

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

August 28, 2014 at 10:30 a.m.

1. 12-34203-E-7 WATSON VENTURES, LLC MOTION TO SELL
HCS-2 Pro Se 7-24-14 [[95](#)]

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 (*pro se*), Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on July 24, 2014. By the court's calculation, 35 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 denied without prejudice.

The Bankruptcy Code permits the Trustee, Alan S. Fukushima, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363. Here, Movant proposes to sell the "Property" described as follows:

- a. La Noria - Lot #109, Mexico
- b. La Noria - Lot #110, Mexico

- c. Timeshare in Cabo
- d. Timeshare in Cancun
- e. Timeshare in Maui

The proposed purchaser of the Property is Greg Watson and the terms of the sale are Mr. Watson will purchase the Property for \$35,000.00, conditional on the court's approval of the sale. Mr. Watson, under the Agreement, will pay any and all costs or fees that may be incurred in connection with the sale of the Property and assume responsibility for all taxes or assessments on the Property, including delinquent or defaulted amounts and penalties. The purchase of the Property will be on an "as is" basis.

REVIEW OF MOTION

In reviewing the Motion, it appears that Trustee's Counsel has been delegated the responsibility of investigating the value of the property to be sold. From a review of the Motion, the grounds stated with particularity (Fed. R. Bankr. P. 9013) for each property to be sold are as follows.

La Noria - Lot #109, Mexico

- A. Broker estimates value.....\$100,000
- B. A large hotel is planned to be built next door, which would block the ocean view. This statement is corroborated by the proposed purchaser, the principal of the Debtor.
 - 1. However, the Motion states that the current value, apparently with the known pending construction of the hotel next door is \$100,000. No allegation is made that the present value of the property is less than \$100,000. The Motion affirmatively states that the hotel is currently being built.

La Noria - Lot #110, Mexico

- A. Broker estimates value.....\$ 75,000
- B. A large hotel is planned to be built next door, which would block the ocean view. This statement is corroborated by the proposed purchaser, the principal of the Debtor.
 - 1. However, the Motion states that the current value, apparently with the known pending construction of the hotel next door is \$75,000. No allegation is made that the present value of the property is less than \$75,000. The Motion affirmatively states that the hotel is currently being built.

Homeowners Fees on the Mexico Properties

- A. The Motion states that Counsel has confirmed with the proposed buyer (principal of the Debtor) that there are \$36,601 in fees due for Lot 9 and \$30,664 for Lot #10.
- B. It is further asserted that the amount have been confirmed in an email from the homeowners' association. However, no communications have been with the Trustee or Trustee's representatives, but through the buyer.

Commissions, Taxes, and Projected Net Proceeding From Sale of Mexico Properties

The Trustee has also obtained from the proposed buyer representations that there is \$2,550 due on property taxes, and 14% for costs of sale and taxes.

A rough computation of the economics of the transaction are as follows:

Gross Sales Price.....	\$175,000
Homeowners' Assoc. Fees.....	(\$ 67,265)
Property Taxes.....	(\$ 2,550)
Costs of Sale and Taxes (14%).....	<u>(\$ 24,500)</u>

Projected Net Proceeds.....\$ 80,685

Sale of Timeshare Properties

- A. The Motion identifies the following timeshare interests to be sold by the Trustee
 - 1. Cabo Timeshare (Value).....\$2,500
 - 2. Cancun Timeshare (Value).....\$2,500
 - 3. Maui Timeshare (Value).....\$2,500
- B. The Motion only states the values for the Timeshares as listed on Schedule B. The Motion makes no statement of any investigation done by the Trustee to ascertain the value of these assets of the Estate.
- C. The Trustee proposes to sell the Mexico Properties, which are alleged to have a net value of \$80,685.00 and the Timeshares, which are alleged to have a value of \$7,500 (based solely on the Schedules) for \$35,000.00 to Greg Watson, the principal of the Debtor. No basis is alleged for selling what is stated to be property with a value of \$89,185.00 to the principal of the Debtor for \$35,000 (a 55% discount).

Other than stating that through the Trustee's attorney, what efforts, if any, the Trustee has made to market the Mexico Properties and the Timeshares to expose them to potential willing, competitive buyers. The court notes from Exhibit A, it appears that the Trustee is using Greg Watson, the principal of

the Debtor and proposed buyer, to communicate with the real estate agent in Mexico for an opinion as to the fair market value of the two Mexico Properties. Exhibit A, Dckt. 100 at 2.

The Trustee presents the Motion supported by three declaration. The first is by Greg Watson, principal of the Debtor and proposed buyer. He authenticates the email communication and that property taxes have not been paid by him or the Debtor since 2012.

The second Declaration is by the Trustee. Dckt. 98. He states his conclusion that it is not in the best interests of the estate to market and try to sell the properties. Notwithstanding the real estate agent confirming the \$175,000.00 value in light of the existing construction of the hotel which will block the ocean view, the Trustee states the value will be further diminished by construction of the hotel. No explanation is given for this conclusion.

The Trustee states that Greg Watson, through his counsel, offered to purchase the Mexico Properties and the Timeshares for \$20,000.00. Eventually the price was increased to the proposed \$35,000.00.

What is glaring in its absence in the Declaration is any effort by the Trustee to actually market the property. Rather than exposing the Mexico properties to the market (using local and international real estate brokers and listing services), it appears that the Trustee has relied upon the offices of Greg Watson, the principal of the Debtor and proposed buyer, and Mr. Watson's counsel in determining that \$35,000.00 is a "fair market value" for the Properties and Timeshares.

Further, the Trustee provides no testimony of what he did to determine the fair market value of the Timeshares and how such should be marketed.

The final declaration is that of Loris Bakken, attorney for the Trustee. Dckt. 99. Her testimony is that at the direction of the Trustee she contacted a real estate broker to obtain a preliminary analysis regarding the value of the Mexico Property. (Ms. Bakken does not explain why she, the lawyer, was doing the Trustee's job of investigating the value of real property.) She testifies that the real estate broker, with knowledge of the hotel to be built, stated that the Mexico Properties are worth \$100,000 and \$75,000. Then, to determine the Homeowners' Association dues and other fees relating to the Mexico Properties, she requested that Greg Watson, principal of the Debtor and proposed purchaser, provide her with that information. Counsel provides no testimony as to anything being done to determine the value of the three Timeshares.

For this Motion, the Movant has not established that the estate would receive the fair market value from the proposed sale of the Mexico Properties and the Timeshares. At best, the Motion and supporting evidence is that the Trustee can recover an easy \$35,000.00 for minimal work done by counsel for the Trustee. (This conduct smacks of having the attorney do the work, and bill for it, and then the Trustee double dipping by claiming a commission on the sales proceeds.) The court is not convinced that the Trustee telling his attorney to get a preliminary analysis and then counsel and the Trustee relying on the buyer to obtain critical information as to the value of the assets to be sold

demonstrates a good faith, bona fide determination as a basis for approving the proposed sale to the principal of the Debtor.

The Motion is denied without prejudice.

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

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

The Motion to Sell Property filed by Alan S. Fukushima, 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 denied without prejudice.

2.	<u>11-26812-E-7</u> TJW-4	PHILIP/CYNTHIA SCANNELL Timothy J. Walsh	MOTION TO COMPEL ABANDONMENT 8-14-14 [87]
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Tentative Ruling: The Motion to Abandon Property 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 Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on August 12, 2014. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

The Motion to Abandon Property 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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The Motion to Abandon Property is granted.

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

The Motion filed by Phillip Scannell and Cynthia Scannell ("Debtor") requests the court to order the Trustee to abandon property commonly known as 1895 Regency Parkway, Dixon, California (the "Property"). This Property is encumbered by the liens of Wells Fargo Bank, N.A., securing claims of \$375,439.19 and \$36,499.72, respectively. The Declaration of Phillip Scannell and Cynthia Scannell has been filed in support of the motion and values the Property to be \$320,000.00.

Chapter 7 Trustee filed a non-opposition to the Debtor's Motion to Compel on August 14, 2014.

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

Chambers Prepared Order

The court shall issue an Order (not a minute order) substantially in the following form holding that:

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

The Motion to Abandon Property filed by Phillip Scannell and Cynthia Scannell ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

1. 1895 Regency Parkway, Dixon, California

and listed on Schedule A by Debtor is abandoned to Phillip Scannell and Cynthia Scannell by this order, with no further act of the Trustee required.

3. [10-40522-E-7](#) JAMES/TERRI EIFFERT
DNL-6 Frank J. Ferris

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF DESMOND, NOLAN,
LIVIAICH AND CUNNINGHAM FOR J.
LUKE HENDRIX, TRUSTEE'S
ATTORNEY(S)
7-31-14 [[126](#)]

Final Ruling: No appearance at the August 28, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on July 31, 2014. 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.
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FEES REQUESTED

Susan Didriksen, the Chapter 7 Trustee ("Client"), on behalf of Desmond, Nolan, Livaich & Cunningham, Attorney for the Client ("Applicant"), 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 September 24, 2010 through July 30, 2014. The order of the court approving employment of Applicant was entered on October 15, 2010, Dckt. 55.

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

Settlement of State Court Judgment: Applicant spent 21.3 hours in this category. Applicant assisted Client with: (1) communicating with the Client, Fuller, and counsel for the Tarantos regarding the estate's interest in the State Court Judgment and potential resolutions of the same that could be

approved by the Bankruptcy Court; (2) negotiating and preparing form of settlement agreement with the Tarantos; and (3) preparing motion to approve the settlement (DNL-4), appearing at the hearing on the motion, and obtaining approval of the motion.

Advising the Trustee Regarding the Tarantos' Bankruptcy Filings
Applicant spent 65.90 hours in this category. Applicant assisted Client with: (1) reviewing the Tarantos' two bankruptcy filings and advising the Trustee regarding the potential impact on the estate's interest in the State Court Judgment; (2) reviewing the Tarantos' Chapter 11 plan in their first filing and successfully objecting to the same; (3) assessing basis for potential dismissal motion in response to second filing; (4) assessing potential 523 action against the Tarantos in response to second filing to except from the Tarantos' discharge the estate's claims under the State Court Judgment; (5) preparing and filing motion for default judgment against the Tarantos on the 523 action and obtaining judgment excepting from the Tarantos' discharge the estate's claims under the State Court Judgment; (6) advising the Trustee regarding the conversion of the Tarantos' second bankruptcy case from Chapter 7 to Chapter 11 after the Discharge Judgment; (7) researching the Tarantos' possible treatment of the Trustee's claims through a Chapter 11 plan and advising the Trustee regarding the same; and (8) advising the Trustee and Fuller regarding judgment collection options, including garnishment, in response to the Tarantos' bankruptcy filings, the automatic stay, and the Trustee's ultimate Discharge Judgment.

Employment/Fee Applications: Applicant spent 13.5 hours in this category. Applicant assisted Client with: (1) preparing application to employ Fuller, appearing at hearing on the application, and obtaining approval of the same; (2) preparing application to approve Fuller's compensation and obtaining approval of the same; and (3) preparing the instant fee application.

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

- (I) unnecessary duplication of services; or
- (ii) services that were not--
 - (I) reasonably likely to benefit the debtor's estate;
 - (II) necessary to the administration of the case.

11 U.S.C. § 330(a) (4) (A) .

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged 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 reviewing the filings of the Debtor, assisting in settlement on the state court judgment, and reviewing the benefits and consequences of the conversion from a Chapter 11 to Chapter 7 case.

The Client and Applicant have not provided information on the amount of unencumbered monies in the estate. FN. 1. However, the Client and Applicant do provide the figures that the estate has been able to recover arising under the settled claim from the state court judgment. After calculation done by the court, the estate appears to have, at a minimum, \$44,499.90 from garnishment of Mr. Taranto's income and \$70,000.00 from the eventual settlement of the judgment against Mr. Taranto, totaling \$114,499.90. Dckt. 126. After deducting Mr. Fuller's attorney's fees that arose from the state court litigation in the amount of \$45,799.96, the court approximates that the estate has a remaining \$68,699.44, sufficient for the compensation sought in the instant motion.

FN.1. The court notes to Client and Applicant that any motion for compensation should state the amount of unencumbered monies in the estate so that the court can properly determine if there is sufficient funds in the estate to cover the amount of compensation sought and to ensure that the compensation would not lead to an unjustifiable depletion of the estate. A slight about of "bragging" is appropriate for professionals of the estate and to make it clear, in the transparent world of bankruptcy, how the fees relate to tangible benefit to the estate.

The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES ALLOWED

The fees request are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
J. Russell Cunningham, Esq.; admitted to the California State Bar in 1987	.3	\$400.00	\$120.00
J. Russell Cunningham, Esq.; admitted to the California State Bar in 1987	1.4	\$375.00	\$525.00
J. Russell Cunningham, Esq.; admitted to the California State Bar in 1987	9.7	\$350.00	\$3,395.00
J. Luke Hendrix, Esq.; admitted to the California State Bar in 2010	34.8	\$275.00	\$9,570.00

J. Luke Hendrix, Esq.; admitted to the California State Bar in 2010	6.5	\$225.00	\$1,462.50
J. Luke Hendrix, Esq.; admitted to the California State Bar in 2010	4.6	\$195.00	\$897.00
J. Luke Hendrix, Esq.; admitted to the California State Bar in 2010	2.0	\$150.00	\$300.00
Gabriel P. Herrera, Esq.; admitted to the California State Bar in 2012	41.4	\$175.00	<u>\$7,245.00</u>
Total Fees For Period of Application			\$23,514.50

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 \$23,514.50 pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$86.66 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Photocopies	\$0.05 per page	\$20.95
Postage		\$62.71
Fax		\$3.00
Total Costs Requested in Application		\$86.66

The First and Final Costs in the amount of \$86.66 subject to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

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

Fees	\$23,514.50
Costs and Expenses	\$86.66

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

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

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

The Motion for Allowance of Fees and Expenses filed by Susan Didriksen, the Chapter 7 Trustee ("Client"), on behalf of Desmond, Nolan, Livaich & Cunningham, Attorney for the Client ("Applicant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

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

Fees in the amount of \$23,514.50
Expenses in the amount of \$86.66,

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

4. [14-23471-E-11](#) ERROL/SUZANNE BURR
DNL-1 Iain A. MacDonald

MOTION TO EMPLOY J. RUSSELL

7-24-14 [[126](#)]

Final Ruling: No appearance at the August 28, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, parties requesting special notice, and Office of the United States Trustee on July 24, 2014. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion to Employ is granted.

Chapter 11 Trustee, Susan Smith, seeks to employ counsel Desmond, Nolan, Livaich & Cunningham, pursuant to Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of counsel to assist the Trustee in advising and representing the Trustee with respect to bankruptcy matters and proceedings and assisting the Trustee in the investigation of the Debtors' assets and with the preparation of and confirmation of a plan of reorganization.

The Trustee argues that counsel's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate regarding general

Russell Cunningham, an associate of Nolan, Livaich & Cunningham, testifies that he and his firm are representing the Chapter 11 Trustee as general counsel for matter arising out of the Chapter 11 Trustee's role in the Debtor's bankruptcy. Mr. Cunningham testifies he, his firm, or proposed joint special counsel do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

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

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

Taking into account all of the relevant factors in connection with the employment and compensation of counsel, considering the declaration demonstrating that counsel does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Nolan, Livaich & Cunningham as counsel for the Chapter 11 estate on the terms and conditions set forth in the Hourly Fee Agreement for Legal Services filed as Exhibit A, Dckt. 129. The approval of the contingency fee is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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

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

The Motion to Employ filed by the Chapter 11 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Employ is granted and the Chapter 11 Trustee is authorized to employ Nolan, Livaich & Cunningham as counsel for the Chapter 11 Trustee on the terms and conditions as set forth in the Hourly Fee Agreement for Legal Services filed as Exhibit A, Dckt. 129.

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

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

IT IS FURTHER ORDERED that except as otherwise ordered

by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

5. 14-23471-E-11 **ERROL/SUZANNE BURR**
DNL-2 **Iain A. MacDonald**

MOTION TO EMPLOY GONZALES AND
SISTO, LLP AS ACCOUNTANT(S)
8-14-14 [[135](#)]

Tentative Ruling: The Motion to Employ 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, parties requesting special notice, and Office of the United States Trustee on August 14, 2014. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Employ 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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The Motion to Employ is granted.

Chapter 11 Trustee, Susan Smith, seeks to employ accountants Gonzales & Sisto, LLP, pursuant to Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of counsel to assist the Trustee in performing tax-related accounting, income tax preparation in compliance with state and federal authorities, and preparation of monthly operating reports.

The Trustee argues that accountants' appointment and retention is necessary to continue to assist the Trustee in performing tax-related and monthly operating report preparation services.

Gene Gonzales, a certified public accountant of Gonzales & Sisto, LLP, testifies that he and his firm are employed on an hourly fee agreement. Mr. Gonzales testifies he and his firm do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

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

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

Taking into account all of the relevant factors in connection with the employment and compensation of counsel, considering the declaration demonstrating that counsel does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Gonzales & Sisto, LLP as accountants for the Chapter 11 estate on the terms and conditions set forth in the Engagement Agreement for Accounting Services filed as Exhibit A, Dckt. 138. The approval of the contingency fee is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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

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

The Motion to Employ filed by the Chapter 11 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Employ is granted and the Chapter 11 Trustee is authorized to employ Gonzales & Sisto, LLP as accountants for the Chapter 11 Trustee on the terms and conditions as set forth in the Contingency Fee Employment Agreement filed as Exhibit A, Dckt. 138.

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

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by Gonzales & Sisto, LLP in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

6. 10-23577-E-11 GLORIA FREEMAN
WFH-45 Reno F.R. Fernandez

MOTION TO COMPROMISE
CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH GLORIA FREEMAN
AND LAURENCE FREEMAN
8-7-14 [1466]

Tentative Ruling: The Motion for Approval of Compromise 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 whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on August 7, 2014. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(3), 21 day notice.)

The Motion for Approval of Compromise 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 defaults of the non-responding parties in interest are entered.

The Motion For Approval of Compromise is granted.
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David Flemmer, the Plan Administrator ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Gloria Freeman ("Debtor") and Laurence Freeman. The claims and disputes to be resolved by the proposed settlement are issues raised in Adversary Proceeding No. 12-02027 between Movant, Debtor, and Mr. Freeman, which seeks declaratory relief over a tax refund issued to Debtor and Mr. Freeman in 2012, and the related

third party complaint. The proposed settlement also seeks to resolve issues not directly implicated by Adversary Proceeding No. 12-02027 and two pending appeals.

Movant, Mr. Freeman, and Debtor has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement is set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 1470):

- A. Mr. Freeman will transfer his interest in the proceeds of the 2012 tax refund, in the amount of \$124,736.83 to the Liquidating Trust.
- B. Mr. Freeman will authorize the Plan Administrator to transfer the 2012 tax refund amount from the blocked account to the Liquidating Trust's general bank account, totaling \$151,165.40.
- C. Mr. Freeman will retain his right to expected tax refunds relating to 2010-2012 tax returns (approximately \$64,900.00) and any refunds from 2013.
- D. Mr. Freeman assigns to the Plan Administrator any other tax refunds for periods prior to January 1, 2014.
- E. Debtor will pay the Liquidating Trust the sum of \$26,428.57, which represents the one-half of the 2011 tax refund received by the Debtor.
- F. Debtor will transfer all rights to any bank accounts in her name, except specific bank accounts set forth in the agreement.
- G. Liquidating Agent will transfer to Debtor any disability or workers compensation benefits received or expected from the sources identified in the agreement.
- H. Debtor is entitled to retain the benefits she has received from these sources today, which total at least \$122,873.00.
- I. Debtor will receive the rights to an action commenced in the Superior Court, County of Sacramento, against Cardinal Health and others (Case No. 34-2013-00154710-CU-WT-GDS).
- J. Plan Administrator, Debtor, and Mr. Freeman will grant each other a general release with a waiver of their rights under Civil Code SECTION 1542.
- K. Plan Administrator, Debtor, and Mr. Freeman will stipulate to the dismissal of the Adversary Proceeding No. 12-02027.
- L. Debtor will cause appeals known as BAP No. 13-1593 and 13-1594 to be dismissed, which are appeals by Debtor to orders granting final allowance of fees and costs to Flemmer Associates, L.P. and Wilke, Fleury, Hoffelt, Gould & Birney, LLP.

DISCUSSION

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

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

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Probability of Success

Movant argues that the settlement amount is reasonable in light of the likelihood of success on the merits because he obtains the recovery of the entire 2012 tax refund. The Movant does note that his rights to the 2012 tax refund are more attenuated than his rights to other tax refunds but, because the tax attributes of the bankruptcy estate may have been used to generate the refunds, the Movant believes the tax refunds are part of the estate. Additionally, because it appears that Debtor and Mr. Freeman have abandoned their marital separation, the Movant argues that the reconciliation destroyed any separate property character that the refund may have once had. Lastly, as to the refunds relating to the 2010 tax year totaling \$24,514.00, Movant argues that because the underlying taxes were paid in 2011 from revenues generated by Ulrich, Nash & Gump and that Ulrich, Nash & Gump was community property, the tax refund constitutes community property and belongs to the Liquidating Trust.

Difficulties in Collection

Movant states that he is not aware of any impediments to collection from Mr. Freeman.

Expense, Inconvenience and Delay of Continued Litigation

Movant argues that the Adversary Proceeding No. 12-02027 is the largest dispute left in the instant bankruptcy case. The other disputes are concerning the disgorgement by W. Austin Cooper which is set for evidentiary hearing and a dispute over an administrative claim of the Internal Revenue Service. Because two other disputes remain in addition to the Adversary Proceeding No. 12-02027, litigation over the tax refunds would cause delay in an interim or final distribution for up to one year. Furthermore, Movant argues that litigation in

Adversary Proceeding No. 12-02027 would cause unnecessary expenses and delay in closing the instant bankruptcy case.

Paramount Interest of Creditors

Movant argues that the largest creditors support the settlement. No party, creditor or otherwise, have filed any opposition to the settlement.

Competency of Laurence Freeman

Whether Laurence Freeman has sufficient legal competency to participate in these bankruptcy proceedings has been the subject of significant contention. Gloria Freeman (Debtor) and her former attorney, W. Austin Cooper, represented to this court and in pleadings subject to Federal Rule of Bankruptcy Procedure 9011, that Laurence Freeman was not legally competent. After Laurence Freeman achieved a settlement with the Chapter 11 Trustee that his property was his separate property and not subject to the community property claims of the Debtor, Laurence Freeman, acting under the direction of the Debtor and W. Austin Cooper sought to set that settlement aside. As part of that, both Laurence Freeman and the Debtor signed pleadings and declarations stating that Laurence Freeman was not legally competent.

The court notified Placer County Adult Protective Services and an evidentiary hearing was conducted on the issue of Laurence Freeman's legal competency. After that hearing the court determined that Laurence Freeman, with the assistance of independent legal counsel and accountants (each owning him an independent fiduciary duty), was sufficiently competent and an appointment of a personal representative pursuant to Federal Rule of Civil Procedure 25 and Federal Rule of Bankruptcy Procedure 7025 and 9014 was not warranted at that time.

However, the court conditioned that determination by requiring that Laurence Freeman personally testify at any hearing on a motion to approve a compromise to demonstrate his knowledge of the settlement, the rights he was compromising, and the benefit he was obtaining. At the hearing -----
-----.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate. The motion is granted.

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 Approve Compromise filed by David Flemmer the Plan Administrator, ("Movant") 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 Approve Compromise between Movant, Gloria Freeman ("Debtor") and Laurence Freeman

is granted and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed as Exhibit A in support of the Motion (Docket Number 1469).