

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

August 31, 2017, at 10:30 a.m.

1. <u>16-23600-E-7</u> TODD SHAW ASF-2 Cindy Lee	MOTION FOR COMPENSATION FOR GABRIELSON & COMPANY, ACCOUNTANT(S) 7-25-17 [<u>111</u>]
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Final Ruling: No appearance at the August 31, 2017 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, Debtor’s Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 25, 2017. By the court’s calculation, 37 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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Gabrielson & Company, the Accountant (“Applicant”) for Alan Fukushima, the Chapter 7 Trustee (“Client”), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period August 4, 2016, through July 19, 2017. The order of the court approving employment of Applicant was entered on November 1, 2016. Dckt. 50. Applicant requests fees in the amount of \$1,892.50 and costs in the amount of \$108.61.

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). A professional must “demonstrate only that the services were reasonably likely to benefit the estate at the time rendered,” not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswick Drug Co. (In re Mednet)*, 251 B.R.

103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

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 federal and state income tax returns. The court finds the services were beneficial to the Client and bankruptcy 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 1.4 hours in this category. Applicant prepared a declaration and employment documents for Client’s review, as well as this Application.

Preparation of Tax Returns: Applicant spent 3.7 hours in this category. Applicant prepared federal and California income tax returns for the fiscal year ending July 31, 2017.

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
Michael Gabrielson, principal	2.0	\$365.00	\$730.00

	3.1	\$375.00	\$1,162.50
	0	\$0.00	\$0.00
	0	\$0.00	\$0.00
	0	\$0.00	\$0.00
	0	\$0.00	\$0.00
	0	\$0.00	<u>\$0.00</u>
Total Fees for Period of Application			\$1,892.50

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$108.61 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Copying Charges	\$0.20/page	\$63.80
Postage		\$44.81
		\$0.00
		\$0.00
Total Costs Requested in Application		\$108.61

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 \$1,892.50 are approved 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 case .

Costs & Expenses

First, the court notes that Applicant's requested expenses do not match throughout the Application and the Exhibits. The Application and Exhibit 2 state that total expenses are \$108.61, but only Exhibit 2's category subtotals add up to that amount. The Application itself states that copying charges were

\$44.20 and that postage cost \$27.35, which is a total of \$71.55. Because the Application and Exhibit 2 are consistent that the total is \$108.61, the court treats request in the Application as a typo that should instead what is reflected in Exhibit 2 (copying: \$63.80; postage: \$44.81).

The court normally limits photocopy expenses to \$0.10 per page, unless there is evidence presented of an actual higher cost. Here, Applicant has only listed that 319 pages were copied at \$0.20 per page. Exhibit 2, Dckt. 115. Applicant has not argued why that amount is actual and necessary. The court reduces Applicant's requested copying expenses by half to \$31.90.

First and Final Costs in the amount of \$76.71 are approved 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 case.

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

Fees	\$1,892.50
Costs and Expenses	\$76.71

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 Gabrielson & Company ("Applicant"), Accountant for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Gabrielson & Company is allowed the following fees and expenses as a professional of the Estate:

Gabrielson & Company, Professional employed by the Trustee

Fees in the amount of \$1,892.50
Expenses in the amount of \$76.71,

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

IT IS FURTHER ORDERED that costs of \$31.90 are not allowed by the court.

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 case.

2. [17-22347](#)-E-11 **UNITED CHARTER LLC** **CONTINUED MOTION TO USE CASH**
 JYG-1 **Jeffrey Goodrich** **COLLATERAL**
 8-3-17 [[32](#)]

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, Debtor’s Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on August 3, 2017. By the court’s calculation, 14 days’ notice was provided. 14 days’ notice is required.

The Motion for Approval of Cash Collateral Stipulation was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 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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<p>The Motion for Approval of Cash Collateral Stipulation is granted.</p>
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United Charter, LLC (“Debtor in Possession”) moves the court for an order approving a stipulation with East-West Bank (“Creditor”) (collectively, “the Parties”) to use cash collateral and grant a replacement lien in all post-petition rents, issues, and profits from Debtor in Possession’s real property.

AUGUST 17, 2017 HEARING

At the hearing, the court granted Debtor in Possession's request for a continuance and continued the hearing to 10:30 a.m. on August 31, 2017. Dckt. 42. The court ordered that supplemental pleadings be filed and served on or before August 24, 2017. Dckt. 48.

REVIEW OF AMENDED STIPULATION

The parties filed an Amended Stipulation on August 24, 2017. Dckt. 50. The properties at issue in the Stipulation are part of an industrial complex covering more than 175,000 square feet and made up of eighteen contiguous parcels. The properties are identified commonly as: 1904, 1908, 1912, 1916, 1920, 1928, and 1936 Weber Avenue; 1881 E. Market Street; and 1523, 1531, 1555, and 1617 E. Main Street ("Properties").

The Stipulation contains the following terms:

- A. Debtor in Possession is entitled to use cash collateral to pay actual and necessary operating expenses incurred after the petition date as set forth in an attached budget.
- B. All cash collateral shall be deposited into a segregated bank account.
- C. Debtor in Possession may pay other expenses outside of the ordinary course of business with Creditor's written approval, and remaining net cash collateral shall be paid monthly to Creditor.
- D. Debtor in Possession shall make monthly adequate protection payments to Creditor in the amount of net rents after payment of amounts set forth in the budget (approximately \$7,785.00 per month) no later than the fifteenth of each month, and such payment are retroactive to the petition date.
 - 1. Within five days of entry of an order approving the Stipulation, Debtor in Possession shall deliver an adequate protection payment in an amount sufficient to pay the accrued adequate protection payments from the petition date less the amount Debtor in Possession paid, with Creditor's prior consent, for the April 2017 delinquent property taxes.
- E. Creditor shall be granted a valid, duly-perfected, enforceable, and non-avoidable replacement lien and security interest of the same priority in all post-petition cash collateral.
- F. The post-petition liens in favor of Creditor shall secure repayment to Creditor of the difference between the actual amount of cash collateral spent by Debtor in Possession from and after the petition date and the cash collateral collected but not spent for the same time period.

- G. During the Stipulation's term, no priority claims or other claims for costs or expenses of administration that have been or may be incurred, shall have priority over or parity with either—
1. Creditor's claim for repayment of Debtor in Possession's obligations under loan documents, or
 2. Creditor's security interest in and lien upon the Properties and their rents, and no costs or administrative expenses shall be imposed against Creditor, its claims, or the collateral.
- H. Upon entry of an order by the court approving the Stipulation, Debtor in Possession's right to use cash collateral shall become effective as of the petition date and continue until the sooner of—
1. October 31, 2017,
 2. A default, or
 3. Further court order.

The attached budget includes the following proposed uses of cash collateral:

Description	Typical Monthly Amount	Approximate Payment Date
Cal Water: Water Bill	\$118.00	16th every month
PG&E: Power Bill	\$250.00	16th every month
Property Insurance	\$2,035.00	25th every month for 9 months
Maintenance	\$1,000.00	As needed
Franchise Tax Board	\$75.00	\$900 per annum April 13th
Backflow Water Testing	\$6.25	\$75.00 per annum February 24th
Property Tax: County	\$3,800.00	\$22,800 semi-annually
Accounting	\$500.00	\$15,000 per annum—paid one payment
Bay Alarm	\$103.00	13th every month
Contingency	\$500	Subject to Bank approval

Typical Amount Total	\$7,785.00	
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APPLICABLE LAW

Pursuant to 11 U.S.C. § 1101, a debtor in possession serves as the trustee in the Chapter 11 case when so qualified under 11 U.S.C. § 322. As a debtor in possession, the debtor in possession can use, sell, or lease property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease—

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Federal Rule of Bankruptcy Procedure 4001(b) provides the procedures in which a trustee or a debtor in possession may move the court for authorization to use cash collateral. In relevant part, Federal Rule of Bankruptcy Procedure 4001(b) states:

(b)(2) Hearing

The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

DISCUSSION

Since the August 17, 2017, the parties have identified the court's concerns about distinguishing between Debtor and Debtor in Possession, they have removed a provision that would give Creditor a

replacement lien condition upon Debtor in Possession having waived any objection to Creditor's lien, and they have removed provisions under which they could bilaterally authorize continued use of cash collateral without court approval.

Debtor in Possession has shown that the use of cash collateral as proposed is in the best interest of estate and is in the ordinary course of business. The proposed budget provides for the continued operation and payment of property expenses. Accordingly, the court authorizes the use of cash collateral for the period June 1, 2017, through October 31, 2017.

Capital Contributions

Schedules D, E, and F filed in this case demonstrate that the reorganization taking place is a three-party restructure: Debtor in Possession/Raymond Zhang (principal), East-West Bank (Secured Claim), and Wayne Bier (secured claim). For unsecured claims, the only significant non-insider is the City of Stockton for "fines" in the amount of \$27,613.45 (which claim is listed as disputed). Schedules, Dckt. 12 at 9–12. That a limited number of parties would seek to use a Chapter 11 proceeding as a structure to achieve a better financial result for all is not inappropriate, and in fact it exemplifies conduct that persons in other bankruptcy cases should emulate.

Though a limited group, federal law requires certain conduct of the various "players" in a bankruptcy case, including accurate disclosures, the fiduciary capacity of a "debtor in possession," and compliance with the law. While the court appreciates the need for there to be "reasonable" compliance with the law and for "formalities" not to unduly hinder the parties in their effective prosecution of a bankruptcy case, cutting too many corners will only lead to potentially greater negative consequences for the parties and their attorneys than would otherwise exist.

As discussed at the prior hearing, the court has noted that the operation of the bankruptcy estate by Debtor in Possession is being funded significantly through a cash inflow labeled as "Capital Contributions." In reviewing the most recent monthly operating report, that of July 2017, it states that "Capital Contributions" totaling \$25,500.00 have been made to the bankruptcy estate since this case was commenced. Dckt. 36 at 8. This represents 35.17% of the total cash receipts for the bankruptcy estate since this case was commenced.

After the last hearing, the court realized that the concept of a "capital contribution" and the bankruptcy estate were inconsistent. A capital contribution is defined under California law as being:

"(c) 'Contribution' means any benefit provided by a person to a limited liability company:

(1) In order to become a member upon formation of the limited liability company and in accordance with an agreement between or among the persons that have agreed to become the initial members of the limited liability company.

(2) In order to become a member after formation of the limited liability company and in accordance with an agreement between the person and the limited liability company.

(3) In the **person's capacity as a member and in accordance with the operating agreement or an agreement between the member and the limited liability company.**"

Cal. Corp. § 17701.02(c). The "capital contribution" would be made to the limited liability company by one of the members. The limited liability company is United Charter, LLC, Debtor that commenced this voluntary bankruptcy case.

As previously discussed, by operation of federal law all of the assets of Debtor were transferred into the bankruptcy estate in this case upon the filing of the bankrupt petition. 11 U.S.C. § 541(a). Because this is a Chapter 11 case, a bankruptcy trustee was not immediately appointed to manage the bankruptcy estate, but Debtor accepted the role of serving as "Debtor in Possession," 11 U.S.C. § 1001(1), who then exercises the powers and is subject to the fiduciary obligations of a bankruptcy trustee. 11 U.S.C. § 1107. The bankruptcy estate is not Debtor, the property of the bankruptcy estate is not Debtor's property, and Debtor exercises power and control over the property of the estate (here the real estate and its operation) solely in its fiduciary capacity as Debtor in Possession.

The "capital contribution" made by the member of United Charter, LLC would have been to Debtor, United Charter, LLC. It has not been explained how the money was then transferred from United Charter, LLC into the bankruptcy estate. The bankruptcy estate is not a "limited liability company" that has "members" from whom "capital contributions" may be received.

The most common method by which new money is placed in a bankruptcy estate is by a loan made pursuant to 11 U.S.C. § 364. Other than for an unsecured loan in the ordinary course of business, court authorization for such a loan is required. If court authorization is not obtained, the "lender's" right and ability to be repaid for the loan is impaired.

If things "do not go well" and this case is converted to one under Chapter 7 or if a Chapter 11 trustee is appointed, it has already been disclosed that there is a substantial preference that such trustee may be pursuing against the principal of Debtor. Debtor in Possession (Debtor and its principal as the managing member) has chosen not pursuing such preference at this time, believing that there may well be time for any subsequently appointed trustee to pursue it at a later date. The decision not to assert such rights may limit how long Debtor can serve as Debtor in Possession, or how the conduct of Debtor in fulfilling the fiduciary role of Debtor in Possession, counsel for Debtor in Possession, and the principal who is acting for Debtor in Possession if the preference is less collectable at that later date after the trustee is appointed than if Debtor in Possession had pursued it from day one.

Additionally, the principal making the "capital contribution" may be believing that if the "finances hit the fan" in this case, whatever he may owe on a preference can be offset against the "capital contributions." While such an offset might be properly provided for as part of court-approved post-petition credit pursuant to 11 U.S.C. § 364, none exists here and the principal (who, with the assistance of other

professionals of the bankruptcy estate, has made the decision that the estate should not be seeking the recovery of the preference from him) may be in for a rude awakening of an even bigger loss.

With respect to such “capital contributions,” at the hearing Counsel for Debtor in Possession addressed **XXXXXXXXXXXXXXXXXXXXXXXXXXXX**.

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

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

The Motion for Approval of Cash Collateral Stipulation filed by Debtor in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, pursuant to this order, for the period June 1, 2017, through October 31, 2017, and the cash collateral may be used to pay the following expenses, granting Debtor in Possession a variance of 10% in any individual line item expense as long as the total amount used does not exceed five percent of the monthly total budget:

Description	Monthly Amount	Approximate Payment Date
Cal Water: Water Bill	\$118.00	16th every month
PG&E: Power Bill	\$250.00	16th every month
Property Insurance	\$2,035.00	25th every month for 9 months
Maintenance	\$1,000.00	As needed
Franchise Tax Board	\$75.00	\$900 per annum April 13th
Backflow Water Testing	\$6.25	\$75.00 per annum February 24th
Property Tax: County	\$3,800.00	\$22,800 semi-annually
Accounting	\$500.00	\$15,000 per annum—paid one payment
Bay Alarm	\$103.00	13th every month
Contingency	\$500	Subject to Bank approval

Amount Total	\$7,785.00	

IT IS FURTHER ORDERED that the creditors having an interest in the cash collateral are given replacement liens in the post-petition proceeds in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim.

IT IS FURTHER ORDERED that the hearing on the Motion is continued to 10:30 a.m. on October 5, 2017, to consider a Supplement to the Motion to extend the authorization to use cash collateral. On or before, September 21, 2017, Debtor in Possession shall file and serve supplemental pleadings for the further use of cash collateral and notice of the October 5, 2017 hearing. Any opposition to the requested use of cash collateral may be presented orally at the hearing.

3. [17-22347](#)-E-11 **UNITED CHARTER LLC** **MOTION TO EMPLOY TEN-X LLC AS**
JJG-2 **Jeffrey Goodrich** **AUCTIONEER(S) AND/OR MOTION TO**
 SELL FREE AND CLEAR OF LIENS
 O.S.T.
 8-16-17 [37]

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)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, creditors, and parties requesting special notice on August 18, 2017. By the court's calculation, 13 days' notice was provided. The court required 13 days' notice. Dckt. 41.

The Motion to Employ and Sell Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). 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 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 to Employ and Sell Property is granted.

Employment Application for Auctioneer

United Charter, LLC (“Debtor in Possession”) seeks to employ Ten-X LLC (“Auctioneer”) pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor in Possession seeks the employment of Auctioneer to sell all of its interest in real property by auction free and clear of liens on condition that all of the claims secured by such liens are paid in full from net sale proceeds.

Debtor in Possession argues that Auctioneer’s appointment and retention is necessary to conduct an online live auction of property of the Estate. As of August 3, 2017, claims totaled less than \$5.3 million. Debtor in Possession retains a fee simple interest in a 177,692 square foot industrial complex consisting of a total of 15.34 acres, located in Stockton, California (“Property”). Debtor in Possession has scheduled the value of the Property as approximately \$7.855 million. Debtor in Possession desires to sell the Property using an auction process, and after soliciting auction proposals from a number of real estate brokers and companies, seeks the services of Auctioneer. Auctioneer will represent only Debtor in Possession and will market the Property for 150 days to be followed by a “live bid” auction on September 11 through September 13, 2017. Auctioneer has agreed to sell at the minimum price of \$7,800,000. Auctioneer will receive 5% of the buyer’s offer price paid at closing, or 5% of the minimum price if there is a withdrawal of the Property from the market. Auctioneer will receive a contingency fee of at least \$40,000. Debtor in Possession may accept a lower price, subject to approval of the Bankruptcy Court, so long as that price is sufficient to pay the monetary demands of all creditors in full, including all costs of sale and administrative claims against the Estate. Debtor in Possession is in negotiations with Mark Bello (“Listing Broker”) and anticipates submitting a separate application to employ Listing Broker prior to the hearing.

Jimmie Russell, a Business Development Associate of Ten-X, LLC, testifies that he has more than fifteen years’ experience in lending and has been employed with Auctioneer for more than two years. Mr. Russell testifies that he has been personally involved in over \$100,000,000.00 in commercial real estate transactions during his employment with Auctioneer, and he believes that Auctioneer will be able to provide services to this bankruptcy estate in this case without conflict. Mr. Russell testifies he and the company do not represent or hold any interest adverse to Debtor in Possession or to the Estate and that they have no connection with Debtor in Possession, creditors, 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.

Request to Sell Property at Auction

Movant also seeks to sell at auction real property commonly known as 1904, 1908, 1912, 1916, 1920, 1928, and 1936 Weber Avenue; 1881 E. Market Street; 1617, 1555, 1531, and 1523 E. Main Street, Stockton, California, on the following terms:

- A. Marketing period, followed by a “live bid” auction September 11–13, 2017.
- B. Starting Bid is presently \$2,500,000, and Debtor in Possession is only obligated to accept the highest bid once a bid meets or exceeds the stated “Minimum Price” of \$7,800,000. Debtor in Possession may accept a lower price, subject to approval of the Bankruptcy Court.
- C. Auctioneer will receive a five percent transaction fee of the final sales price.
- D. If the Property is withdrawn from the market, Auctioneer will receive a withdrawal fee of \$390,000.00, which is equal to five percent of the Minimum Price.
- E. Buyer’s broker will receive one percent of the buyer’s offer price (exclusive of any transaction fee) from the Listing Broker.

Request to Sell Free and Clear of Liens

The Motion seeks to sell the Property free and clear of any liens. The Bankruptcy Code provides for the sale of estate property free and clear of liens in the following specified circumstances,

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

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

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

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

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

11 U.S.C. § 363(f)(1)–(5).

For this Motion, Movant has not identified any creditor and has not established any grounds for a sale free and clear of liens.

Request to Waive the Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 6004(h) stays an order approving a sale for fourteen days after the order is entered. Movant requests that the stay be waived so that the auction may proceed without delay. Dckt. 44 at 5:16–18. The court notes that fourteen days after the August 31, 2017 hearing is September 14, 2017, which is after the auction is proposed to take place. Debtor in Possession has shown sufficient reason to waive the stay, and that request is granted.

RULING

Taking into account all of the relevant factors in connection with the employment and compensation of Auctioneer, considering the declaration demonstrating that Auctioneer 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 Ten-X, LLC as Auctioneer for the Chapter 11 Estate on the terms and conditions set forth in the Ten-X Marketing Agreement filed as Exhibit A, Dckt. 46. Approval of the transaction fee is subject to the provisions of 11 U.S.C. § 328 and subsequent review of the fee allowed for Ten-X, LLC.

Auction Sale of the Property

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because it will liquidate real property of the bankruptcy estate and provide cash to pay all secured and unsecured claims against the Estate.

The court pre-approves a sales price of \$7,800,000.00 or more, for which no further court authorization is required. On Schedule D, Debtor lists secured claims totaling (\$4,852,882). The largest is for East-West Bank, which is stated to be (\$4,246,804). This amount is consistent with Proof of Claim No. 3 filed by East-West Bank in the amount of (\$4,522,031.36).

For unsecured claims, on Schedules E and F Debtor lists unsecured claims totaling \$71,171.38. Of this, \$33,657.93 is asserted as an unsecured debt owing to Raymond Zhang, Inc., which appears to be a corporation of the principal of the Debtor. Though not listed on Schedule E, the Internal Revenue Service has filed Proof of Claim No. 1 asserting a priority unsecured claim in the amount of \$16,047.98.

Though the court is not presented with the tax consequences of such a sale, a \$7,800,000.00 sales price appears to provide adequate monies to pay all claims in full, the costs of sale, and the income taxes incurred in connection with such a sale.

The court notes that for this commercial property, the fees and commissions paid will total 7%. On the \$7,800,000.00 sale, that will total \$546,000.00. While this is higher than the court normally sees for commercial property, with a \$7,800,000.00 sale, that is being paid out of the Debtor's "profit," not an administrative expense reducing the payment to creditors.

If a lower offer amount is received that Debtor in Possession believes represents the fair market value and that such a sale is in the best interests of the bankruptcy estate, Debtor in Possession may set on shortened time a hearing on a motion for a supplemental order authorizing the sale at a price for less than \$7,800,000.00. The court will also consider the appropriate commission for such a lower sale, in light of the authorization of employment having been made upon the representation that there would be a sale of at least \$7,800,000.00.

As part of the sale, the court permits Debtor in Possession to pay the 5% transaction fee, the 1% seller's broker's commission, and the 1% buyer's broker's commission, with all such fees and the authorized payment subject to review pursuant to 11 U.S.C. § 328.

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 and Sell Property filed by United Charter, LLC, as the Debtor in Possession, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Employ is granted, and Debtor in Possession is authorized to employ Ten-X, LLC as Auctioneer for Debtor in Possession on the terms and conditions as set forth in the Ten-X Marketing Agreement filed as Exhibit A, Dckt. 46.

IT IS FURTHER ORDERED that no compensation is permitted except as expressly stated herein:

- A. 5% of gross sales price transaction fee to Ten-X, LLC as Auctioneer;
- B. 1% of gross sales price for seller's real estate broker commission to Mark Bello, or the realtor for which Mark Bello is employed if he is not licensed as a real estate broker; and
- C. 1% of the gross sales price for buyer's real estate broker commission;

with such fees and commissions subject to review and modification pursuant to 11 U.S.C. § 328.

IT IS FURTHER ORDERED that Debtor in Possession is authorized to sell pursuant to 11 U.S.C. § 363(b) the Property commonly known as 1904, 1908, 1912, 1916, 1920, 1928, and 1936 Weber Avenue; 1881 E. Market Street; 1617,

1555, 1531, and 1523 E. Main Street, Stockton, California (“Property”), on the following terms:

- A. The Property shall be sold on the terms and conditions set forth in the Ten-X Marketing Agreement, Exhibit A, Dckt. 46, and as further provided in this Order, and for a sales price that is not less than \$7,800,000.00.
- B. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
- C. Debtor in Possession is authorized to execute any and all documents reasonably necessary to effectuate the sale.
- D. Debtor in Possession is authorized to pay from the sales proceeds the transaction fee, the buyer’s broker’s commission, and the seller’s broker’s commission as authorized above (subject to the provisions of 11 U.S.C. § 328) from the sales proceeds.

IT IS FURTHER ORDERED that if Debtor in Possession determines that a sales price of less than \$7,800,000.00 is in the best interest of the bankruptcy estate and creditors, then Debtor in Possession may by a separate motion (using Docket Control No. JJG-2) seek a supplemental order authorizing the sale of the above property for less than \$7,800,000.00. Said motion may be set for hearing on at least seven days notice, with opposition authorized to be presented orally at the hearing. The hearing may be set for the court’s regularly scheduled Sacramento Division Chapter 11 law and motion calendar, or specially set for hearing on the court’s regularly scheduled 1:30 p.m. Tuesday afternoon Sacramento Chapter 13 motion for relief calendar.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement of Federal Rule of Bankruptcy Procedure 6004(h) is waived for cause shown.

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 **Not** Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 3, 2017. 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).

At the hearing, the Trustee made an oral motion to **XXXXXXXXXXXXXXXXXXXXXX**.

The Motion for Allowance of Professional Fees has not been set properly 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 denied without prejudice.

J. Michael Hopper, the Trustee ("Applicant") for Debtor Janet Robinson ("Client"), makes a Request for the Allowance of Fees and Expenses in this case. Fees of \$17,750.00 are requested for the period January 31, 2015, through May 31, 2017.

INSUFFICIENT NOTICE PROVIDED

Federal Rule of Bankruptcy Procedure 2002(a)(6) requires a minimum of twenty-one days' notice for a hearing on a compensation request that exceeds \$1,000.00. Local Bankruptcy Rule 2016-2(a) states

that “[e]very application for compensation of a Chapter 7 Trustee . . . shall be presented by motion noticed and set for hearing pursuant to [Local Bankruptcy Rule] 9014-1.” Local Bankruptcy Rule 9014-1 requires an additional fourteen days for parties to file any written opposition. The minimum number of days for a compensation application that exceeds \$1,000.00 under Local Bankruptcy Rule 9014-1(f)(1) is thirty-five days. Applicant provided twenty-eight days. Therefore, the Motion is denied without prejudice.

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 J. Michael Hopper (“Applicant”), the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Motion is denied without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF APPLICANT PROVIDES SUFFICIENT NOTICE

Applicant has requested \$17,750 in fees, which Applicant computes as a percentage of the monies to be disbursed by the Trustee in this bankruptcy case.

Computation of Maximum Fees Allowed Trustee (11 U.S.C. § 326).

Congress has established a maximum amount of fees which a trustee (or the cumulative fees if there are multiple trustees in a bankruptcy case) may be paid for the services provided. The maximum is computed based on the Trustee having \$290,000.00 in disbursements to make in this case.

The Trustee reports that the monies that will be disbursed by the Trustee upon which the 11 U.S.C. § 326 computation is made is as follows:

	Monies to be Disburse	Maximum Percentage Amount
25% of the first \$5,000.00	\$5,000.00	\$1,250.00
10% of the next \$45,000.00	\$45,000.00	\$4,500.00
5% of the next \$950,000.00	\$240,000.00	\$12,000.00

Calculated Maximum Trustee Fees Compensation in Case (based on current information)		\$17,750.00
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Reasonableness of Percentage Fees

While allowed as a percentage commission, Congress only provides for a “not to exceed amount,” requiring the court to make a post-work reasonableness calculation. The consideration of the court includes, as provided by 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). A professional must “demonstrate only that the services were reasonably likely to benefit the estate at the time rendered,” not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswick Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Benefit to the Estate

Even if the court finds that the services billed by a trustee are “actual,” meaning that the fee application reflects time entries properly charged for services, the trustee must demonstrate still that the work performed was necessary and reasonable. *Unsecured Creditors’ Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). A trustee must exercise good billing judgment with regard to the services provided because the court’s authorization to employ a trustee to work in a bankruptcy case does not give that trustee “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 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 reviewing the petition and schedules, conducting meetings of creditors, investigating scheduled and unscheduled real property, reviewing employment applications, gaining possession of real property, selling real property, investigating ownership claims about real property, communicating with attorneys about Debtor’s discharge, consulting accountants, preparing the final report. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

FEES REQUESTED

In the Motion, the Trustee states with particularity the various services and tasks performed by the Trustee. Dckt. 239. He supports those with his declaration providing testimony under penalty of perjury of the services provided. Dckt. 241. Additionally, the Trustee has

provided a Timesheet Report that details specific activities of the Trustee, the time spent, and a computation based on an hourly billing rate of \$300.00. Dckt. 242. On a purely hourly rate basis, the Trustee identifies there being \$15,390.00 in just hourly fees. However, the Trustee's compensation is based on a "commission," recognizing that a trustee does not get paid an "hourly rate" in all cases.

The Trustee's Final Report is provided as Exhibit B in support of the Motion. *Id.* The actual and proposed disbursements by the Chapter 7 Trustee include payment of \$31,917.00 in state and federal taxes as administrative expenses, \$120,365.08 for secured claims from property sold by the Trustee, \$3,032.80 for accountants for the Trustee, \$38,010.10 for counsel for the Trustee, and \$3,107.76 in bank fees. After payment of the requested Trustee's fees, there will be a \$51,166.80 distribution to creditors holding general unsecured claims, which represents a 45% dividend in this Chapter 7 case.

As detailed in the Motion and supported in the Declaration, this was not a simple case of a trustee having his or her employed professional liquidate an asset of the estate. The Trustee was required to investigate, analyze, and direct the prosecution of the Estate's interests in properties and recover monies owed to the Estate for post-petition rents and operation of Estate property. The Trustee had to assert the rights of the Estate against conflicting statements of Debtor concerning ownership of property.

The court determines that the requested Trustee's Fees of \$17,750.00, the maximum permissible, are reasonable and represent fair commission compensation to the Trustee in this case. Such fees are consistent with the Trustee's financially responsible use of professionals in this case, which at the end of the day has resulted in a substantial dividend for creditors holding general unsecured claims in this case.

The Motion is granted, and the Trustee is allowed \$17,750.00 in fees pursuant to 11 U.S.C. § 327 and 330 in this case. No costs have been requested by the Trustee.

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

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

The Motion for Allowance of Professional Fees filed by J. Michael Hopper ("Applicant"), the Chapter 7 Trustee, having been presented to the court, no task billing analysis having been provided in support of the Application, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Allowance of Chapter 7 Trustee Fees is granted, and J. Michael Hopper is allowed \$17,750.00 in Chapter 7 Trustee's fees in this case. No costs have been requested. The court makes this final award of trustee's fees pursuant to 11 U.S.C. §§ 327 and

330, and the Trustee is authorized to pay such fees from the unencumbered monies of the estate.