

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

August 26, 2021 at 10:30 a.m.

1.	<u>21-22787-E-7</u> <u>PSB-1</u>	FREDERICK BRANDT Paul Bains	MOTION TO COMPEL ABANDONMENT 8-4-21 [7]
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Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, creditors, and Office of the United States Trustee on August 3, 2021. By the court's calculation, 23 days' notice was provided. 14 days' notice is required.

The Motion to Compel Abandonment was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, -----

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The Motion to Compel Abandonment is granted.

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

The Motion filed by Frederick Ernest Brandt (“Debtor”) requests the court to order Susan K. Smith (“the Chapter 7 Trustee”) to abandon property identified as:

Cal. Civ. Proc. Code § 703.140 (b)(5) - \$5,000.00	
a. 2,500 SQ Feet of Rubber flooring	
Cal. Civ. Proc. Code § 703.140 (b)(6) - \$20,000.00	
b. Barbells x 20 c. Dumbbells x 100 d. Weight Plates x 100 e. Workout Benches x 7 f. Dual Cable Machine x 1 g. Cable Machine Attachments x 20 h. Single Cable Machine x 1 i. Battle Ropes x 3 j. Push Sled x 1 k. Slam Balls x 10 l. Medicine Balls x 5 m. Swiss Balls x 8 n. Boxing Punching Bag x 12 o. Punching Bag Wall Mounts x 7 p. Boxing Gloves x 20 q. Boxing Focus Mitts x 10 r. Boxing Punching Shields x 5	s. Boxing Hand Wraps x 20 t. Jump Ropes x 15 u. Rower x 2 v. Spin Bike x 1 w. Treadmill x 1 x. Squat Racks x 4 y. Squat Rack Attachments x 20 z. Pullup Bars x 7 aa. Leg Press x 1 bb. Plyometric Boxes x 7 cc. Ab Benches x 2 dd. Leg Curl / Extension Machine x 1 ee. Reverse Hyperextension x 1 ff. Glute Ham Developer x 1 gg. Exercise Fitness Bands x 50 hh. Fitness Truck Tires x 5 ii. Stretching Mats x 4
Cal. Civ. Proc. Code § 703.140 (b)(5) - \$50.00	
jj. Office Desk x 1	kk. Office Chairs x 5

(“Property”). The Property is fully exempted and thus there is zero equity for the benefit of the estate or creditors. The Declaration of Frederick Ernest Brandt has been filed in support of the Motion and values the Property at \$25,050.00.

Trustee does not oppose the relief requested. Trustee’s August 10, 2021 Docket Entry Statement.

The court finds that the debt secured by the Property exceeds the value of the Property and that there are negative financial consequences to the Estate caused by retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate and orders the Chapter 7 Trustee to abandon the property.

CHAMBERS PREPARED ORDER

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

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

The Motion to Compel Abandonment filed by Frederick Ernest Brandt (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is granted, and the Property identified as:

a. 2,500 SQ Feet of Rubber flooring b. Barbells x 20 c. Dumbbells x 100 d. Weight Plates x 100 e. Workout Benches x 7 f. Dual Cable Machine x 1 g. Cable Machine Attachments x 20 h. Single Cable Machine x 1 i. Battle Ropes x 3 j. Push Sled x 1 k. Slam Balls x 10 l. Medicine Balls x 5 m. Swiss Balls x 8 n. Boxing Punching Bag x 12 o. Punching Bag Wall Mounts x 7 p. Boxing Gloves x 20 q. Boxing Focus Mitts x 10 r. Boxing Punching Shields x 5 s. Boxing Hand Wraps x 20	t. Jump Ropes x 15 u. Rower x 2 v. Spin Bike x 1 w. Treadmill x 1 x. Squat Racks x 4 y. Squat Rack Attachments x 20 z. Pullup Bars x 7 aa. Leg Press x 1 bb. Plyometric Boxes x 7 cc. Ab Benches x 2 dd. Leg Curl / Extension Machine x 1 ee. Reverse Hyperextension x 1 ff. Glute Ham Developer x 1 gg. Exercise Fitness Bands x 50 hh. Fitness Truck Tires x 5 ii. Stretching Mats x 4 jj. Office Desk x 1 kk. Office Chairs x 5
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and listed on Schedule A / B by Debtor is abandoned by the Chapter 7 Trustee, Susan K. Smith (“Trustee”) to Frederick Ernest Brandt by this order, with no further act of the Trustee required.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Creditor, creditors, and Office of the United States Trustee on August 11, 2021. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, -----

<p>The Motion to Avoid Judicial Lien is granted.</p>

This Motion requests an order avoiding the judicial lien of Northern California Collection Service, Inc. ("Creditor") against property of the debtors, ERIC MICHAEL NEWMAN and AMBER LEE NEWMAN ("Debtor") commonly known as 11625 Moonrise Court, Nevada City, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of \$18,458.10. Exhibit B, Dckt. 55. An abstract of judgment was recorded with Nevada County on June 14, 2012, that encumbers the Property. *Id.*

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of \$180,000.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total \$375,651.22 as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 1. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of \$1.00 on Amended Schedule C. Dckt. 51.

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

ISSUANCE OF A CHAMBERS PREPARED ORDER

An order substantially in the following form shall be prepared and issued by the court:

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

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

IT IS ORDERED that the judgment lien of Northern California Collection Service, Inc., California Superior Court for Sacramento County Case No. 34201100101821, recorded on June 14, 2012, Document No. 20120015508, with the Nevada County Recorder, against the real property commonly known as 11625 Moonrise Court, Nevada City, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

3. [20-24123](#)-E-11 **RUSSELL LESTER**
[FWP-31](#) **Thomas Willoughby**
3 thru 6

**MOTION FOR COMPENSATION BY
THE LAW OFFICE OF FELDERSTEIN
FITZGERALD WILLOUGHBY
PASCUZZI & RIOS LLP FOR THOMAS
A. WILLOUGHBY, DEBTORS
ATTORNEY(S)
7-29-21 [[743](#)]**

**The Court Posts This as a Tentative Ruling to Afford Applicant
Access to Address any Issues Which May Relate to the Ruling
or Form of the Order Drafted by the Court**

No Appearance of Applicant is Required

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on July 29, 2021. By the court's calculation, 28 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.
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Felderstein Fitzgerald Willoughby Pascuzzi & Rios LLP, the Attorney (“Applicant”) for Russell Wayne Lester, the Debtor in Possession (“Client”), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period August 27, 2020, through July 1, 2021, plus billings after July 1, 2021 incurred in the preparation and filing of this Application, which will be submitted to the Court prior to the hearing. The order of the court approving employment of Applicant was entered on September 10, 2020. Dckt. 102. Applicant requests fees in the amount of \$951,463.00 and costs in the amount of \$29,166.19.

Prepetition, the Debtor in Possession provided Applicant with a retainer in the amount of \$100,000.00. Applicant applied \$25,000.00 from the retainer to the prepetition work Applicant performed, leaving \$75,000.00 of the prepetition retainer on deposit with Applicant. Motion, ¶ 4.

Pursuant to the Plan, the Debtor in Possession must pay the Allowed Administrative Claims in the case as soon as practicable after the Effective Date of the Plan (July 1, 2021). *Id.*, ¶ 6. However, holders of Allowed Administrative Claims may enter into an agreement with the Debtor in Possession to be treated as a Voluntarily Deferred Allowed Administrative Claim. *Id.* Holders of Voluntarily Deferred Allowed Administrative Claims (“Pledge Holders”) are to be paid as a priority distribution from the Conservation Easement Sale as well as from sales of other parcels of real property defined as the “SPE Designated Properties” as provided in Section 4.1 of the Plan. *Id.*, ¶ 7.

Pursuant to the SPE Profits and Distributions Pledge Agreement, Pledgors (the Lester Family Trusts and its beneficiaries) shall cause the SPE to pay and distribute directly to the Pledge Holders, in the order of priority specified in the SPE Profits and Distributions Pledge Agreement, all SPE Profits and Distributions and other Collateral otherwise payable to Pledgors. *Id.*, ¶ 8.

Applicant and the Debtor in Possession have voluntarily agreed to have the remaining balance of the compensation and expenses as authorized to be paid Applicant in excess of the prepetition retainer treated as a Voluntarily Deferred Allowed Administrative Claim as defined in the Plan, to the extent it is allowed by the Bankruptcy Court and give up its right to require immediate payment upon Bankruptcy Court approval of its Administrative Claim. *Id.*, ¶ 9. The agreement to treat Applicant’s claim as a Voluntarily Deferred Allowed Administrative Claim is filed as Exhibit C in support of the Application. Dckt. 746.

Pursuant to the Plan, Applicant and Debtor in Possession’s Financial Advisor have voluntarily agreed to cap their combined professional fees and costs incurred from the date of filing the bankruptcy through the effective date of the Plan at a total amount of \$1,000,000, with Applicant receiving \$700,000.00 and Debtor in Possession’s Financial Advisor to receive \$300,000.00. *Id.*, ¶ 10. Applicant has agreed that to the extent its fees and expenses are allowed by this court, to accept \$700,000.00, plus the balance of its pre-petition retainer in full satisfaction of all of Applicant’s fees and expenses incurred from the petition date through the effective date of the Plan. *Id.*

APPLICABLE LAW

Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the

circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

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

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

recovery?

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

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

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

A review of the application shows that Applicant’s services for the Estate include general case administration, assessing real estate transactions, preparing the Plan and Disclosure Statement, and handling financing and cash collections. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 263.50 hours in this category. Applicant performed the following, but are not limited to: multiple meetings and emails with the Reorganized Debtor and staff regarding case issues; preparing schedules, monthly operating reports, and amended schedules; exemption and retirement account analysis; preparing for, and attending, the initial debtor interview; and preparing for, and attending, the motion to modify scheduling order.

Asset Analysis and Recovery: Applicant spent 11.80 hours in this category. Applicant performed the following, but are not limited to: evaluating the potential claim against First Northern Bank of Dixon (“FNB”) which was done for a short period of time in April when it appeared that discovery was about to commence.

Asset Disposition: Applicant spent 105.80 hours in this category. Applicant performed the following, but are not limited to: multiple telephone calls and emails with the Reorganized Debtor regarding bulk sale status and issues; negotiating and preparing the bulk sale stipulation; reviewing inventory valuation materials; reviewing the budget prepared by BPM LLP regarding cash collateral; communicating with numerous individuals regarding the Conservation Easement; assisting in the retention of the brokers; preparing the motion to sell Gordon Ranch; communicating with title and interested parties regarding the sale of Gordon Ranch; extensive communications with Curtis Stocking, BPM LLP, the Reorganized Debtor, FNB, and Prudential regarding the Gordon Ranch sale; reviewing and analyzing multiple offers for real property; and assisting in the retention of the SPE manager.

Fee/Employment Applications: Applicant spent 123.60 hours in this category. Applicant provided the following, but are not limited to: preparing employment applications for Applicant and BPM LLP; conducting legal research regarding requirements for fee applications; conducting legal research and analysis regarding application to employ real estate broker; preparing employment application for brokers; preparing draft engagement agreement for CPA and application for employment

of Carbahal & Company as CPA; communicating with Wagner Kirkman regarding retention as special counsel; reviewing Wagner Kirkman's employment contract to conform with bankruptcy requirements; preparing the application to employ Wagner Kirkman as special counsel; preparing the employment and compensation application for Judge Newsome; and communicating with interested parties regarding the retention agreement for JAMS.

Avoidance Action Analysis: Applicant spent 12.50 hours in this category. Applicant provided the following, but are not limited to: preparing analyses of avoidance actions and issues regarding value of claims against children of Debtor in Possession; preparing tolling agreement for avoidance actions against George and Cynthia Lester; and preparing the motion for approval of the tolling agreement.

Assumption/Rejection of Leases and Contracts.: Applicant spent 28.30 hours in this category. Applicant provided the following but are not limited to: preparing analysis of the energy services agreement; communicating with the Reorganized Debtor regarding the energy services agreement and PG&E grant programs; reviewing grower contracts; communicating with the Reorganized Debtor regarding the Farm Leases; communicating with Prudential regarding the Farm Leases; prepare the Meeks and B&T leases; and communicating with the Reorganized Debtor regarding the BizCap contract and need to evaluate the same for rejection.

Other Contested Matters: Applicant spent 9.00 hours in this category. Applicant provided the following but not limited to: communicating with interested parties regarding the stipulation for an extension of time for Prudential to object to discharge and communicating with Prudential regarding the same; preparing the John Deere settlement motion; conducting research regarding absolute right to convert issues; reviewing FNB's application for Rule 2004 Examination.

Business Operations: Applicant spent 58.80 hours in this category. Applicant performed the following, including entries related to multiple motions concurrently including the motion regarding utility adequate assurance, motion for continued use of cash management, and motion for turnover of funds held by receiver; communicating with interested parties regarding first day motions; preparing budgets; preparing for, and appearing at, hearings on first day motions; preparing the motion to assume and modify farm lease; and communicating with interested parties regarding lease issues.

Employee Benefits/Pensions: Applicant spent 8.90 hours in this category. Applicant performed the following but are not limited to: preparing an analysis of the simplified budget; preparing the prepetition wage motion; communicating with interested parties regarding drafting of order granting prepetition wage motion; and preparing payroll calculations.

Financing/Cash Collections.: Applicant spent 170.20 hours in this category. Applicant performed the following but are not limited to: communicating with counsel in State Court receivership action; preparing cash collateral motions and replies; communicating extensively with BPM LLP regarding simplified budgets; reviewing simplified budgets and cash collateral reports; preparing for, and appearing at, numerous hearings on cash collateral motions; and negotiating and drafting numerous orders regarding cash collateral motions.

Tax Issues: Applicant spent 16.90 hours in this category. Applicant performed the following, but are not limited to: analyzing the capital gain impact on sales of properties; communicating extensively with the Reorganized Debtor's professionals regarding tax issues.

Real Estate [Plan Supplement Docs and Implementation of Plan]: Applicant spent 159.60 hours in this category. Applicant provided the following, but are not limited to: negotiating and preparing all plan supplement documents and documents required for implementation of the Plan.

Board of Directors Matters: Applicant spent 29.00 hours in this category. Applicant performed the following but are not limited to: negotiating and preparing the common interest agreement between K. Lester, R. Lester and the Reorganized Debtor; communicating extensively with BPM LLP and counsel for K. Lester regarding the common interest agreement; communicating extensively with the Reorganized Debtor and Lester family regarding post-confirmation budget and feasibility of the Plan; reviewing several versions of the Dynamic Model; participating in several meetings with the Reorganized Debtor, Lester family members, and others regarding entity structure and transfer of properties into the SPE entity; and participating in several meetings with the Reorganized Debtor, Lester family members, and others regarding creation and form of the SPE and Lester Family Trust.

Claims Administration and Objections: Applicant spent 27.50 hours in this category. Applicant performed the following but are not limited to: reviewing proofs of claim; communicating extensively with creditors regarding claims; and negotiating creditor claims in this case.

Plan and Disclosure Statement: Applicant spent 473.80 hours in this category. Applicant performed the following but are not limited to: participating in several meetings with the Reorganized Debtor and BPM LLP regarding strategy; engaging in significant and protracted negotiations regarding the plan contents; preparing multiple draft versions of a plan of reorganization; reviewing and assisting in the creation of the plan budget; preparing multiple draft versions of a disclosure statement; preparing motions to modify the briefing schedules; extensive communications with interested parties regarding Plan issues; preparing the amended plan and amended disclosure statement; preparing the Plan Solicitation Package; preparing for, and appearing at, the hearing on approval of the Disclosure Statement and Plan.

Restructurings: Applicant spent 0.00 hours in this category. Applicant performed the following but are not limited to: communicating extensively with interested parties regarding the Reorganized Debtor's lock-up agreement with Prudential; preparing the term sheet and lockup agreement; preparing the motion to approve the settlement with Prudential and reply; and preparing for, and appearing at, the hearing on the motion to approve the settlement with Prudential.

Fact Investigation/Development: Applicant spent 336.30 hours in this category. Applicant provided the following but are not limited to: participating in strategy conferences regarding confirmation issues in the event of anticipated contested plan; preparing plan based settlement proposals to FNB and Prudential; communicating extensively with BPM LLP and the Reorganized Debtor regarding proposals to FNB and Prudential; evaluating trial strategy for contested confirmation issues with Prudential and FNB; and participating in strategy conferences regarding potential cram down issues regarding FNB.

Settlement/Non-Binding ADR: Applicant spent 389.00 hours in this category. Applicant performed the following but are not limited to: communicating extensively with FNB and Prudential regarding settlement; preparing multiple revisions of bullet points to send to Prudential and FNB; communicating extensively with the Reorganized Debtor regarding settlement with FNB and Prudential; communicating with the Reorganized Debtor and BPM LLP regarding mediation considerations; communicating extensively with John Deere regarding settlement; preparing the Reorganized Debtor's

mediation brief; attending the mediation with Judge Newsome.

Pleadings: Applicant spent 13.70 hours in this category. Applicant provided the following services but are not limited to: conducting research regarding PACA producer liens; preparing an adversary complaint against Mid Valley Nut; and preparing an application to expand Applicant's employment.

Regulatory Reviews: Applicant spent 32.60 hours in this category. Applicant performed the following but are not limited to: conducting research and analysis regarding PPP loan eligibility; and preparing the application for authority to apply for PPP loans.

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
Thomas A. Willoughby	1234.20	\$525.00	\$647,955.00
Paul A. Pascuzzi	2.70	\$525.00	\$1,417.50
Jason E. Rios	64.60	\$450.00	\$29,070.00
Holly A. Estioko	157.30	\$350.00	\$55,055.00
Nicholas L. Kohlmeyer	136.00	\$325.00	\$44,200.00
Lauren M. Kawano	471.30	\$325.00	\$153,172.50
Susan R. Darms	104.30	\$95.00	\$9,908.50
Denise Pascuzzi	113.10	\$95.00	<u>\$10,744.50</u>
Total Fees for Period of Application			\$951,523.00

The billing summary and billing documents provided by Applicant show a total of \$10,684.50 for Denise Pascuzzi. Yet, according to the court's calculations, the fees for this professional total \$10,744.50.

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$29,166.19 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Court Filing Fees/CourtCall Appearances		\$1,919.60
Overnight Mailing/Messenger Service/Certificate of Service (off-site copying and mailing service for mail services to creditors in case)		\$19,758.64
Document Retrieval (Pacer)		\$108.80
On-Line Legal Research		\$2,731.30
Other Expenses-Notary Services		\$340.00
Outside Printing		\$2,727.45
Photocopies	(@ \$.10 per page)	\$632.04
Postage		\$948.36
Total Costs Requested in Application		\$29,166.19

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$951,463.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by Debtor in Possession from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

Costs & Expenses

First and Final Costs in the amount of \$29,166.19 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by Debtor in Possession from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

The court authorizes Debtor in Possession to pay 100% of the fees and 100% of the costs allowed by the court.

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

Fees	\$951,463.00
Costs and Expenses	\$29,166.19

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

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

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

The Motion for Allowance of Fees and Expenses filed by Felderstein Fitzgerald Willoughby Pascuzzi & Rios LLP (“Applicant”), Attorney for Russell Wayne Lester, Debtor in Possession / Reorganized Debtor, (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Felderstein Fitzgerald Willoughby Pascuzzi & Rios LLP is allowed the following fees and expenses as a professional of the Estate:

Felderstein Fitzgerald Willoughby Pascuzzi & Rios LLP, Professional employed by Debtor in Possession

Fees in the amount of \$951,463.00

Expenses in the amount of \$29,166.19,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for Debtor in Possession.

IT IS FURTHER ORDERED that total compensation to Applicant is authorized in the amount of \$775,000.00 (plus billings after July 1, 2021, incurred in the preparation and filing of this Application), and calculated as follows: (a) \$75,000.00, which represents the balance of Applicant’s prepetition retainer; (b) \$700,000.00 to be paid by the Debtor in Possession pursuant to the agreed cap on professional fees between BPM LLP (Debtor in Possession’s Financial Advisor) and Applicant; and (c) fees to be paid by the Debtor in Possession incurred by Applicant after July 1, 2021, in the preparation and filing of this Application.

IT IS FURTHER ORDERED that Applicant is authorized to apply the balance its pre-petition retainer in the amount of \$75,000.00 to the total amount of compensation allowed to Applicant.

IT IS FURTHER ORDERED that Applicant and Debtor in Possession’s agreement (filed as Exhibit C, Dckt. 746) to treat the remaining balance of the compensation and expenses as authorized to be paid Applicant in excess of the pre-petition retainer as a Voluntarily Deferred Allowed Administrative Claim as described in the Amended Plan of Reorganization (the “Plan”) is approved.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors holding the twenty (20) largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on July 30, 2021. By the court's calculation, 27 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00).

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

The Motion for Allowance of Professional Fees is granted.

Wagner Kirkman Blaine Klomprens & Youmans LLP, the Special Counsel ("Applicant") for Russell Wayne Lester, Debtor in Possession ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period January 19, 2021, through July 1, 2021. The order of the court approving employment of Applicant was entered on January 25, 2021. Dckt. 362. Applicant requests fees in the amount of \$59,908.00 and costs in the amount of \$75.00.

Applicant was employed as special counsel and by the order of the court granting Debtor in Possession's motion to employ, the court approved a \$20,000.00 retainer to Applicant. *Id.*, ¶ 5. No

amount has been charged against the \$20,000.00 retainer. *Id.*

Pursuant to the Plan, the Debtor in Possession must pay the Allowed Administrative Claims in the case as soon as practicable after the Effective Date of the Plan (July 1, 2021). *Id.*, ¶ 7. However, holders of Allowed Administrative Claims may enter into an agreement with the Debtor in Possession to be treated as a Voluntarily Deferred Allowed Administrative Claim. *Id.* Holders of Voluntarily Deferred Allowed Administrative Claims (“Pledge Holders”) are to be paid as a priority distribution from the Conservation Easement Sale as well as from sales of other parcels of real property defined as the “SPE Designated Properties” as provided in Section 4.1 of the Plan. *Id.*, ¶ 8.

Pursuant to the SPE Profits and Distributions Pledge Agreement, Pledgors (the Lester Family Trusts and its beneficiaries) shall cause the SPE to pay and distribute directly to the Pledge Holders, in the order of priority specified in the SPE Profits and Distributions Pledge Agreement, all SPE Profits and Distributions and other Collateral otherwise payable to Pledgors. *Id.*, ¶ 9.

Applicant and the Debtor in Possession have voluntarily agreed to have Applicant’s Administrative Claim, remaining after application of its retainer, against the Estate treated as a Voluntarily Deferred Allowed Administrative Claim as defined in the Plan, to the extent it is allowed by the Bankruptcy Court, and give up its right to require immediate payment upon Bankruptcy Court approval of its Administrative Claim. **Applicant’s agreement with the Debtor in Possession will be reduced to a written agreement and submitted to the Court prior to the hearing on the Application. *Id.*, ¶ 9.**

APPLICABLE LAW

Reasonable Fees

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

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

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

A review of the application shows that Applicant’s services for the Estate include assisting in creating the required entities under the Plan, providing income tax advice regarding the Plan terms and an ordinary income and capital gain analysis from potential sales, and providing advice on other general business, real estate, and transactional matters. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Conservation Easement: Applicant spent 27.5 hours in this category. Applicant assisted in preparation of several documents such as the conservation easement, subordination agreement, purchase and sale agreement, deed, baseline report, and other necessary documents, and several revisions to the same following collaboration with other counsel involved in this case. There was also a tax analysis performed regarding the easement and its sale.

Transactional Documents and Structure: Applicant spent 71.7 hours in this category. Applicant drafted multiple transactional documents drafted in accordance with the Plan including, but not limited to, the SPE operating agreement, the SPE Profits and Distributions Pledge Agreement, the Lester Family Trust documents, and other related documents.

Tax Analysis: Applicant spent 35.2 hours in this category. Applicant reviewed prior tax returns, current assets, coordinated with the CPA on work papers, and worked with the Reorganized Debtor's financial advisor and general counsel. Applicant also reviewed the current balance sheet and income statement as well as a determination and allocation of basis.

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
Robin Klomparens	115.1	\$475.00	\$54,672.50
Douglas Youmans	4.3	\$485.00	\$2,085.50
Cathy Bennett	15.0	\$210.00	\$3,150.00
	0	\$0.00	<u>\$0.00</u>
Total Fees for Period of Application			\$59,908.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$75.00 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Secretary of State filing of Articles of Organization	\$75.00	\$75.00
		\$0.00
Total Costs Requested in Application		\$75.00

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$59,908.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by Debtor in Possession from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

Costs & Expenses

First and Final Costs in the amount of \$75.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by Debtor in Possession from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

The court authorizes Debtor in Possession to pay 100% of the fees and 100% of the costs allowed by the court.

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

Fees	\$59,908.00
Costs and Expenses	\$75.00

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

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

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

~~The Motion for Allowance of Fees and Expenses filed by Wagner Kirkman Blaine Klomprens & Youmans LLP (“Applicant”), Special Counsel for Russell Wayne Lester, Debtor in Possession, (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that Wagner Kirkman Blaine Klomprens &~~

~~Youmans LLP is allowed the following fees and expenses as a professional of the Estate:~~

~~Wagner Kirkman Blaine Klomparens & Youmans LLP, Professional employed by Debtor in Possession~~

~~Fees in the amount of \$59,908.00~~

~~Expenses in the amount of \$75.00;~~

~~as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for Debtor in Possession.~~

~~**IT IS FURTHER ORDERED** that total compensation to Applicant is authorized in the amount of \$59,983.00, and calculated as follows: (a) \$20,000.00, which represents the balance of Applicant's prepetition retainer; (b) \$39,983.00 to be paid by the Debtor in Possession.~~

~~**IT IS FURTHER ORDERED** that Applicant is authorized to apply the balance its pre-petition retainer in the amount of \$20,000.00 to the total amount of compensation allowed to Applicant.~~

~~**IT IS FURTHER ORDERED** that Applicant and Debtor in Possession's agreement (filed as **XXXXXXXXXX**) to treat the remaining balance of the compensation and expenses as authorized to be paid Applicant in excess of the pre-petition retainer as a Voluntarily Deferred Allowed Administrative Claim as described in the Amended Plan of Reorganization (the "Plan") is approved.~~

Final Ruling: No appearance at the August 26, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on July 29, 2021. By the court’s calculation, 28 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days’ notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days’ notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

BPM LLC, the Financial Advisor (“Applicant”) for Russell Wayne Lester, Debtor in Possession (“Client”), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period August 27, 2020, through July 1, 2021. The order of the court approving employment of Applicant was entered on August 27, 2020. Dckt. 185. Applicant requests fees in the amount of \$357,982.00 and costs in the amount of \$533.24.

Prepetition, the Debtor in Possession provided Applicant with a retainer in the amount of \$100,000.00. Applicant applied \$25,000.00 from the retainer to the prepetition work Applicant performed, leaving \$75,000.00 of the prepetition retainer on deposit with Applicant. Motion, ¶ 4.

Pursuant to the Plan, the Debtor in Possession must pay the Allowed Administrative Claims in the case as soon as practicable after the Effective Date of the Plan (July 1, 2021). *Id.*, ¶ 6. However, holders of Allowed Administrative Claims may enter into an agreement with the Debtor in

Possession to be treated as a Voluntarily Deferred Allowed Administrative Claim. *Id.* Holders of Voluntarily Deferred Allowed Administrative Claims (“Pledge Holders”) are to be paid as a priority distribution from the Conservation Easement Sale as well as from sales of other parcels of real property defined as the “SPE Designated Properties” as provided in Section 4.1 of the Plan. *Id.*, ¶ 7.

Pursuant to the SPE Profits and Distributions Pledge Agreement, Pledgors (the Lester Family Trusts and its beneficiaries) shall cause the SPE to pay and distribute directly to the Pledge Holders, in the order of priority specified in the SPE Profits and Distributions Pledge Agreement, all SPE Profits and Distributions and other Collateral otherwise payable to Pledgors. *Id.*, ¶ 8.

Applicant and the Debtor in Possession have voluntarily agreed to have the remaining balance of the compensation and expenses as authorized to be paid Applicant in excess of the prepetition retainer treated as a Voluntarily Deferred Allowed Administrative Claim as defined in the Plan, to the extent it is allowed by the Bankruptcy Court and give up its right to require immediate payment upon Bankruptcy Court approval of its Administrative Claim. *Id.*, ¶ 9. The agreement to treat Applicant’s claim as a Voluntarily Deferred Allowed Administrative Claim is filed as Exhibit C in support of the Application of Debtor in Possession’s bankruptcy attorneys [FWP-31]. Dckt. 746.

Pursuant to the Plan, Applicant and Debtor in Possession’s bankruptcy attorneys have voluntarily agreed to cap their combined professional fees and costs incurred from the date of filing the bankruptcy through the effective date of the Plan at a total amount of \$1,000,000, with Debtor in Possession’s attorney’s receiving \$700,000.00 and Applicant to receive \$300,000.00. *Id.*, ¶ 10. Applicant has agreed that to the extent its fees and expenses are allowed by this court, to accept \$300,000.00, plus the balance of its pre-petition retainer in full satisfaction of all of Applicant’s fees and expenses incurred from the petition date through the effective date of the Plan. *Id.*

APPLICABLE LAW

Reasonable Fees

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

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

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

A review of the application shows that Applicant’s services for the Estate include preparing operating reports and cash budgeting and budgeting, developing dynamic modeling and sensitivity testing, and attending settlement and confirmation negotiations. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 3.1 hours in this category. Applicant provided Debtor in Possession with financial assistance in support of First Day Motions, bankruptcy petition documents, and employment applications and fee applications.

Monthly Operating Reports: Applicant spent 192.7 hours in this category. Applicant assisted Debtor in Possession with the preparation and filing of monthly operating reports.

Court Hearings: Applicant spent 16.5 hours in this category. Applicant prepared for and attended hearings, either in person or by Court Call.

Mediation/Settlement Sessions: Applicant spent 26.7 hours in this category. Applicant prepared for and attended, either in person or by conference call, mediation session under Judge Newsom, and a secured lender Settlement session under Judge Sargis.

Cash Budgeting and Reporting: Applicant spent 155.3 hours in this category. Applicant assisted Debtor in Possession with preparing and filing Cash Collateral motions, developing and maintaining rolling 13-week cash flow budgets, reporting weekly cash flows and other financial metrics, answering related questions posed by the Debtor in Possession's secured lenders, and reporting weekly and period weekly and period variances against approved interim budgets.

Dynamic Modeling and Sensitivity Testing: Applicant spent 134.4 hours in this category. Applicant developed, populated, and maintained a dynamic 3-year cash flow model showing detailed pro forma projections and cash flows associated with the Debtor in Possession's operations and its proposed financial restructuring, including dynamic inputs to facilitate Plan viability and sensitivity testing under various organizations scenarios and operating assumptions.

Disclosure Statement Development: Applicant spent 40.8 hours in this category. Applicant assisted the Debtor in Possession with developing and filing its Disclosure Statement, including extensive financial comparisons of creditor recoveries under Chapter 11 versus Chapter 7.

Reorganization Plan Development: Applicant spent 71.5 hours in this category. Applicant assisted the Debtor in Possession with developing and refining its Plan of Reorganization, including dynamic cash flow modeling to ensure that the Plan is viable and conforms to its financial commitments and assumptions.

Settlement/Confirmation Negotiations: Applicant spent 106.9 hours in this category. Applicant assisted the Debtor in Possession and its counsel to explain, revise, and negotiate the financial terms of its Plan toward the objective of a court sanctioned Settlement between its contentious secured lenders or an uncontested confirmation of the Debtor in Possession's Plan.

Plan Implementation: Applicant spent 12.9 hours in this category. Applicant assisted the

Debtor in Possession with the selection of a Special Purpose Entity manager, a real estate broker and a Lester Family Trust trustee, the negotiation of a farm lease between Lester and the SPE, and other incidental matters related to Plan implementation.

Preparation and Filing of this Application: Applicant spent 13.0 hours in this category. Applicant prepared and filed the instant motion, including a detailed billing statement reflecting Applicant's time records for fees incurred.

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
Russell Burbank	601.7	\$550.00	\$330,935.00
Mahnoosh Moghadam	159.1	\$170.00	\$27,047.00
	0	\$0.00	<u>\$0.00</u>
Total Fees for Period of Application			\$357,982.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$533.24 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Mileage (cents / mile)	\$Not Provided	\$533.24
		\$0.00
Total Costs Requested in Application		\$533.24

Applicant has failed to provided a breakdown of the mileage or the applicable rate per mile used in providing for a total in costs. Assuming \$0.57 per mile, which was the federal reimbursable rate in 2020, the \$533.24 represents 935 miles. Such expense is not unreasonable in light of the services provided by Applicant. While such simple reporting of the miles for which the reimbursement is requested was not provided, the court will waive it - **for this one application**. If Applicant should "cut the corner" another time, there will be no mileage reimbursement allowed.

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$357,982.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by Debtor in Possession from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

Costs & Expenses

First and Final Costs in the amount of \$533.24 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by Debtor in Possession from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

The court authorizes Debtor in Possession to pay 100% of the fees and 100% of the costs allowed by the court.

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

Fees	\$357,982.00
Costs and Expenses	\$533.24

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

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

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

The Motion for Allowance of Fees and Expenses filed by BPM LLP (“Applicant”), Financial Advisor for Russell Wayne Lester, Debtor in Possession, (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

BPM LLP, Professional employed by Debtor in Possession

Fees in the amount of \$357,982.00
Expenses in the amount of \$533.24,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for Debtor in Possession.

IT IS FURTHER ORDERED that total compensation to Applicant is

authorized in the amount of \$313,890.00 (plus billings after July 1, 2021, incurred in the preparation and filing of this Application), and calculated as follows: (a) \$6,740.00, which represents the balance of Applicant's prepetition retainer; (b) \$300,000.00 to be paid by the Debtor in Possession pursuant to the agreed cap on professional fees between Applicant and Debtor in Possession's bankruptcy attorneys; and (c) \$7,150.00 to be paid by the Debtor in Possession incurred by Applicant after July 1, 2021, in the preparation and filing of this Application.

IT IS FURTHER ORDERED that Applicant is authorized to apply the balance its pre-petition retainer in the amount of \$6,740.00 to the total amount of compensation allowed to Applicant.

IT IS FURTHER ORDERED that Applicant and Debtor in Possession's agreement (filed as Exhibit C, Dckt. 746) to treat the remaining balance of the compensation and expenses as authorized to be paid Applicant in excess of the pre-petition retainer as a Voluntarily Deferred Allowed Administrative Claim as described in the Amended Plan of Reorganization (the "Plan") is approved.

Final Ruling: No appearance at the August 16, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on July 29, 2021. By the court's calculation, 28 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

Jennifer Nitzkowski, a partner at Carbahal & Company, an accountancy corporation, the Accountant ("Applicant") for Russell Wayne Lester, Debtor in Possession ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period August 27, 2020, through July 1, 2021. The order of the court approving employment of Applicant was entered on December 17, 2020. Dckt. 304. Applicant requests fees in the amount of \$6,488.00 and costs in the amount of \$0.00.

APPLICABLE LAW

Reasonable Fees

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

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

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

mandatory.”). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that Applicant’s services for the Estate include preparation and analysis of tax returns. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

The Application cites to this court’s prior employment authorization, setting a “short form” procedure for obtaining final approval of fees of less than \$10,000. Order, Dckt. 304. The services for which employment was authorized were limited in scope. The \$6,488.88 in fees requested are within the limits previously established by the court.

The Declaration of Applicant and Exhibit identify the services provided, though not by an hourly billing statement. Though the detailed information is not provided, the court determines the requested fees as reasonable for those provided in a case of this size and financial detail.

Costs & Expenses

Applicant does not seek allowance and recovery of costs and expenses pursuant to this application.

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$6,488.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by Debtor in Possession from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

The court authorizes Debtor in Possession to pay 100% of the fees and 100% of the costs

allowed by the court.

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

Fees	\$6,488.00
Costs and Expenses	\$0.00

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

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

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

The Motion for Allowance of Fees and Expenses filed by Jennifer Nitzkowski, a partner at Carbahal & Company, an accountancy corporation (“Applicant”), Accountant for Russell Wayne Lester, Debtor in Possession, (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Jennifer Nitzkowski, a partner at Carbahal & Company, an accountancy corporation is allowed the following fees and expenses as a professional of the Estate:

Jennifer Nitzkowski, a partner at Carbahal & Company, an accountancy corporation, Professional employed by Debtor in Possession

Fees in the amount of \$6,488.00
Expenses in the amount of \$0.00,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for Debtor in Possession

IT IS FURTHER ORDERED that Plan Administrator is authorized to pay 100% of the fees and 100% of the costs allowed by this Order, after giving full credit is given for the \$5,592.00 inadvertently paid in advance to Applicant (Order, Dckt. 304) from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

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

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

Sufficient Notice Provided. No Certificate of Service was filed with the court. Thus, the court is unable to determine which parties received notice and whether parties received the number of days required by the local rules.

However, the target creditors, Thomas T. Aoki, M.D. and Aoki Diabetes Research Institute have filed an Opposition (Dckt. 71), demonstrating that service was made by the Subchapter V Debtor/Debtor in Possession.

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

The Motion to Deem Creditor's Debt as Unliquidated, Ambiguous, and Contingent is denied.

Bionica Inc., the Subchapter V Debtor/Debtor in Possession ("Debtor in Possession" or "Debtor/Debtor in Possession"), requests the court deem the debt of Thomas T. Aoki and Aoki Diabetes Research Institute as not liquidated, ambiguous, and thus contingent for purposes of the Subchapter V of the Chapter 11 Bankruptcy Code on the basis that the District Court's calculation of damages was erroneous and Debtor in Possession is not liable for any amounts over \$1,191,225.00; or in the alternative, that the court find that the judgment issued by the District Court is unliquidated and contingent.

Creditors Thomas Aoki and Aoki Diabetes Research Institute ("ADRI") filed an Opposition on August 9, 2021. Dckt. 71.

APPLICABLE LAW

The Bankruptcy Code defines the term “debtor” for purposes of filing for protection under the Subchapter V of the Chapter 11 bankruptcy case as follows:

(1) Debtor.—The term “debtor”—

(A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate) that has **aggregate noncontingent liquidated secured and unsecured debts** as of the date of the filing of the petition or the date of the order for relief **in an amount not more than \$7,500,000** (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor[.]

11 U.S.C. § 1182. Due to the COVID-19 crisis, under the CARES Act, an amendment to section 1182(1) effectively increased the debt limit for eligibility from \$2,725,625 to \$7,500,000.

As to what is a contingent claim, *Collier on Bankruptcy* discusses in the context of when an asserted creditor will qualify as a creditor to commence an involuntary bankruptcy case:

Holders of claims that are contingent as to liability are not proper petitioners. 11 U.S.C. § 303(b)(1). The definition of the term “claim” includes claims that are contingent as to liability. 11 U.S.C. § 101(5)(A). Although the term “contingent” is not defined in the Bankruptcy Code, **a claim that is contingent as to liability is one as to which the debtor’s obligation to pay does not come into being until the happening of some future event, and that event was within the contemplation of the parties at the time their relationship originated.** *Chicago Title Ins. Co. v. Seko Invs., Inc. (In re Seko Invs., Inc.)*, 156 F.3d 1005, 1008, 40 C.B.C.2d 1384 (9th Cir. 1998), cert. denied, 526 U.S. 1066, 119 S. Ct. 1458, 143 L. Ed. 2d 544 (1999); *Subway Equip. Leasing Corp. v. Sims (In re Sims)*, 994 F.2d 210, 29 C.B.C.2d 443 (5th Cir. 1993); *FMB Bancshares, Inc. v. Trapeza CDO XII, Ltd. (In re FMB Bancshares, Inc.)*, 517 B.R. 361, 370 (Bankr. M.D. Ga. 2014) (citing Treatise). See generally ¶ 109.06[2][b] *supra* (discussion of contingent debts in chapter 13 eligibility context). **Thus, when the duty to pay does not rest upon a future event, the claim is not contingent.** *In re All Media Props., Inc.*, 2 C.B.C.2d 449, 5 B.R. 126 (Bankr. S.D. Tex. 1980), *aff’d per curiam*, 646 F.2d 193 (5th Cir. 1981) (“claims are contingent as to liability if the debt is one which the debtor will be called upon to pay only **upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor** to the alleged creditor and if such triggering event or occurrence was one reasonably contemplated by the debtor and creditor at the time the event giving rise to the claim occurred”).

2 *Collier on Bankruptcy* P 303.10 (16th 2021).

For the term “liquidated,” the Bankruptcy Code does not provide a statutory definition.

However, the courts have long established a definition of that term when used in context of the Bankruptcy Code. The Ninth Circuit Court of Appeals last addressed this in 2003, stating in an unpublished decision, citing to an earlier published decision:

The last remaining issue is whether Geary's tax debt was liquidated within the meaning of § 109(e). **A debt is liquidated "if the amount of the debt is readily determinable."** *Slack v. Wilshire Ins. Co. (In re Slack)*, 187 F.3d 1070, 1073 (9th Cir. 1999). The court in *In re Slack* canvassed the holdings of bankruptcy courts in the Ninth Circuit as well as the majority of courts outside this circuit and determined that the prevailing doctrine was that a "debt is liquidated if the amount of the debt is readily ascertainable." *Id.* at 1074.

Geary v. United States (In re Geary), 2003 U.S. App. LEXIS 348 (9th Cir. 2003). In *Slack*, the Circuit Court provides a more detailed explanation, stating;

Under § 109(e), a debtor is ineligible for Chapter 13 relief if his or her noncontingent, liquidated, unsecured debts exceed the statutory limit of \$ 250,000. [**8] See 11 U.S.C. § 109(e) (1997). **This circuit has held that a debt is liquidated for the purposes of calculating eligibility for relief under § 109(e) if the amount of the debt is readily determinable.** In *In re Fostvedt*, we stated that the question of whether a debt is liquidated "turns on whether it is subject to 'ready determination and precision in computation of the amount due.'" 823 F.2d at 306 (quoting *Sylvester v. Dow Jones and Co., Inc. (In re Sylvester)*, 19 B.R. 671, 673 (B.A.P. 9th Cir. 1982)). In *In re Wenberg*, we affirmed for the reasons stated by the bankruptcy appellate panel ("BAP"). See 902 F.2d at 768. The BAP stated in its opinion: "The definition of 'ready determination' turns on the distinction between a simple hearing to determine the amount of a certain debt, and an extensive and contested evidentiary hearing in which substantial evidence may be [*1074] necessary to establish amounts or liability." *In re Wenberg*, 94 B.R. at 634.

Bankruptcy courts in this circuit have held that disputes regarding liability arising out of contract and tort claims do not render a debt unliquidated. See *Nicholes v. Johnny Appleseed of Wash. (In re Nicholes)*, 184 B.R. 82, 90 (B.A.P. 9th Cir. 1995) (debt liquidated because amount easily ascertainable); *Loya v. Rapp (In re Loya)*, 123 B.R. 338, 341 (B.A.P. 9th Cir. 1991) (even though claim of creditors was based on tort and no judgment had been entered, debt liquidated because some of the creditors would admit that claim was barred by statute of limitations and, therefore, the amount was readily ascertainable at \$ 0 after a simple hearing); *In re Sylvester*, 19 B.R. at 673 (**contract claim is easily ascertainable and, therefore, debt is liquidated even though liability is disputed**); *In re King*, 9 B.R. 376, 379 (D. Or. 1981) (**claim for punitive damages not liquidated because amount not easily ascertainable**).

...

We are persuaded that under **this circuit's "readily determinable" standard, if the amount of the creditor's claim at the time of the filing the petition is ascertainable with certainty, a dispute regarding liability will not necessarily render a debt unliquidated.** Whether the debt is subject to "ready determination"

will depend on whether the amount is easily calculable or whether an extensive hearing will be needed to determine the amount of the debt, or the liability of the debtor. *See In re Wenberg*, 94 B.R. at 634. Therefore, the mere assertion by the debtor that he is not liable for the claim will not render the debt unliquidated for the purposes of calculating eligibility under § 109(e).

According to Black's Law Dictionary, a liquidated debt is one in which "it is certain what is due and how much is due." Black's Law Dictionary 930 (6th ed. 1990). "Therefore, the concept of a liquidated debt relates to the amount of liability, not the existence of liability." *Verdunn*, 89 F.3d at 802. **Even if a debtor disputes the existence of liability, if the amount of the debt is calculable with certainty, then it is liquidated for the purposes** of § 109(e). *See In re Mazzeo*, 131 F.3d at 304; *Verdunn*, 89 F.3d at 802; *In re Knight*, 55 F.3d at 235.

Slack v. Wilshire Ins. Co. (In re Slack), 187 F.3d 1070, 1073-1075 (9th Cir. 1999).

DISCUSSION

Here, the court is presented with Findings of Fact and Conclusions of Law issued by District Court Judge Troy Nunley of the Eastern District of California in which the District Court Judge awarded creditors Dr. Joseph Aioki and ADRI \$9,277,725.00 in damages jointly and severally against several defendants including Mr. Gregory Gilbert and his two companies Bionica, Inc. and Trina Health, LLC. Findings of Fact and Conclusions of Law, Dckt. 64.

Debtor in Possession contends that the judgment awarded to creditors should be deemed unliquidated and contingent because the District Court's decision is erroneous as no evidence was presented to prove the calculations on which the decision is based. Debtor in Possession alleges that the judgment is either on the process to be appealed or that the appeal has been filed. The court is uncertain. However, in the Opposition, Creditor asserts that the appeal has been dismissed after Debtor in Possession failed to file an opening brief. Opposition, at 3:9-11.

Notwithstanding whether the appeal has been dismissed, the basis of this request is that Debtor in Possession disputes the damages awarded and the basis of calculation, and the judgment is not final. Debtor in Possession's reasoning is erroneous. A party disputing an amount of debt does not mean that it is not unliquidated or contingent.

As addressed above and is as well established in the Ninth Circuit as stated in *In re Fostvedt*:

the rule is clear that a contingent debt is "one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor." *Brockenbrough v. Commissioner*, 61 Bankr. 685, 686 (W.D. Va. 1986), quoting *In re All Media Properties, Inc.*, 5 Bankr. 126, 133 (Bankr. S.D. Tex. 1980), *affd. per curiam*, 646 F.2d 193 (5th [*307] Cir. 1981).

In re Fostvedt, 823 F.2d 305, 306-07 (9th Cir. 1987). While Debtor/Debtor in Possession argues that

the debt is contingent because it is disputed, there is no future event that must occur in order for Debtor in Possession to be liable for such a debt.

The District Court Decision has been issued and Debtor in Possession has been found liable by the District Court after a 19-day bench trial. The debt is not ambiguous as the Findings of Fact and Conclusions of Law specifically state that Debtor in Possession was found liable for violations pursuant to § 43(a) of the Lanham Act, patent infringement, and copyright infringement. Findings of Fact and Conclusions of Law, at 26-37.

Judge Nunley's Decision determining that the Debtor was liable to Creditors in the amount of \$9,277,725 was issued on November 17, 2020. Findings and Conclusions, Exhibit [unnumbered]; Dckt. 65.

Whether a debt is liquidated turns on whether it is subject to ready determination and precision in computation of the amount due. *In re Fostvedt*, 823 F.2d 305, 306 (9th Cir. 1987). In this case, the debt is liquidated because the amount of the debt is easily determined. Judge Nunley's judgment specifically states that the award in damages is in the amount of \$9,277,725. The decision also provides the breakdown as to how the District Court arrived at this amount. *Id.*, at 42-51. (The court references this in light of the District Court Decision running 65 pages in detailed length, not that this Bankruptcy Court is reviewing/overruling the Decision of the District Court judge.)

Moreover, the bankruptcy court is not the proper forum for "overruling" an Eastern District of California District Court judgment. Such review and overruling, if proper, is done through an appeal to the Ninth Circuit Court of Appeals. Debtor in Possession having failed to take the necessary steps for its appeal, Debtor in Possession has to live with the judgment. Thus, this court cannot limit Creditor's claim to the amount requested by Debtor in Possession in the alternative.

As provided by 11 U.S.C. § 1182 of the bankruptcy code, a Debtor in Possession under Subchapter V cannot exceed \$7,500,000 in aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief.

Congress sets debt limits for cases that are provided special treatment, such as Chapter 12 farmer/fisher person, Chapter 13 wage earner, and Chapter 11 Subchapter V cases as a rough method of having the cases be "simple enough" for the more streamlined special treatment provided. If the debt limits are exceeded, the debtor is not without relief, but must do so through a regular Chapter 11 case.

Thus, at present, the debt owed to creditor is neither contingent nor unliquidated. Debtor did not file bankruptcy until May 11, 2021, five months after Judge Nunley determined the amount of the damages (saving this court from having to address whether such could be readily determined). The District Court's determination of the damages to Creditors being \$9,277,725, in addition to the \$2,784,079.15 in other claims having been filed to date, the temporary debt limit increased by Congress for a Subchapter V to no more than \$7,500,000 is exceeded. Debtor in Possession is over the limit and thus no longer eligible for bankruptcy protection pursuant to Subchapter V of Chapter 11 of the bankruptcy code.

The Motion is denied.

The court shall issue an order in 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 Deem Creditor's Debt as Unliquidated, Ambiguous, and Contingent filed by Bionica Inc. ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied, the court determining that the \$9,277,725 claim asserted by Thomas T. Aoki, M.D. and Aoki Diabetes Research Institute is neither contingent nor unliquidated.

FINAL RULINGS

8. [21-22709-E-7](#) **JACQUELINE TORRES** **ORDER TO SHOW CAUSE - FAILURE**
August Bullock **TO PAY FEES**
8-6-21 [13]

Final Ruling: No appearance at the August 26, 2021 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 7 Trustee as stated on the Certificate of Service on August 8, 2021. The court computes that 18 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: \$338.00 due on July 27, 2021.

The Order to Show Cause is discharged, and the bankruptcy case shall proceed in this court.

The court's docket reflects that the default in payment that is the subsection of the Order to Show Cause has been cured.

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 Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Order to Show Cause is discharged, no sanctions ordered, and the bankruptcy case shall proceed in this court.