

At the April 23, 2015 hearing, the court continued the hearing to allow discovery to proceed and set an Evidentiary Hearing Schedule Conference at 10:30 a.m. on July 23, 2015. The court further ordered that the Creditor shall file and serve any supplemental pleadings on or before June 26, 2015, and Debtor shall file and serve Replies, if any, on or before July 10, 2015.

JUNE 11, 2015 AMENDED CIVIL MINUTE ORDER

On July 11, 2015, the court issued an Amended Civil Minute Order that stated:

IT IS ORDERED that the hearing on the Motion is continued to 10:30 a.m. on August 13, 2015, at which time the Court shall conduct an Evidentiary Hearing Scheduling Conference (to set the Evidentiary Hearing date for this contested Matter). The Creditor shall file and serve any supplemental pleadings on or before July 20, 2015, and Debtor shall file and serve Replies, if any, on or before July 31, 2015.

Dckt. 62.

SUPPLEMENTAL PLEADINGS FILED

Declaration of Ronald Garland

On July 20, 2015, the declaration of Ronald Garland was filed by Creditor. Dckt. 67. Mr. Garland is a licensed appraiser with a Certified General Real Estate Appraiser licence and the principal of Garland and Associates. Mr. Garland states that he was retained to appraise the Property and came to the conclusion that the market value of the Property as of June 4, 2013 was \$340,000.00. Attached to the Declaration is a copy of the appraisal. Dckt. 68.

August 13, 2015 at 10:30 a.m.

In the Appraisal Mr. Garland states, "The scope of the property inspection was impaired because of the hostile situation during the property inspection. As a result the interior of the two dwellings were not inspected." Appraisal, p. 2; *Id.*

Debtor's Supplemental Response

The Debtor filed a response to the appraisal on July 24, 2015. Dckt. 69. The Debtor states that on page 6 of the Appraisal (listed as page 5 of 19 on the document itself), the Appraisal describes the condition of the structures on the Property as "fair to average."

Debtor argues that the Appraisal does not assign an independent value to the structures nor sets forth the standard to make such determination. Debtor argues that he is a mentally disabled veteran who performs no maintenance on the Property. The Debtor asserts that the Property is covered with a collection of metal, including inoperable vehicles, the wood is rotting, the floors are covered in filth, and that the cost of repair would be substantial and would lead to a lower value on the Property. The Debtor asserts these things were not considered by Mr. Garland.

The Debtor requests that either the court disallow the admission of the Appraisal or to continue the hearing for an additional 30 days for the Debtor to obtain additional evidence in response to the Appraisal.

DISCUSSION

The first issue raised by Creditor is whether the Debtor may claim the automatic homestead exemption in light of the state court, at the time of issuing the right to attach order, stating that the state court found that the Debtor failed to prove that the property was exempt from attachment. Opposition, p. 2:19-21, Request for Judicial Notice, Exhibit D; Dckt. 45.

As discussed by the Hon. Christopher M. Klein, the issue of what qualifies as an exemption in California, for the most part, is an issue of state law, not federal law. *In re Tallerico*, 523 B.R. 774 (Bankr. E.D. Cal. 2015), and see *Law v. Siegel*, ___U.S.___, 134 S. Ct. 1188, 188 L. Ed. 2d 146 (2014), the right to exemption is based on exemption law, as qualified by 11 U.S.C. § 522. Here, the State of California requires that only exemptions provided under California law are applicable in bankruptcy cases. Cal. C.C.P. § 703.140, providing that "all of the exemptions provided by this chapter, including homestead exemption, ...are applicable...[or may elect the alternative exemptions under § 703.140(b)]...."

Creditor asserts that, as a matter of state law, the issue of whether this property qualifies as exempt for purposes of Creditor's lien was already determined by the state court. The specific State law provision is,

"(a) If the defendant claims that **the personal property** described in the plaintiff's application, or a portion of such property, **is exempt from attachment**, the defendant shall claim the exemption as provided in this section. If the **defendant fails to make the claim or makes the claim but fails to prove**

that the personal property is exempt, the defendant may not later claim the exemption except as provided in Section 482.100."

Cal. C.C.P. § 484.070(a) [emphasis added]. The plain language of this paragraph applies to personal property in which exemptions are claimed. As discussed by the California Court of Appeal in *Martin v. Aboyan*, 148 Cal.App. 3d 826, 831, prior to the 1983 amendment to § 484.070(a) the fail to claim or assert and lost provisions applied to all property (real and personal). In 1983 the California Legislature limited it to "personal property" only.

In addition, the California, the Code of Civil Procedure further provides, for the Section of the Code relating to these pre-judgment enforcement remedies, that:

The court's determinations under this chapter shall have no effect on the determination of any issues in the action other than issues relevant to proceedings under this chapter nor shall they affect the rights of the plaintiff or defendant in any other action arising out of the same claim of the plaintiff or defendant. The court's determinations under this chapter shall not be given in evidence nor referred to at the trial of any such action.

Cal. Civ. Proc. Code § 484.100.

Here, Debtor is claiming a homestead exemption in the amount of \$175,000 pursuant to California Code of Civil Procedure § 704.730. That section does not provide for a homestead exemption, but sets the amounts of a possible homestead exemption, as follows:

- A. \$75,000, if the judgment debtor or spouse of the judgment debtor resides in the homestead, unless one of the following other amounts applies;
- B. \$100,000 if the judgment debtor or spouse who resides in the homestead is a member of a family unit, and at least one member of the family unit has no interest in the homestead or it is a community property interest;
- C. \$175,000 if the judgment debtor or spouse of the judgment debtor who resides in the homestead is:
 - 1. 65 years of age or older,
 - 2. A person physically or mentally disabled who as a result of that disability is unable to engage in substantial gainful employment, or
 - 3. A person 55 years of age or older with a gross annual income of not more than twenty-five thousand dollars (\$25,000) or, if the judgment debtor is married, a gross annual income, including the gross annual income of the judgment debtor's spouse, of not more than thirty-five thousand dollars (\$35,000) and the sale is

an involuntary sale.

Fortunately, it is common knowledge (at least among business and real estate attorney, bankruptcy attorneys, and judges) that the actual California homestead provisions are found in, and include, California Code of Civil Procedure §§ 704.710 [definitions], 704.720 [automatic homestead exemption], and 704.910 et seq. [declared homestead exemption]. The term "homestead," for purposes of claiming this exemption is statutorily defined by the California Legislature to be:

"(c) "Homestead" means the principal dwelling (1) in which the judgment debtor or the judgment debtor's spouse resided on the date the judgment creditor's lien attached to the dwelling, and (2) in which the judgment debtor or the judgment debtor's spouse resided continuously thereafter until the date of the court determination that the dwelling is a homestead. Where exempt proceeds from the sale or damage or destruction of a homestead are used toward the acquisition of a dwelling within the six-month period provided by Section 704.720, "homestead" also means the dwelling so acquired if it is the principal dwelling in which the judgment debtor or the judgment debtor's spouse resided continuously from the date of acquisition until the date of the court determination that the dwelling is a homestead, whether or not an abstract or certified copy of a judgment was recorded to create a judgment lien before the dwelling was acquired."

Cal. C.C.P. § 704.710(c).

In the Motion, the grounds stated with particularity upon which the requested relief is based (Fed. R. Bankr. P. 9013) include:

- A. "The Abstract of Judgment secures the Lien-holder's claim by all real property owned by the Debtor in the County of Solano." Motion, Dckt. 38, p. 2:10-11.
- B. "Debtor claimed an exemption on the Subject Property pursuant to C.C.P. § 704.730, see Exhibit 4. Debtor lives in the Subject Property, and is entitled to the claim the exemption under 11 U.S.C. § 522(b)." *Id.*, p. 2:14.5-17.

While it may be assumed that Debtor is alleging that the property qualifies as a homestead exemption and that as of the time of the bankruptcy filing he asserts the homestead exemption, he does not allege that the property qualified as a homestead exemption when the creditor's judgment lien (pursuant to the right to attach order) first encumbered the property. In this Motion to avoid the lien, it is the Debtor's burden to prove that such an exemption exists before the court avoids the lien. *In re Tallerico*, 523 B.R. 774 (Bankr. E.D. Cal. 2015).

When timely served with the Creditor's Supplemental Pleadings, Debtor responds,

- c. That he disputes the appraisal;

August 13, 2015 at 10:30 a.m.

- Page 44 of 55 -

- d. Debtor is a mentally disabled veteran; FN.2.
- e. Debtor provides no maintenance to the property whatsoever; and
- f. The property is covered with a collection of metal, including twenty inoperative vehicles.

Response, Dckt. 69.

FN.2. The court cannot tell whether this contention of being "mentally disable" is a make-weight argument or the Debtor is actually contenting that he is mentally disable. If so, then serious issues exist not only whether a conservator or personal representative must be appointed in the bankruptcy case, but whether counsel and Debtor have provided the court with any effective pleadings, schedules, statement of financial affairs, and other documents purported to be signed by Debtor.

Because Debtor disputes the appraisal, he requests that the court either disallow admission of the appraisal or now give the Debtor more time to prepare for the evidentiary hearing. First, the court cannot fathom what possible proper evidentiary objection exists to the appraisal based on a "I disagree with it, so exclude the evidence" objection. Debtor has not provided the court with any specific objection. Further, the time for preparing the for the evidentiary hearing has run, with Debtor afforded the full opportunity to seek out, obtain, organize, and be ready to present the evidence in support of the motion he filed. Debtor will have the full opportunity to cross-examine the witness and present rebuttal witnesses at the evidentiary hearing. This is the proper method for countering evidence offered against a party.

EVIDENTIARY HEARING SCHEDULING

1. The Evidentiary Hearing on the motion to value the collateral of creditor George Merrill will be held on **xxxxxx, 2015, at XXXXXX X.m.** before the Honorable Ronald H. Sargis, in Department E, United States Bankruptcy Court, 501 I Street, Sixth Floor, Courtroom 33, Sacramento, California.

2. Evidence shall be submitted pursuant to Local Rule 9017-1. Original signatures on any Alternate Direct Testimony must be lodged with the court. Attendance of witnesses at the hearing is required (no telephonic appearance).

4. The court requires the original and two copies [copies to include any highlighting, color, fonts, etc. as original] of all exhibits that a party may offer into evidence or use. The documents shall be pre-marked (plaintiff to use numbers and defendant to use letters). In the case of ten or more exhibits, they should be placed in three-ring binders with each exhibit tabbed.

5. On or before *****, 2015**, Debtor shall lodge with the court (Attn: Janet Larson, Clerk's Office, 3rd Floor) and serve direct testimony statements and exhibits [see paragraph 4].

6. On or before *****, 2015**, Creditor shall lodge with the court (Attn: Janet Larson, Clerk's Office, 3rd Floor) and serve direct testimony

August 13, 2015 at 10:30 a.m.

statements and exhibits [see paragraph 4].

7. ANY DOCUMENTS NOT PROPERLY LODGED, FILED, SERVED, OR COPY DELIVERED TO CHAMBERS AS DESCRIBED IN THIS ORDER MAY RESULT IN EXCLUSION OF CONSIDERATION BY THE COURT.

8. Evidentiary objections to the direct testimony statements and exhibits and any hearing briefs (not to exceed five pages) shall be filed, copy delivered to Chambers (Attn: Janet Larson, Clerk's Office, 3rd Floor), and served on or before *****, 2015.**

9. Opposition to any evidentiary objections shall be filed, copy delivered to Chambers (Attn: Janet Larson, Clerk's Office, 3rd Floor), and served on or before *****, 2015.**

8. [13-27672-E-7](#) DAVID FLORK
RVD-1 Stephen N. Murphy

EVIDENTIARY HEARING SCHEDULING
CONFERENCE RE: MOTION FOR
RELIEF FROM AUTOMATIC STAY
3-4-15 [[33](#)]

GEORGE MERRILL VS.

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee on March 4, 2015. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

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

<p>Evidentiary Hearing on the Motion For Relief From the Automatic Stay shall be conducted at xxxxxx __.m. on xxxxxxx, 2015.</p>

George Merrill ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 7022 Leisure Town Road, Vacaville, Solano County, California (the "Property"). Movant has provided the Declaration of George Merrill to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The George Merrill Declaration states that Movant has a secured claim against the Property initially evidenced by a Right to Attach Order recorded May 16, 2012 as Document No. 201200046875 in the Official Records of the Solano

Recorder, and subsequently perfected by the recording of an Abstract of Judgment on September 25, 2012 as Document No. 201200096920 of the Official Records of the Solano County Recorder. The Judgment, as entered, is in the amount of \$690,835.92 as of September 19, 2012. From that time until February 28, 2015, interest has accrued at the rate of 10% per annum in the amount of \$168,828.94 for a total owed on the Judgment of \$859,664.86. Debtor has never made a payment towards the Judgment and as of March 1, 2015, the outstanding balance due was \$859,664.86.

OPPOSITION

Opposition has been filed by David Flork ("Debtor") asserting Movant's lien is unenforceable, as it was obtained as a result of a Defective Order.

Debtor claims that Movant incorrectly represented that real property located at 7022 Leisure Town Road, Vacaville, was not exempt from attachment. At the time of the entry of the order, Debtor was entitled to an automatic exemption provided under C.C.P. § 704.730 because the Subject Property was Debtor's principal residence and Debtor is a disabled veteran.

APRIL 23, 2015 HEARING

At the hearing, the court continued the hearing on this Motion to 10:30 a.m. on August 13, 2015, to be heard in conjunction with the Evidentiary Hearing Scheduling Conference on the contested motion to avoid lien (DCN: SNM-1). Dckt. 59.

DECLARATION OF RONALD GARLAND

On July 20, 2015, Ronald Garland filed a declaration. Dckt. 65. Mr. Garland is a licensed appraiser with a Certified General Real Estate Appraiser licence and the principal of Garland and Associates. Mr. Garland states that he was retained to appraise the Property and came to the conclusion that the market value of the Property as of June 4, 2013 was \$340,000.00. Attached to the Declaration is a copy of the appraisal. Dckt. 66.

DEBTOR'S RESPONSE

The Debtor filed a response to the appraisal on July 24, 2015. Dckt. 71. The Debtor states that on page 6 of the Appraisal (listed as page 5 of 19 on the document itself), the Appraisal describes the condition of the structures on the Property as "fair to average." The Debtor argues that the Appraisal does not assign an independent value to the structures nor sets forth the standard to make such determination. The Debtor argues that he is a mentally disabled veteran who performs no maintenance on the Property. The Debtor asserts that the Property is covered with a collection of metal, including inoperable vehicles, the wood is rotting, the floors are covered in filth, and that the cost of repair would be substantial and would lead to a lower value on the Property. The Debtor asserts these things were not considered by Mr. Garland.

The Debtor requests that either the court disallow the admission of the Appraisal or to continue the hearing for an additional 30 days for the Debtor to obtain additional evidence in response to the Appraisal.

DISCUSSION

The court has thoroughly addressed Debtor's contentions objecting to the appraisal in connection with the related Motion to Avoid Lien (DCN:SNM-1) which is being set for evidentiary hearing. Because the determination of this Motion for Relief From the Stay is inextricably tied to the motion to avoid lien, the court will conduct the evidentiary hearing on this Motion in conjunction with the evidentiary hearing on that related motion.

EVIDENTIARY HEARING SCHEDULING

1. The Evidentiary Hearing on the Motion for Relief From the Automatic Stay filed by creditor George Merrill will be held on **xxxxxx, 2015, at XXXXX X.m.** before the Honorable Ronald H. Sargis, in Department E, United States Bankruptcy Court, 501 I Street, Sixth Floor, Courtroom 33, Sacramento, California.

2. Evidence shall be submitted pursuant to Local Rule 9017-1. Original signatures on any Alternate Direct Testimony must be lodged with the court. Attendance of witnesses at the hearing is required (no telephonic appearance).

4. The court requires the original and two copies [copies to include any highlighting, color, fonts, etc. as original] of all exhibits that a party may offer into evidence or use. The documents shall be pre-marked (plaintiff to use numbers and defendant to use letters). In the case of ten or more exhibits, they should be placed in three-ring binders with each exhibit tabbed.

5. On or before *****, 2015**, Debtor shall lodge with the court (Attn: Janet Larson, Clerk's Office, 3rd Floor) and serve direct testimony statements and exhibits [see paragraph 4].

6. On or before *****, 2015**, Creditor shall lodge with the court (Attn: Janet Larson, Clerk's Office, 3rd Floor) and serve direct testimony statements and exhibits [see paragraph 4].

7. ANY DOCUMENTS NOT PROPERLY LODGED, FILED, SERVED, OR COPY DELIVERED TO CHAMBERS AS DESCRIBED IN THIS ORDER MAY RESULT IN EXCLUSION OF CONSIDERATION BY THE COURT.

8. Evidentiary objections to the direct testimony statements and exhibits and any hearing briefs (not to exceed five pages) shall be filed, copy delivered to Chambers (Attn: Janet Larson, Clerk's Office, 3rd Floor), and served on or before *****, 2015**.

9. Opposition to any evidentiary objections shall be filed, copy delivered to Chambers (Attn: Janet Larson, Clerk's Office, 3rd Floor), and served on or before *****, 2015**.

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor, parties requesting special notice, and Office of the United States Trustee on July 24, 2015. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

The Motion for Examination and for Production of Documents is granted
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Rickie Walker ("Debtor-in-Possession") filed the instant Motion for Examination and for Production of Documents on July 24, 2015. Dckt. 57. The Debtor-in-Possession is seeking an order authorizing a Fed. R. Bankr. P. 2004 Examination and Production of Willmington Trust Nation Association, as successor Trustee to Citibank, N.A. as Trustee for Bear Stearns Alt-A Trust 2007-3, Mortgage Pass-Through Certificates, Series 2007-3 ("Creditor")

The Debtor-in-Possession argues that a Rule 2004 examination by admissions, interrogatories, and requests for documents is the best method to reveal any material information in the possession of Creditor, especially in light of the issues raised in the Objection to Proof of Claim No. 10, which the Debtor intends to file.

Fed. R. Bankr. P. 2004 provides, in relevant part:

(a) Examination on motion

On motion of any party in interest, the court may order the examination of any entity.

(b) Scope of examination

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

Attached to the Motion are Exhibits which provides for the definitions used (Exhibit A), the interrogatories (Exhibit B), requests for production (Exhibit C), and the requests for admissions (Exhibit D). While this is improper under Local Bankr. R. 9014-1, the court's review of the requested information, admissions, and interrogatories all fall within the standard realm of a 2004 Examination.

Therefore, in light of the foregoing, the Motion is granted and Debtor-in-Possession is authorized to examine Creditor pursuant to Fed. R. Bankr. P. 2004(a) and (b).

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

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

The Motion for Examination and for Production of Documents filed by Rickie Walker, Debtor-in-Possession, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and Debtor-in-Possession is authorized to examine Willmington Trust Nation

August 13, 2015 at 10:30 a.m.

- Page 51 of 55 -

Association, as successor Trustee to Citibank, N.A. as Trustee for Bear Stearns Alt-A Trust 2007-3, Mortgage Pass-Through Certificates, Series 2007-3, pursuant to Fed. R. Bankr. P. 2004(a) and (b).

IT IS FURTHER ORDERED that pursuant to Fed. R. Bankr. P. 2004(c), attendance for production of documents may be compelled in the manner provided in Fed. R. Bankr. P. 9016 for the attendance of witnesses at a hearing or trial.

10. [14-91197-E-7](#) NICOLAS PEREZ AND MARIA MOTION FOR AUTHORITY TO OPERATE
SSA-4 MOSQUEDA DEPEREZ BUSINESS NUNC PRO TUNC AND/OR
 MOTION TO USE CASH COLLATERAL
 O.S.T.
 8-5-15 [[125](#)]

Tentative Ruling: The Motion for Authority to Operate Business Pending Hearing in this Matter and Request for Nunc Pro Tunc Authority Approving Trustee's Authority to Operate Business Effective June 11, 2015 and Use of Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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

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

Local Rule 9014-1(f)(3) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Chapter 7 Trustee on August 7, 2015. By the court's calculation, 6 days' notice was provided.

The Motion for Authority to Operate Business Pending Hearing in this Matter and Request for Nunc Pro Tunc Authority Approving Trustee's Authority to Operate Business Effective June 11, 2015 and Use of Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----.

<p>The Motion for Authority to Operate Business Pending Hearing in this Matter and Request for Nunc Pro Tunc Authority Approving Trustee's Authority to Operate Business Effective June 11, 2015 and Use of Cash Collateral is granted.</p>

Michael McGranahan, the Chapter 7 Trustee, filed the instant Motion for Authority to Operate Business Pending Hearing in this Matter and Request for Nunc Pro Tunc Authority Approving Trustee's Authority to Operate Business Effective June 11, 2015 and Use of Cash Collateral on August 5, 2015. Dckt. 125. The court issued an order shortening time to 10:30 a.m. on August 13, 2015. Dckt. 129.

The Trustee states that Nicolas Perez and Maria Mosqueda DePerez ("Debtor") own two rental properties:

1. 136 Algen Avenue, Modesto, California
2. 4904 Ebbett Way, Modesto, California

("Properties")

The court granted a Motion for Turnover of the Properties on June 11, 2015. Dckt. 81. The Trustee has determined that the Properties are marketable and beneficial to the estate. The 136 Algen Avenue property currently has a rent paying tenant in residence.

In light of such, the Trustee states he needs an order allowing the Trustee to operate a business for the purpose of administering the Properties, receiving rents, ensuring insurance and maintenance are in place during the administration of this case until the Properties can be sold for the purpose of estate administration and payment of claims.

The Trustee requests that the court issue an order authorizing the Trustee, on an interim basis, authority to operate the business and use cash collateral (rent proceeds) as set forth in the present motion, effective nunc pro tunc to June 11, 2015. The Trustee additionally requests that the court establish a hearing for the further hearing.

11 U.S.C. § 721 allows the court to authorize "the trustee to operate the business of the debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate." "The bankruptcy court can enter an order authorizing a chapter 7 trustee to temporarily operate a debtor's business, but such authorization must be restricted to a limited period of time, and the scope of the authorized operation must be consistent with the orderly liquidation of the estate." In re Century City Doctors Hosp., LLC, No. ADV.LA 09-01101-SB, 2010 WL 6452903, at *9 (B.A.P. 9th Cir. Oct. 29, 2010).

Pursuant to 11 U.S.C. § 363(c), the Trustee is authorized to operate the business of the Debtor, including entering into transactions, "including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing." In order for the Trustee to use, sell, or lease cash collateral under § 363(c)(1), the court may authorize such use after notice and a hearing on a preliminary basis. 11 U.S.C. § 363(c)(2) and (3).

Here, the court finds that it is in the best interest of the estate and consistent with the orderly liquidation of the estate, based on the information based on the representations by the Trustee, for the Trustee to operate the

business of the Debtor. As such, the court finds that, pursuant to 11 U.S.C. § 363(c), the Trustee is authorized to use cash collateral of the business, effective nunc pro tunc to June 11, 2015.

Further, the court continues the hearing for a final hearing on September 3, 2015 at 10:30 a.m.

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

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

The Motion for Authority to Operate Business Pending Hearing in this Matter and Request for Nunc Pro Tunc Authority Approving Trustee's Authority to Operate Business Effective June 11, 2015 and Use of Cash Collateral filed by Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and Michael D. McGranahan, the Chapter 7 Trustee, is authorized to operate the business of the Debtor, pursuant to 11 U.S.C. § 721, effective from and including June 11, 2015.

IT IS FURTHER ORDERED that the Chapter 7 Trustee is authorized to use the cash collateral pursuant to 11 U.S.C. § 363(c)(2) and (3).

IT IS FURTHER ORDERED that the hearing is set for a final hearing at 10:30 a.m. on September 3, 2015.