

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis  
Chief Bankruptcy Judge  
Sacramento, California

September 21, 2016, at 10:30 a.m.

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1. [12-28312-E-7](#)      **MARIANNE GULLINGSRUD**      **MOTION FOR ADMINISTRATIVE**  
**KJH-2**      **Scott Shumaker**      **EXPENSES**  
9-1-16 [[91](#)]

**Tentative Ruling:** The Motion for Administrative Expenses has been 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).**

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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 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 1, 2016. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

The Motion for Administrative Fees 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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<b>The Motion for Administrative Expenses is granted.</b>
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Kimberly J. Husted, the Chapter 7 Trustee, filed the instant Motion for Allowance of Administrative Income Tax Claims on September 1, 2016. Dckt. 91. The Trustee requests that the court

authorize payment of administrative expense claims for income taxes incurred by the estate that became due and owing post-petition to the Internal Revenue Service (“IRS”) in the amount of \$6,500.00 and to the Franchise Tax Board (“FTB”) in the amount of \$5,800.00.

In the present Motion, the Trustee stitches requests for allowance of administrative expenses for two different parties in interest. The first is for income taxes owed to the IRS and the second is for income taxes owed to the FTB. The Trustee requests that the court authorize the payment of administrative expense claims for income taxes associated with the estate for the fiscal year ended August 31, 2016, in the aggregate amount of \$12,300.00 (of which \$6,500.00 is owed to the IRS and \$5,800.00 is owed to the FTB). The Trustee asserts that the relief sought is proper pursuant to 11 U.S.C. § 503(b)(1)(B).

In relevant part, 11 U.S.C. § 503 states:

- (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—
  - (1) (A) the actual, necessary costs and expenses of preserving the estate including—
    - (B) any Tax—
      - (i) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both except a tax of a kind specified in section 507(a)(8) of this title

11 U.S.C. § 507(a)(8)(A)(i) & (ii) refers to:

allowed unsecured claims of governmental units, only to the extent that such claims are for a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition [or] assessed within 240 days before the date of the filing of the petition.

It appears that the income taxes the Trustee is seeking an allowance of administrative expense for do not fall into the category excluded by 11 U.S.C. § 507(a)(8) as they are not for a taxable year on or before the date of the filing of the petition for which a return is last due, including extensions, after three years before the date of the filing of the petition or assessed within 240 days of the filing of the petition.

Therefore, the Motion is granted, and the Trustee is authorized to pay up to \$12,300.00 for the income taxes associated with the estate, with \$6,500.00 to be paid to the IRS and \$5,800.00 to be paid to the FTB.

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 Motion for Allowance of Administrative Income Tax Claims filed by the Trustee (“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 is granted, the following administrative expenses are allowed, and the Trustee is authorized to pay a total of up to \$12,300.00 for income taxes associated with the estate, consisting of \$6,500.00 to the IRS and \$5,800.00 to the FTB.

2.     [16-20852](#)-E-11     **MATHIOPOULOS 3M FAMILY**     **MOTION TO EMPLOY GTR TAX**  
          DNL-4           **LIMITED PARTNERSHIP**       **PLANNING AND PREPARATION AS**  
                          **J. Luke Hendrix**       **ACCOUNTANT(S)**  
  **8-15-16 [80]**

**Tentative Ruling:** 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).

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.**

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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-in-Possession, creditors, parties requesting special notice, and Office of the United States Trustee on August 15, 2016. By the court’s calculation, 37 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). The defaults of the non-responding parties and other parties in interest are entered.

<b>The Motion to Employ is denied.</b>
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Debtor-in-Possession, Mathiopoulos 3M Family Limited Partnership, seeks to employ GTR Tax Planning & Preparation as its accountant (“GTR”), pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor-in-Possession seeks the employment of an accountant to assist the Debtor-in-Possession with income tax preparation in compliance with state and federal authorities and tax-related accounting services.

The Debtor-in-Possession argues that GTR’s appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate regarding income taxes and tax-related accounting.

Grant Rose, the owner of GTR and California Tax Education Council certified tax preparer, licensed for several years, testifies that GTR served as Debtor-in-Possession’s accountant prior to Debtor-in-Possession’s bankruptcy and has extensive experience with Debtor-in-Possession and performing tax-related accounting and income tax preparation. The scope of GTR’s tax preparation services has been limited to preparing annual state and federal tax returns. Grant Rose has disclosed that he and the firm represent creditors in this case who have agreed to subordinate their claims to all other creditors.

## **TRUSTEE’S OPPOSITION**

The U.S. Trustee filed an Opposition to the instant Motion on September 8, 2016. Dckt. 98. The Trustee opposes confirmation on the basis that the Application and Supplement do not deal with whether there is a conflict of interest. Both the Application and Supplement disclose that GTR has prepared annual state and federal tax returns for the following entities for an aggregate cost of \$1,000.00 to \$1,500.00, with Debtor-in-Possession’s portion approximating \$650.00 per year:

- A. Diane Mathiopoulos (trustee of the Mathiopoulos Family Trust);
- B. Kostantinos Mathiopoulos (trustee of the Mathiopoulos Family Trust);
- C. the Mathiopoulos Family Trust (general Partner of Debtor-in-Possession);
- D. Alexander Mathiopoulos (limited partner of Debtor-in-Possession);
- E. Sotirios Mathiopoulos (limited partner of Debtor-in-Possession);
- F. G&M Das (a general partnership of Alexander and Sotirios Mathiopoulos); and
- G. Dimitri Mathiopoulos Irrevocable Special Needs Trust for Gifting (limited partner of Debtor-in-Possession).

The above, except for the Family Trust and the Special Needs Trust, are creditors of the Debtor-in-Possession for \$10,000.00 each. The Supplement informs that GTR intends to continue tax return preparation services for all of the above in the future, with the exception of Sotirios Mathiopoulos.

The U.S. Trustee is concerned that there may be an actual conflict of interest. There may be tax positions that may be taken that would benefit GTR’s related clients to the detriment of the bankruptcy

estate. Neither the Application nor the Supplement discuss such a scenario, only suggesting that related entities or individuals have agreed to subordinate their claims.

## DISCUSSION

Section 1107 provides the rights, powers, and duties of a Debtor-in-Possession. “[A] debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties . . . of a trustee serving in a case under this chapter.” 11 U.S.C. § 1107(a).

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.

Pursuant to section 327(a), a trustee or debtor-in-possession is authorized, with court approval, to engage the services of professionals, including accountants, 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 101(14) defines a “disinterested person” as a person that—

- A. is not a creditor, an equity holder, or an insider;
- B. is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor; and
- C. does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.

When determining whether a professional holds a disqualifying “interest materially adverse” under the definition of disinterested, courts have generally applied a factual analysis to determine whether an actual conflict of interest exists. 3 COLLIER ON BANKRUPTCY ¶ 327.04[2][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.) Some courts have been willing to go further and find a potential conflict or appearance of impropriety as disqualifying. *See Dye v. Brown*, 530 F.3d 832, 838 (9th Cir. 2008) (in context of section 324, examining totality of circumstances, trustee’s past relationship with insider created potential for materially adverse effect on estate and appearance of conflict of interest).

The term “adverse interest” is not defined in the Bankruptcy Code, but the reported cases have defined what it means to hold an adverse interest as follows: (1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or (2) to possess a predisposition under circumstances that

render such a bias against the estate. *In re Perry*, 194 B.R. 875, 878–79 (Bankr. E.D. Cal. 1996) (citing *In re Roberts*, 46 B.R. 815, 827 (Bankr. D. Utah 1985), *aff'd in relevant part*, 75 B.R. 402 (D. Utah 1987)).

Examples of such materially adverse interests include: a pre-petition claim against the debtor (*Sholer v. Bank of Albuquerque (In re Gallegos)*, 68 B.R. 584 (Bankr. D. N.M. 1986)); representation of a shareholder (*In re Temp-Way Corp.*, 95 B.R. 343 (E.D. Pa. 1989), *In re Git-N-Go, Inc.*, 321 B.R. 54 (Bankr. N.D. Okla. 2004), *In re Carrousel Motels, Inc.*, 97 B.R. 898 (Bankr. S.D. Ohio 1989), *In re Hoffman*, 53 B.R. 564 (Bankr. W.D. Ark. 1985)); representation of an adversary (*In re Johore Inv. Co.*, 49 B.R. 710 (Bankr. D. Haw. 1985)); representation of certain investors of the debtors (*In re Envirodyne Indus.*, 150 B.R. 1008 (Bankr. N.D. Ill. 1993)); and performance of services for an entity whose subsidiary is a member of the creditors' committee (*In re Hub Business Forms, Inc.*, 146 B.R. 315 (Bankr. D. Mass. 1992)).

Section 327(b) permits a trustee or debtor-in-possession to operate the business of the debtor, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee or debtor-in-possession may retain or replace such professional persons if necessary.

While a person is not disqualified for employment solely because of such person's employment by or representation of a creditor, the court shall disapprove such employment if there is an objection by another creditor or the U.S. Trustee and there is an actual conflict of interest. 11 U.S.C. § 327(c).

The ultimate question is whether GTR has an interest materially adverse to the interest of the estate by reason of any direct or indirect relationship to or connection with Mathiopoulos 3M Family Limited Partnership, the Chapter 11 Debtor-in-Possession.

Taking into account all of the relevant factors in connection with the employment and compensation of GTR, considering the declaration of GTR, and the nature and scope of the services to be provided, the court cannot grant the motion to employ GTR as an accountant. The Movant has not provided sufficient evidence that there is not an actual conflict regarding tax positions that may be taken that benefit GTR's other clients who hold claims against the Debtor to the detriment of the bankruptcy estate.

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 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 denied.

**Final Ruling:** No appearance at the September 21, 2016 hearing is required.

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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, all creditors, parties requesting special notice, and Office of the United States Trustee on August 7, 2016. By the court's calculation, 45 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Discharge 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.

<p><b>The Motion For Entry of Discharge is granted.</b></p>
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The Motion for Entry of Discharge has been filed by Machel Holloway ("Plan Administrator/Debtor"). With some exceptions, 11 U.S.C. § 1328 permits the discharge of debts provided for in the Plan or disallowed under 11 U.S.C. § 502 after the completion of plan payments. The Chapter 11 Trustee's final report was filed on August 5, 2016 (Dckt. 394), and no objection was filed within the specified thirty-day period. *See* Fed. R. Bankr. P. 5009. The order closing the case was entered on September 26, 2014. Dckt. 384.

The Plan Administrator's Declaration certifies that she:

- A.        has completed the plan payments,
- B.        does not have any delinquent domestic support obligations,
- C.        has completed a financial management course and filed the certificate with the court,
- D.        is not subject to the provisions of 11 U.S.C. § 522(q)(1), and
- E.        is not a party to a pending proceeding that implicates 11 U.S.C. § 522(q)(1).

There being no objection, and Plan Administrator having stated sufficient grounds in accordance with Federal Rule of Bankruptcy Procedure 9013, the Plan Administrator/Debtor is entitled to a discharge.

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 Entry of Discharge filed by the Machel Holloway, the Chapter 11 Debtor, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted, and the court shall enter the discharge for Machel Holloway in this case.