

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

October 3, 2019 at 10:30 a.m.

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| 1. 19-90122-E-11 MF-28 | MIKE TAMANA FREIGHT LINES, LLC Matt Olson | MOTION FOR APPROVAL OF ADEQUATE PROTECTION STIPULATION WITH MERCEDES-BENZ FINANCIAL SERVICES USA LLC 9-12-19 [356] |
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Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors holding the twenty largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on September 12, 2019. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Motion for Approval of Adequate Protection Stipulation with Mercedes-Benz Financial Services USA LLC dba Daimler Truck Financial is XXXXX.

The debtor in possession, Mike Tamana Freight Lines, LLC (“ ΔIP”) filed this Motion seeking approval of Stipulation seeking to set adequate protection payments to creditor Mercedes–Benz Financial Services, LLC (“Creditor”), holding a claim secured by several of ΔIP’s vehicles (listed fully in the Motion (Dckt. 356)).

The Motion is supported by the Declaration of Amanjot Tamana, the Responsible Individual for the ΔIP. Dckt. 358. The Tamana Declaration states Creditor’s collateral here is essential to the operation of ΔIP’s business. *Id.*, ¶ 9.

The Stipulation (summarized by the court, and set out fully in Dckt. 359) proposes the following terms:

1. Commencing on August 20, 2019, ΔIP shall pay adequate protection payments in the amount of \$31,641.22 per month to Creditor to adequately protect the Creditor’s interest in the collateral.
2. Commencing on August 20, 2019, ΔIP shall make six (6) payments of \$10,547.07 in order to cure the post-petition delinquency of \$63,282.44.
3. ΔIP may cure a default within ten days of receipt written notice of that default. If ΔIP fails to cure default, the Creditor may apply for relief from the automatic stay *ex parte* on fourteen (14) days’ notice.

DISCUSSION

At the hearing, xxxxxxxxxxxxxxxx.

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 Approval of Adequate Protection Stipulation filed by the debtor in possession, Mike Tamana Freight Lines, LLC (“ ΔIP”) 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 Adequate Protection Stipulation (Dckt. 359) is approved..

Final Ruling: No appearance at the October 3, 2019 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 Debtors', Debtors' Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 23, 2019. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Objection to Claimed Exemptions 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 Objection to Claimed Exemptions is overruled without prejudice as moot.

The Chapter 7 Trustee, Irma Edmonds ("Trustee") objects to Earnest Norman Gunter and Janice Ellen Gunter's ("Debtor") claimed exemptions under California law as to certain funds received in connection with Debtor's business.

Trustee argues that the funds totaling \$19,000.00 were generated post-petition from using a peterbuilt water truck, property of the Estate, and therefore the funds were also property of the Estate.

Trustee argues this exemption is claimed in the Debtor's Amended Schedule C, and files as Exhibit 1 (Dckt. 59) a copy of the Amended Schedule C. However, a review of the docket shows that no such amended filing was made.

Debtor never amended Schedule C to claim the exemption to which Trustee objects. Therefore, the Objection is overruled as moot.

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 Objection to Claimed Exemptions filed by The Chapter 7 Trustee, Irma Edmonds (“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 Objection is overruled as moot.

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| 3. <u>19-90151-E-11</u> <u>UST-2</u> | Y&M RENTAL PROPERTY David Johnston | CONTINUED MOTION FOR REVIEW OF MANAGEMENT, LLC FEES 7-11-19 [21] |
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Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession’s Attorney, and creditors, on July 11, 2019. By the court’s calculation, 21 days’ notice was provided. 21 days’ notice is required. FED. R. BANKR. P. 2002(a)(6).

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

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| <p>The Motion for Review of Fees is granted.</p> |
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The US Trustee, Tracy Hope Davis (“Movant”) filed this Motion seeking review and disgorgement of fees paid prepetition by then-debtor, who subsequently served as the Debtor in Possession

(a Chapter 11 Trustee having since been appointed) and now debtor, Y&M Rental Property Management, LLC's ("Debtor") to counsel, David C. Johnston ("Counsel").

Movant provides the following factual background in the Motion:

1. Mr. Johnston filed a voluntary petition under Chapter 11 on behalf of the Debtor on February 21, 2019.
2. Mr. Johnston has not sought to be employed as counsel in this case.
3. Mr. Johnston has not filed an application for compensation in this case.
4. The Debtor discloses the following under Part 6 of its Statement of Financial Affairs:

\$2,983 paid for attorney's fees and \$1,717 for clerk's filing fee for prior Chapter 11 case. \$2,983 paid for as compromise for additional fees in prior case. \$1,717 for clerk's filing fee for present case.

5. Mr. Johnston filed a "Disclosure of Compensation of Attorney For Debtor(s)" indicating that he has agreed to accept "Reasonable value of services" for his legal services, and that he received nothing for the present case except the filing fee. He further discloses that the balance due is "Reasonable value of services[.]"
6. Mr. Johnston filed a prior Chapter 11 case on behalf of the Debtor on May 22, 2018.
7. In the Prior Case, on Part 6 of its Statement of Financial Affairs, the Debtor disclosed payment of \$2,983 for attorney's fees and \$1,717 for the clerk's filing fee.
8. In the Prior Case, Mr. Johnston filed a "Disclosure of Compensation of Attorney for Debtor(s)" agreeing to accept "Reasonable value of services as allowed by Court" for legal services, \$2,983 received prior to filing, and a balance due of "Reasonable value of services as allowed by Court."
9. The Debtor's Prior Case was dismissed on December 6, 2018, on the U.S. Trustee's motion, which alleged cause for dismissal for failure to file four monthly operating reports.
10. Mr. Johnston never filed an application for compensation in the Prior Case.

Motion, Dckt. 21.

Movant argues Counsel should be required to disclose all fees received in this case and the Debtors prior case, No. 18-90375, what these fees were for, and what fees Counsel argues have been earned

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but not yet paid. Movant argues this is necessary because Counsel has not filed any fee applications or sought to be employed in either of Debtors cases.

Without any explanation provided, Movant concludes that full disgorgement is warranted given Debtors failure to prosecute this and Debtors prior case.

AUGUST 1, 2019 HEARING & APPOINTMENT OF TRUSTEE

At the August 1, 2019, hearing the court continued the hearing to allow appointment of a Chapter 11 Trustee. *See* Dckt. 34. Movant filed an Application for order approving Irma Edmonds as Chapter 11 Trustee, and the court issued an Order granting that Application on August 29, 2019. Dckt. 44.

COUNSEL’S MOTION FOR DETERMINATION OF REASONABLENESS OF FEES

Counsel has not presented further response to this Motion. Rather, Counsel filed a Motion in the present case seeking a determination that fees received in Debtors prior case were reasonable. Dckt. 55. That Motion is set for hearing November 7, 2019.

The Motion filed in this case states that in the prior case Counsel was authorized to be employed as counsel for the Debtor in Possession. It states that Counsel received \$4,700.00 from the Debtor which was disbursed as follows:

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| Monies Received by Counsel..... | \$4,700.00 |
| CH 11 Filing Fee Paid..... | (\$1,717.00) |
| Payment for Pre-Petition Services..... | <u>(\$1,872.00)</u> |
| Balance for Post-Petition Fees..... | \$1,111.00 |

The court does not find any authority pursuant to 11 U.S.C. § 330 allowing counsel any legal fees or expenses for his post-petition representation of the Debtor in Possession in the prior case (18-90375). In dismissing the prior case, the court noted that the Debtor in Possession, during the seven months that case was pending, had failed to take any action to adjudicate the asserted disputed deed of trust which was the purported reason for filing that Chapter 11 case. 18-90375; Civil Minutes, Dckt. 39.

In his Declaration in support of the current Motion, Counsel testifies as to the above and the following additional information. Dckt. 57. He testifies that he computes his fees for the prior case to be (\$6,269.00). *Id.*, ¶ 5. While Counsel computes such amount, no such fees have been allowed by the court.

Counsel then testifies that he agreed to waive (\$3,286.00) of that amount if the Debtor would pay him (\$2,083.00) of the fees which had not been approved and authorized to be paid by the court. *Id.* Counsel states by waiving the prior fees and taking the discounted amount, Counsel was no longer a creditor of the Debtor for this second case. *Id.*

It appears in his Declaration that counsel asserts that if a Debtor and Counsel have a bankruptcy case dismissed, the requirement that any fees and expenses that counsel for a debtor have to be approved

by the court in that case is a nullity. The court knows of no such “waiver” of the law that can be obtained by a debtor in possession and attorney’s handling of a case resulting in a dismissal being warranted.

This court declines the opportunity to conduct a *de facto* fee application filed in the wrong case as a method of trying to work around a circumvention of the Bankruptcy Code.

DISCUSSION

Disgorgement of Fees

Federal Rule of Bankruptcy Procedure 2017(a) provides a procedure for the review of compensation for prefiling services, stated as follows:

On motion by any party in interest or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Code by or against the debtor or before entry of the order for relief in an involuntary case, to an attorney for services rendered or to be rendered is excessive.

The review performed by the court pursuant to Rule 2017 in determining the value of services rendered will apply the same tests that would be applied in review of an application for compensation pursuant to Rule 2016 and section 330 of the Code. 9 COLLIER ON BANKRUPTCY P 2017.05 (16th 2019).

Once a question has been raised about the reasonableness of an attorney’s fee under section 329, the attorney bears the burden of establishing that the fee is reasonable.” 3 COLLIER ON BANKRUPTCY P 329.01 (16th 2019). Section 329(b) provides that if “such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to ... the entity that made such payment.” 11 U.S.C. 329(b).

On the subject of disgorgement, Collier states:

The bankruptcy court has the authority and responsibility to look for ethical breaches when examining fee transactions. Compensation may be denied, particularly when an attorney intentionally misrepresents facts or deceives the court. The bankruptcy court may order disgorgement of fees, award costs, or impose other penalties when an attorney is found to have committed a fraud on the court or when an attorney has a conflict of interest. A bankruptcy court does not have to calculate how much the unethical conduct depleted the value of the attorney’s service, but may, in its discretion, deny compensation in whole or in part. It may also order disgorgement of all fees already paid.

3 COLLIER ON BANKRUPTCY P 329.04 (16th 2019).

DISCUSSION

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On July 18, 2019, Monthly Operating Reports were filed for the period of March through June 2019. However, the filing appears to have been made for the sole purpose of preventing dismissal, and not in the normal, good faith course of prosecuting this Chapter 11 case.

In Debtors most recent case, No. 18-90375, the court dismissed the case for failure to file any Monthly Operating Reports until the last minute. 18-90375, Civil Minutes, Dckt. 39.

Counsel has not filed a response to the Motion.

The Motion to Disgorge Fees is granted, with David Johnston ordered to turnover or pay from other monies if he is not holding the monies paid to him by the Debtor the sum of \$3,194.00 (the total of the \$1,111.00 and the additional \$2,083.00) on or before October 25, 2019. The Chapter 11 Trustee shall segregate the \$3,194.00 (which can be done by an accounting entry rather than a separate account), to which any attorney lien or right to payment of David Johnston shall fix. The Trustee shall not disburse the \$3,194.00 except on further order of this court.

If no motion for allowance of attorney's fees is filed by David Johnston for his services as the attorney for the debtor in possession in the prior case on or before noon on October 31, 2019, the Chapter 11 Trustee may lodge with this court a supplemental order (using the Docket Control Number for the present Motion) authorizing the Chapter 11 Trustee to disburse or otherwise administer the monies as permitted under the Bankruptcy Code.

The Court shall issue an order in substantially the following form:

The Court's Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing on this Matter.

Upon review of the Motion For Review of Fees, opposition stated at the hearing, considering of the pleadings in support and against, the arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and David C. Johnston, Esq., shall turnover or pay from other monies if he is not holding the monies paid to him by the Debtor the sum of \$3,194.00 (the total of the \$1,111.00 and the additional \$2,083.00) on or before October 25, 2019. The Chapter 11 Trustee shall segregate the \$3,194.00 (which can be done by an accounting entry rather than a separate account), to which any attorney lien or right to payment from of David Johnston shall fix. The Trustee shall not disburse the \$3,194.00 except on further order of this court.

IT IS FURTHER ORDERED that if no motion for allowance of attorney's fees is filed by David Johnston for his services as the attorney for the debtor in possession in the prior case on or before noon on October 31, 2019, the Chapter 11 Trustee may lodge with this court a supplemental order (using the Docket Control Number for the present Motion) authorizing the Chapter 11 Trustee to disburse or otherwise administer the monies as permitted under the Bankruptcy Code.

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4. [19-90159](#)-E-11 **BARRENO ENTERPRISES, LLC** **CONTINUED MOTION FOR REVIEW OF**
[UST-2](#) **David Johnston** **FEES AND/OR MOTION TO DISGORGE**
 FEES
 7-11-19 [23]

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 in Possession, Debtor in Possession's Attorney, creditors holding the twenty largest unsecured claims, creditors, and Office of the United States Trustee on July 11, 2019. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

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| The Motion for Review of Fees is granted. |
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The US Trustee, Tracy Hope Davis ("Movant") filed this Motion seeking review and disgorgement of fees paid prepetition by then-debtor in possession(a Chapter 11 Trustee having since been appointed) and now debtor, Barreno Enterprises, LLC's ("Debtor") to counsel, David C. Johnston ("Counsel").

Movant provides the following factual background in the Motion:

1. Mr. Johnston filed a voluntary petition under Chapter 11 on behalf of the Debtor on February 25, 2019.
2. Mr. Johnston has not sought to be employed as counsel in this case.

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3. Mr. Johnston has not filed an application for compensation in this case.
4. The Debtor discloses the following under Part 6 of its Statement of Financial Affairs:

\$4,000 compromise for pre-petition services and
\$1,717 for clerk's filing fee.
5. Mr. Johnston filed a "Disclosure of Compensation of Attorney For Debtor(s)" indicating that he has agreed to accept "Reasonable value of services" for his legal services, and that he received nothing for the present case except the filing fee. He further discloses that the balance due is "Reasonable value of services[.]"
6. Mr. Johnston filed a prior Chapter 11 case on behalf of the Debtor on May 22, 2018.
7. In the Prior Case, on Part 6 of its Statement of Financial Affairs, the Debtor disclosed payment of \$5,000.00 for attorney's fees and \$1,717 for the clerk's filing fee.
8. In the Prior Case, Mr. Johnston filed a "Disclosure of Compensation of Attorney for Debtor(s)" agreeing to accept "Reasonable value of services as allowed by Court" for legal services, \$2,983 received prior to filing, and a balance due of "Reasonable value of services as allowed by Court."
9. The Debtor's Prior Case was dismissed on December 6, 2018 for failure to file four monthly operating reports.
10. Mr. Johnston never filed an application for compensation in the Prior Case.

Motion, Dckt. 23.

Movant argues Counsel should be required to disclose all fees received in this case and the Debtor's prior case, No. 18-90196, what these fees were for, and what fees Counsel argues have been earned but not yet paid. Movant argues this is necessary because Counsel has not filed any fee applications or sought to be employed in either of Debtor's cases.

Without any explanation provided, Movant argues full disgorgement is warranted given Debtors failure to prosecute this and Debtor's prior case.

**AUGUST 1, 2019 HEARING &
APPOINTMENT OF TRUSTEE**

At the August 1, 2019, hearing the court continued the hearing to allow appointment of a Chapter 11 Trustee. *See* Dckt. 40. Movant filed an Application for order approving David M. Sousa as Chapter 11 Trustee, and the court issued an Order granting that Application on August 31, 2019. Dckt. 52.

The Chapter 11 Trustee filed Status Reports on September 13 and September 27, 2019. Dckts. 61, 65. The Second Report states the Trustee does not believe a successful Chapter 11 Plan is possible due to the operating expenses and an inability to make payments. Trustee states it is very likely he will seek conversion to Chapter 7.

APPLICABLE LAW

Disgorgement of Fees

Federal Rule of Bankruptcy Procedure 2017(a) provides a procedure for the review of compensation for prefiling services, stated as follows:

On motion by any party in interest or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Code by or against the debtor or before entry of the order for relief in an involuntary case, to an attorney for services rendered or to be rendered is excessive.

The review performed by the court pursuant to Rule 2017 in determining the value of services rendered will apply the same tests that would be applied in review of an application for compensation pursuant to Rule 2016 and section 330 of the Code. 9 COLLIER ON BANKRUPTCY P 2017.05 (16th 2019).

Once a question has been raised about the reasonableness of an attorney's fee under section 329, the attorney bears the burden of establishing that the fee is reasonable." 3 COLLIER ON BANKRUPTCY P 329.01 (16th 2019). Section 329(b) provides that if "such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to ... the entity that made such payment." 11 U.S.C. 329(b).

On the subject of disgorgement, Collier states:

The bankruptcy court has the authority and responsibility to look for ethical breaches when examining fee transactions. Compensation may be denied, particularly when an attorney intentionally misrepresents facts or deceives the court. The bankruptcy court may order disgorgement of fees, award costs, or impose other penalties when an attorney is found to have committed a fraud on the court or when an attorney has a conflict of interest. A bankruptcy court does not have to calculate how much the unethical conduct depleted the value of the attorney's service, but may, in its discretion, deny compensation in whole or in part. It may also order disgorgement of all fees already paid.

3 COLLIER ON BANKRUPTCY P 329.04 (16th 2019).

Reasonable Fees

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

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

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

DISCUSSION

On July 17, 2019, Monthly Operating Reports were filed for the period of March through June 2019. Dckts. 27, 29, 31, 33. However, the filing appears to have been made for the sole purpose of preventing dismissal, and not in the normal, good faith course of prosecuting this Chapter 11 case.

In reviewing the docket, the court has granted a motion to dismiss the case based on failure to file the Monthly Operating Reports, failure to prosecute the case, and because the case was filed in bad faith.

In Debtor's most recent case, No. 18-90196, the court dismissed the case for failure to file any Monthly Operating Reports until the last minute. 18-90196, Civil Minutes, Dckt. 39.

In filing this second case, the Debtor paid \$4,000.00 in attorney's fees and \$1,717.00 in costs for filing. Dckt. 14.

Now, a Chapter 11 Trustee having been appointed, a determination has been made that it is likely no successful Chapter 11 plan is possible given the operating expenses.

The evidence presented by the U.S. Trustee shows that the following monies have been received by David Johnston relating to the Debtor and serving as counsel for the Debtor in Possession:

Monies Paid to Counsel Pre-Petition.....\$5,717.00

Statement of Financial Affairs Question 11.1. It states that \$4,000 as a compromise for pre-petition services and \$1,717 for clerk's filing fee. Dckt. 14.

Filing Fee Paid in Current Case.....(\$1,717.00)

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Attorneys' Fees Monies.....\$4,000.00

As noted by the U.S. Trustee, David Johnston, Esq., has not sought employment as counsel for the Debtor in Possession. 11 U.S.C. § 327, § 1107. No order allowing attorneys' fees and costs has been entered in this case or the prior Chapter 11 case in which Mr. Johnston served as counsel for the debtor in possession in that case (18-90196).

In dismissing the prior Chapter 11 case the court determined that the Debtor in Possession had failed to timely file (or file any) monthly operating reports. 18-90196; Civil Minutes, Dckt. 60. In reviewing the Response filed by the Debtor in Possession in that case (for which no evidence was filed to support the factual allegations), it indicates that in addition to serving as the counsel for the Debtor in Possession, Mr. Johnson also undertook the bookkeeping and accounting tasks of preparing monthly operating report. *Id.*; Response, Dckt. 56.

The court has not authorized pursuant to 11 U.S.C. § 330 the payment of any fees for counsel for the Debtor in Possession in the current case or the prior case. Debtor and Counsel cannot circumvent the operation of federal law by "succeeding" in getting a Chapter 11 case dismissed.

Based on the evidence presented, and no opposition presented, it appears compensation for much of the services provided was not reasonable. At the time of filing this case, Debtor had already been through a Chapter 11 case and was well versed on the importance of timely filing Monthly Operating Reports and prosecuting the case. Based on the failure to prosecute, the court found the present case was filed in bad faith. Additionally, filing of the case may not have been necessary where no successful Chapter 11 plan is possible. Therefore, the services performed were not reasonable.

The Motion is granted, and Debtor's counsel shall pay \$4,000.00 in attorney's fees to the Chapter 11 trustee appointed in this case. The court does not order the disgorgement of the fees that were paid by counsel to the court.

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 Review of Fees filed by the US Trustee, Tracy Hope Davis ("Movant"), in this matter 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 David C. Johnston, Esq., shall turnover or pay from other monies if he is not holding the monies paid to him by the Debtor the sum of \$4,000.00 on or before October 25, 2019. The Chapter 11 Trustee shall segregate the \$4,000.00 (which can be done by an accounting entry rather than a separate account), to which any attorney lien or right to payment from of David Johnston shall fix. The Trustee shall not disburse the \$3,194.00 except on further order of this court.

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IT IS FURTHER ORDERED that if no motion for allowance of attorney's fees is filed by David Johnston for his services as the attorney for the debtor in possession in the prior case on or before noon on October 31, 2019, the Chapter 11 Trustee may lodge with this court a supplemental order (using the Docket Control Number for the present Motion) authorizing the Chapter 11 Trustee to disburse or otherwise administer the monies as permitted under the Bankruptcy Code.

5. [19-90262-E-7](#)
[ICE-1](#)

MARTIN GIVARGIS
Pro Se

**CONTINUED TRUSTEE'S MOTION TO
DISMISS FOR FAILURE TO APPEAR
AT SEC. 341(A) MEETING AND
MOTION TO EXTEND THE DEADLINES
FOR FILING OBJECTIONS TO
DISCHARGE AND MOTIONS TO
DISMISS .
7-18-19 [\[26\]](#)**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) and Office of the United States Trustee on July 20, 2019. By the court's calculation, 40 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor (*pro se*) has not filed opposition. If the *pro se* Debtor appears at the hearing, the court shall consider the arguments presented and determine if further proceedings for this Motion are appropriate.

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| The hearing on the Motion to Dismiss is granted, and the case is dismissed. |
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The Chapter 7 Trustee, Irma Edmonds (“Trustee”), seeks dismissal of the case on the grounds that Martin Givargis (“Debtor”) did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Dckt. 26.

Alternatively, if Debtor’s case is not dismissed, Trustee requests that the deadline to object to Debtor’s discharge and the deadline to file motions for abuse, other than presumed abuse, be extended to sixty days after the date of Debtor’s next scheduled Meeting of Creditors, which is set for 12:00 p.m. on August 19, 2019. If Debtor fails to appear at the continued Meeting of Creditors, Trustee requests that the case be dismissed without further hearing.

DEBTOR’S OPPOSITION

Debtor filed an Opposition on August 2, 2019. Dckt. 31. Debtor states he did not receive notice of the continued Meeting of Creditors, and was instructed by Trustee that the case would need to be refiled after 6 months.

TRUSTEE’S REPLY

Trustee filed a Reply on August 22, 2019. Dckt. 32. Trustee clarifies that at the first Meeting of Creditors, May 20, 2019, Trustee learned Debtor has not been a California resident long enough to file bankruptcy here.

Trustee referred this case to the U.S. Trustee for dismissal. However, U.S. Trustee did not file a dismissal motion.

Subsequently, when Debtor failed to appear at the continued Meeting of Creditors, Trustee filed this Motion.

AUGUST 29, 2019 HEARING

At the August 29, 2019 hearing the court noted Debtor appeared at the continued August 19, 2019, Meeting of Creditors. Debtor has also appeared at the May 20, 2019 and July 1, 2019 Meetings.

The court continued the hearing to allow Debtor to appear at the continued Meeting of Creditors on September 16, 2019.

DISCUSSION

The Trustee’s Report entered on the docket on September 18, 2019, indicates Debtor did not appear. Attendance at the Meeting is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay that is prejudicial to creditors and is cause to dismiss the case. 11 U.S.C. § 1307(c)(1).

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 Dismiss the Chapter 7 case filed by The Chapter 7 Trustee, Irma Edmonds (“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 hearing on the Motion to Dismiss granted, and the case is dismissed.

6. [19-90482-E-7](#) **DOROTHY YOUNG**

**MOTION TO DISMISS CASE
8-30-19 [\[20\]](#)**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, creditors, and Office of the United States Trustee on August 30, 2019. By the court’s calculation, 34 days’ notice was provided. 14 days’ notice is required.

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

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| The Motion to Dismiss is XXXXXXXXXXXX |
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The debtor, Dorothy Mae Young, filed this Motion on August 30, 2019 requesting voluntary dismissal of the case. In filing the present Motion Debtor's counsel filed a combined Notice of Motion-Motion-Points and Authorities-Declaration-Proof of service. As discussed below, the court has previously identified the Federal Rules of Bankruptcy Procedure and Local Bankruptcy Rules document preparation and filing requirements, so the present failures clearly could not be inadvertent or because counsel for Debtor was unaware of what is required.

The notice of hearing merely states that on October 3, 2019, the Debtor will try and have this case dismissed. Nothing is stated as to the opposition filing requirements.

This is Debtor's second attempt at dismissing the case. At the August 29, 2019, hearing the court made the following findings and conclusions in denying without prejudice the Motion:

Failure To Comply With Local Rules

Debtor filed the Notice of Motion, Declaration, and Memorandum of Points and Authorities in this matter as one document. That is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, exhibits, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." LOCAL BANKR. R. 9004-2(c)(1). Counsel is reminded of the court's expectation that documents filed with this court comply as required by Local Bankruptcy Rule 9004-1(a). Failure to comply is cause to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court (some running hundreds of pages). It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents that can then be used by the court.

Grounds For Dismissal

The Motion states the following with particularity (FED. R. BANKR. P. 9013):

I have decided not to go forward with my bankruptcy and request the court dismiss the case.

Motion, Dckt. 12. In Debtor's Declaration, she explains further that she seeks dismissal to protect real property she thought had been gifted to her daughter many years ago. Declaration, Dckt. 14.

In the Memorandum supporting the Motion, Debtor's counsel argues that Debtor may dismiss the case pursuant to 11 U.S.C. § 1307. However, this being a Chapter 7 case, that section is inapplicable.

October 3, 2019 at 10:30 a.m.

- Page 17 of 25 -

No argument has been presented to demonstrate cause for dismissing this case. Debtor failed to appear at the First Meeting of Creditors. Trustee's July 24, 2019 Docket Entry Report.

Civil Minutes, Dckt. 17.

Despite the court's clear instruction, this Motion was filed the very next day with all the same problems. The Motion, Notice of Hearing, Memorandum of Points and Authorities, Declaration, and Proof of Service were all filed together as a single 8 page document.

Despite being instructed that the prior motion to dismiss (Dckt. 12) fails Federal Rule of Bankruptcy Procedure 9013, the present Motion is a carbon copy. Nothing is stated except:

I have decided not to go forward with my bankruptcy and request the court dismiss the case.

Motion, Dckt. 20.

This Local Bankruptcy Rules ("LBR") for this district provide the following:

(g) Sanctions for Noncompliance with Rules. **Failure of counsel or of a party to comply with these Rules, with the Federal Rules of Civil Procedure or the Federal Rules of Bankruptcy Procedure**, or with any order of the Court **may be grounds for imposition of any and all sanctions** authorized by statute or rule or within the inherent power of the Court, **including**, without limitation, **dismissal of any action**, entry of default, finding of contempt, **imposition of monetary sanctions or attorneys' fees and costs**, and other lesser sanctions.

LOCAL BANKR. R. 1001-1(g)(emphasis added).

Often, the appropriate sanction for noncompliance with the LBR is dismissal of the motion without prejudice so it may be brought again and determined on its merits. The additional cost and time required in bringing the motion again has a corrective effect to incentivize compliance with the rules.

However, here it appears dismissal of the Motion was not incentive enough.

At the hearing, **xxxxxxxxxxxxxxxxxx**.

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 Dismiss filed by Living Centers of Fresno, Inc., (“ΔIP”) 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 **xxxxxxxxxxxx**

FINAL RULINGS

7. [12-92570-E-12](#)
[TOG-50](#)

COELHO DAIRY
Thomas Gillis

MOTION FOR ENTRY OF DISCHARGE
8-26-19 [\[728\]](#)

Final Ruling: No appearance at the October 3, 2019 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 12 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 26, 2019. By the court's calculation, 38 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). 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.

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| The Motion for Entry of Discharge is granted. |
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The Motion for Entry of Discharge has been filed by Coelho Dairy ("Debtor"). With some exceptions, 11 U.S.C. § 1228 permits the discharge of debts provided for in a plan or disallowed under 11 U.S.C. § 502 after the completion of plan payments. The Chapter 12 Trustee, Jan Johnson's ("the Chapter 12 Trustee") final report was filed on June 18, 2019, and no objection was filed within the specified thirty-day period. *See* FED. R. BANKR. P. 5009. The order approving final report and discharging the Chapter 12 Trustee was entered on July 25, 2019. Dckt. 724. The entry of an order approving the final report is evidence that the estate has been fully administered. *See In re Avery*, 272 B.R. 718, 729 (Bankr. E.D. Cal. 2002).

Debtor's Declaration (Dckt. 731) certifies that Debtor:

- A. has completed the plan payments;
- B. does not have any delinquent domestic support obligations;

- C. has not received a discharge in a case under Chapter 7, 11, or 12 during the four-year period prior to filing of this case or a discharge under a Chapter 13 case during the two-year period prior to filing of this case;
- 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 which implicates 11 U.S.C. § 522(q)(1).

There being no objection, 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 Coelho Dairy (“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 Coelho Dairy in this case.

8. [19-90495](#)-E-7

CURTIS PAULUS
Pro Se

**ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
9-5-19 [\[24\]](#)**

Final Ruling: No appearance at the October 3, 2019 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Debtor (*pro se*), and Chapter 7 Trustee as stated on the Certificate of Service on September 7, 2019. The court computes that 26 days’ notice has been provided.

The court issued an Order to Show Cause based on Debtor’s failure to pay the required fees in this case: \$335.00 due on May 29, 2019.

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

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

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

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

Final Ruling: No appearance at the October 23, 2019 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Plaintiff (*pro se*), and Defendant (*pro se*) as stated on the Certificate of Service on August 28, 2019. The court computes that 36 days' notice has been provided.

The court issued an Order to Show Cause based on Defendant's failure to pay the required fees in this case: \$350.00 due on August 12, 2019.

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

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

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

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

Final Ruling: No appearance at the October 23, 2019 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Debtor (*pro se*), and Chapter 7 Trustee as stated on the Certificate of Service on September 7, 2019. The court computes that 26 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: \$335.00 due on March 25, 2019.

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

On September 18, 2019, the court issued an Order approving payment of the filing fee in installments. Order, Dckt. 47. The first payment does not come due until October 18, 2019.

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

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

Final Ruling: No appearance at the October 3, 2019, hearing is required.

Creditor Hirst Law Group, P.C. having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion To Compel was dismissed without prejudice, and the matter is removed from the calendar.**