UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

October 5, 2017, at 10:30 a.m.

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1. 10-49205-E-11 GEL-2 | **TED/KATRINA THOMPSON** Gabriel Liberman | **MOTION FOR ENTRY OF DISCHARGE** 9-12-17 [249]

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 Plan Administrator, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on September 12, 2017. By the court's calculation, 23 days' notice was provided. 14 days' notice is required.

The Motion for Entry of Discharge was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 11 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 for Entry of Discharge is granted.

The Motion for Entry of Discharge has been filed by Ted Thompson and Katrina Thompson ("Plan Administrator/Debtor"). 11 U.S.C. § 1141(d)(5)(A) permits the court's discharge of debts provided for in a plan when all payments have been made.

Though Plan Administrator/Debtor failed in the Declaration (Dckt. 251) in support of the Motion to state that there were no outstanding domestic support obligations, at the hearing counsel for the Plan Administrator/Debtor reported **xxxxxxxxxxxxxxxxxxxxxxx**.

Plan Administrator/Debtor's Declaration (Dckt. 251) certifies that Plan Administrator:

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. 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;

E. is not subject to the provisions of 11 U.S.C. § 522(q)(1); and

F. is not a party to a pending proceeding which implicates 11 U.S.C. § 522(q)(1).

There being no objection, Plan Administrator 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 Ted Thompson and Katrina Thompson ("Plan Administrator") 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 Ted Thompson and Katrina Thompson in this case.

2. **10-46636-E-13** **JOSEPH/KIMBERLY OLIVA** **CONTINUED STATUS CONFERENCE**
17-2105 **Rick Morin** **RE: COMPLAINT**
OLIVA ET AL V. CITIMORTGAGE, INC. **6-19-17 [1]**

Plaintiffs' Atty: Rick Morin
Defendant's Atty: Jonathan C. Cahill

Adv. Filed: 6/19/17
Answer: none

Nature of Action:
Declaratory judgment
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

The Status Conference is xxxxxxxxxxxxxxxxxxxxxxxxxx.

Notes:
Continued from 9/6/17. Responsive pleading to be filed on or before 9/17/17.

Joint *Ex Parte* Motion for Extension of Time to File Responsive Pleading filed 9/15/17 [Dckt 19]; Order granting extension to 9/22/17 filed 9/18/17 [Dckt 21]

Joint *Ex Parte* Motion for Extension of Time to File Responsive Pleading filed 9/22/17 [Dckt 22]; Order granting extension to 9/29/17 filed 9/26/17 [Dckt 24]

No responsive pleading filed as of 9/29/17 3:45 p.m.

OCTOBER 5, 2017 STATUS CONFERENCE

In the Joint Ex Parte Motion to Extend Time, Dckt. 22, the Parties state that "The Parties have reached a resolution of the Complaint, and simply require additional time to memorialize the same and effectuate a dismissal of the Adversary Proceeding."

At the Status Conference the Parties reported, xxxxxxxxxxxxxxxxxxxxxxx.

3. **17-22347-E-11** **UNITED CHARTER LLC** **CONTINUED MOTION TO USE CASH COLLATERAL**
JJG-1 **Jeffrey Goodrich** **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 to Use Cash Collateral 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, ----------.

The Motion to Use Cash Collateral is granted.

United Charter, LLC ("Debtor in Possession") moves the court for an additional 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 FILED ON AUGUST 24, 2017

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**	

AUGUST 31, 2017 HEARING

At the August 31, 2017 hearing, the court noted that the parties had identified the court's concerns about distinguishing between Debtor and Debtor in Possession, that they had removed a provision that would give Creditor a replacement lien condition upon Debtor in Possession having waived any objection to Creditor's lien, and that they had removed provisions under which they could bilaterally authorize continued use of cash collateral without court approval. Dckt. 59

Capital Contributions

At the August 31, 2017, the court and the parties also discussed the use of capital contributions in this case.

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.

The court 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 July 2017 monthly operating report, the court saw that it states that "Capital Contributions" totaling $25,500.00 were made to the bankruptcy estate since this case was commenced. Dckt. 36 at 8. That represents 35.17% of the total cash receipts for the bankruptcy estate since this case was commenced.

The court clarified that the concept of a "capital contribution" and the bankruptcy estate are 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.

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 fulling 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," Counsel for Debtor in Possession addressed that he and independent counsel for the member making such "capital contributions" will be addressing the points.

The court granted the motion to approve the cash collateral stipulation and authorized Debtor in Possession to use cash collateral for the period June 1, 2017, through October 31, 2017. Dckt. 61. The court continued the hearing to 10:30 a.m. on October 5, 2017, to consider a motion to extend the authorization to use cash collateral and ordered Debtor in Possession to file and serve any supplemental pleading by September 21, 2017.

DEBTOR IN POSSESSION'S SUPPLEMENT

Debtor in Possession filed a Supplement to the Motion on September 21, 2017. Dckt. 71. Debtor in Possession reports that the Parties "remain in discussions for a consensual extension of such authority [to use cash collateral], but as of the filing of this Supplement no such agreement has been reached." *Id.* at 1:25–27. Debtor in Possession requests that the court extend the authorization to use cash collateral on the same terms as approved at the August 31, 2017 hearing through January 31, 2018.

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.

RULING

Debtor in Possession states that it and Creditor are negotiating terms for use of cash still, and Debtor in Possession requests that the court extend the authorization it has approved already. 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 November 1, 2017, through January 31, 2018.

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 Use Cash Collateral 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 November 1, 2017, through January 31, 2018, 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 January 25, 2018, to consider a Supplement to the Motion to extend the authorization to use cash collateral. On or before, January 11, 2018, Debtor in Possession shall file and serve supplemental pleadings for the further use of cash collateral and notice of the January 25, 2018 hearing. Any opposition to the requested use of cash collateral may be presented orally at the hearing.

4. **17-25576-E-11** **KEVIN KENNEDY** **MOTION TO EMPLOY MIKALAH RAYMOND LIVIAKIS AS ATTORNEY**
MRL-1 **Mikalah Liviakis** **8-30-17 [11]**

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, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on August 30, 2017. By the court's calculation, 36 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Employ is denied without prejudice.

Kevin Kennedy ("Debtor in Possession") seeks to employ Liviakis Law Firm, PC ("Counsel") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor in Possession seeks the employment of Counsel to assist with prosecuting this Chapter 11 case.

Debtor in Possession argues that Counsel's appointment and retention is necessary for the specialized practice of Chapter 11 cases. Debtor in Possession states that $4,000.00 has been deposited with Counsel as a retainer, of which Counsel will receive $3,950.00 for fees and $50.00 for costs. For post-petition work, Debtor in Possession proposes to pay Counsel $11,000.00 as a flat fee for services performed in this case. Debtor in Possession has agreed with Counsel to deposit $1,833.00 per month to Counsel beginning October 2017 and continuing through March 2018.

Debtor in Possession argues that the Counsel's fees are property of the Estate, and Debtor in Possession requests that the court approve them and authorize payment of them now.

Mikalah Liviakis, of Liviakis Law Firm PC, testifies that he has experience handling Chapter 11 cases and that Debtor in Possession has deposited a $4,000.00 retainer for retention of his legal services. Mr. Liviakis testifies he and the firm 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, the U.S. Trustee, any party in interest, or their respective attorneys.

UNITED STATES TRUSTEE'S OBJECTION

Tracy Hope Davis ("the U.S. Trustee") filed an Objection in opposition to the Motion on September 21, 2017. Dckt. 21. The U.S. Trustee argues that no fees should be authorized yet because Debtor in Possession has not presented an application pursuant to 11 U.S.C. § 330(a).

Additionally, the U.S. Trustee opposes authorization of an advance fee structure as unwarranted in this case, Debtor in Possession not having addressed *Knudsen* factors such whether is a large case, there being a large amount in fees, undue hardship on legal counsel, or recovery of reassessed fees. *Id.* at 2–3 (citing *U.S. Trustee v. Knudsen Corp. (In re Knudsen Corp.)*, 84 B.R. 668, 672 (B.A.P. 9th Cir. 1988)).

The U.S. Trustee requests that no compensation be permitted, except as allowed after application pursuant to 11 U.S.C. § 330(a), and that the sought-after compensation be determined by the lodestar rate. The U.S. Trustee also requests that any funds received for post-petition services be deemed an advance payment of fees that are property of the Estate and that are maintained in a trust account bearing interest in an authorized depository.

DISCUSSION

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.

As an initial point, that a Chapter 11 attorney and client, especially an individual client, may agree to a flat fee for all services provided in the Chapter 11 case is not shocking. However, such employment must be carefully identified as to scope, payment, and services to be provided. Here, the authorized employment is not merely a flat fee, but is stated to be a flat fee for some scope of services, which are not specified in the Motion, and then an hourly fee on top of the flat fee for others.

Though the Motion directs the court to wade through the fee agreement to extract the scope of services, it is not unreasonable to expect experienced bankruptcy counsel to be able to clearly summarize the scope of such services in the Motion—said motion to state with particularity the grounds upon which the relief sought is based, as well as the relief itself. FED. R. BANKR. P. 9013.

Exhibit A, the Employment Agreement, is five pages of single-spaced type. Several points in the Agreement, not set out in the Motion, include:

A. Debtor is to obligated to the future Debtor in Possession to make a $1,833.00 monthly payment to Counsel for "costs and expenses" after the case is filed (presumably from property of the bankruptcy estate). If the Debtor in Possession fails to make the payment, Debtor agrees to allow counsel to seek withdrawal from the representation of Debtor in Possession.

B. Debtor agrees, apparently for Debtor in Possession, to pay the "bills" for counsel representing the future Debtor in Possession.

C. Counsel only agrees to serve as bankruptcy counsel in Debtor's bankruptcy case. It is not clear that counsel is going to be counsel for Debtor in Possession, the fiduciary of the bankruptcy estate until a Chapter 11 trustee is, if ever, appointed.

D. The services that Debtor is engaging counsel, presumably to represent Debtor in Possession (engaged pursuant to 11 U.S.C. § 327 and allowed compensation as permitted pursuant to 11 U.S.C. § 330 and § 331) are limited to the following "specific tasks:"

1. Prepare and file final version (but apparently not draft or prior to final versions) of your (not clear if Debtor or Debtor in Possession) plan and disclosure statement;

2. Prepare a motion to confirm Client's Chapter 11 plan if appropriate and attend the corresponding hearing;

3. Draft amendments to the petition, plan, disclosure statement, statements, and schedules on the U.S. Trustee (?);

4. Assist in "understanding requests" for documents from the U.S. Trustee;

5. Appear at the 341 Meeting of Creditors with Debtor and the meeting with the U.S. Trustee's Office;

6. Respond to Objections to Confirmation;

7. Prepare, file, and serve necessary motions to buy, sell, or refinance property, when appropriate;

8. Object to improper or invalid claims, if necessary, based upon documentation provided by Client;

9. Represent Client (not clear if Debtor or Debtor in Possession) in motions for relief from stay if necessary;

10. Where appropriate, prepare, file, and serve necessary motions:

    a. to avoid liens on real or personal property and to value the collateral of secured creditors,

    b. to use cash collateral, and

    c. motions to employ;

11. Prepare a motion to confirm your Chapter 11 plan if appropriate and attend the corresponding hearing; and

12. Other services necessary to further your chapter 11 case, as determined appropriate by the Firm.

E. The Employment Agreement identifies that additional work that is not included in the flat fee and is "similar to" the following:

1. Defending you against any complaint filed by the trustee or any other party in interest to deny your discharge;

2. Defending you against any complaint filed by any creditor to except its debt from discharge;

3. Defending you against any complaint filed by the trustee to avoid or to recover any transfer of property which you made before the filing of your chapter 7 petition;

4. Prosecuting any complaint which you are obligated to file for a determination that any indebtedness is dischargeable;

5. Appealing any order of judgment which is entered against you;

6. Any legal work necessary after your chapter 11 case is closed, converted, dismissed, or once you begin the payment phase of your plan.

F. The Employment Agreement provides that the "Client," who at the time of the Agreement will be Debtor, must pay the fees upon the court authorizing the award of fees. Such allowed fees would be obligations of the bankruptcy estate and the future Debtor in Possession, to be paid by the bankruptcy estate.

While the court appreciates the thoroughness of the Agreement, it appears to suffer from a significant defect—Debtor in Possession is not a party to the Agreement, only the pre-petition Debtor.

As raised by the U.S. Trustee, even if the court approves the employment for a flat fee amount, the actual allowance and payment of such fee will be the subject of either an interim approval pursuant to 11 U.S.C. § 331 or a final approval pursuant to 11 U.S.C. § 330. The court does not approve and authorize fees to be paid by Debtor in Possession (or monies of the estate held in an attorney's trust account that may be subject to the attorney's lien) in one lump sum prior to the services actually being provided. Any employment for a flat fee, as with a percentage compensation employment, is always subject to the look-back provisions of 11 U.S.C. § 328.

The court emphasizes that it is not adverse to having a flat fee agreement in a small(er) consumer Chapter 11 case, which has issues that can be identified and bracketed for Debtor in Possession and counsel. FN.1.

FN.1. As raised by the U.S. Trustee, the Bankruptcy Appellate Panel for the Ninth has discussed the appropriateness of having a fee payment scheme for professionals upon which disbursements are made before the fees are actually approved pursuant to 11 U.S.C. § 330 or § 331. The Appellate Panel affirmed the use of such a pay-then-get-approved procedure, upon consideration of various factors, which included:

> 1. The case is an unusually large one in which an exceptionally large amount of fees accrue each month;
>
> 2. The court is convinced that waiting an extended period for payment would place an undue hardship on counsel;
>
> 3. The court is satisfied that counsel can respond to any reassessment in one or more of the ways listed above; and
>
> 4. The fee retainer procedure is, itself, the subject of a noticed hearing prior to any payment thereunder.

Knudsen Corp., 84 B.R. at 672–73.

Here, as discussed below, the proposed counsel for *Debtor in Possession* has jumped the gun and seeks authorization to be employed and that the compensation be set at a flat fee of $11,000.00. The Motion then appears to take on a Janus-like nature of seeking to authorize the employment and fee scheme, recognizing that the fee will not be paid until later when allowed and disbursement authorized. Motion, p. 2:6–7. The Motion then states that counsel requests the court to authorize the payment of fees, for which the court has not yet allowed, and authorization pursuant to 11 U.S.C. §§ 327, 328, 330 and 331. That duality has resulted in the U.S. Trustee's opposition.

In this case, Debtor has not addressed the *Knudsen* factors. The court notes that the voluntary petition filed in this case states that there are fewer than fifty creditors and that the total debts are between

$100,001.00 and $500,000.00. Neither of those amounts indicate that this is a rare case that is unusually large. The court does not see any reason why Counsel cannot be fairly compensated under the lodestar analysis that is usually followed.

In reviewing the Schedules filed in this case, Debtor owns no real property and has modest personal property assets. Schedule A/B, Dckt. 1. Debtor lists no secured claims on Schedule D. *Id.*

However, on Schedule E/F, Debtor lists $16,600 in priority tax claims and $45,517.50 in priority domestic support obligation claims. *Id.* For general unsecured claims (including $267,816 in tax claims) Debtor lists $396,754 (which includes, in addition to the tax claims, student loan debt of $113,414). *Id.*

Given the limited number of creditors, the modest priority claims, and Debtor's income (Schedule I, *id.*), this may well be a case in which there is a focused push to either a confirmed Chapter 11 plan or dysfunctional fighting between Debtor in Possession and creditors with priority claims.

The U.S. Trustee has not opposed Counsel's employment, just the proposed fee structure. While the court does not see any hindrance to Counsel's employment, and while Counsel has testified that he is qualified and disinterested, the court does not approve the Motion with the current fee structure. The Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by Kevin Kennedy ("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 without prejudice.

5. **16-25899-E-7** **JUDITH ACERETO** **MOTION FOR ADMINISTRATIVE EXPENSES**
SLC-4 **Stephen Murphy** **9-18-17 [80]**

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, and Office of the United States Trustee on September 18, 2017. By the court's calculation, 17 days' notice was provided. 14 days' notice is required.

The Motion for Allowance of Administrative Expenses 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, ----------.

The Motion for Allowance of Administrative Expenses is granted.

Sheri Carello, the Chapter 7 Trustee, ("Movant") requests payment of administrative expenses in the total amount of $65,378.00 for 2016 capital gains taxes owed to the Franchise Tax Board ("FTB") and Internal Revenue Service ("IRS"). Movant states that she is holding $327,906.11 for the Estate, and she seeks to pay $15,832.00 to the FTB and $49,546.00 to the IRS.

DISCUSSION

Movant argues that she employed a certified public accountant to prepare estate income tax returns, and after a sale of property in May 2017, Movant was required to file tax returns to pay capital gains taxes from the sale of property.

Section 503(b)(1)(A) of the Bankruptcy Code accords administrative expense status to "the actual, necessary costs and expenses of preserving the estate . . . ." Here, Movant has shown that the Estate has incurred tax liabilities that must be paid to preserve the Estate.

The Motion states that the capital gains taxes were incurred for the 2016 tax year, but the property sale that Movant argues is related to the taxes occurred in 2017. At the hearing, Movant explained xxxxxxxxxxxxxxxxxx.

Movant having demonstrated that the expenses were necessary, the court finds that Movant paying capital gains taxes is necessary and provides benefit to the Estate. The Motion is granted, and Movant is authorized to pay administrative expenses in the amount of $15,832.00 to the FTB and $49,546.00 to the IRS.

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 Administrative Expense filed by Sheri Carello, the Chapter 7 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, and the Chapter 7 Trustee is authorized to pay the Franchise Tax Board $15,832.00 and the Internal Revenue Service $49,546.00 each as an administrative expense of the Chapter 7 Estate in this case pursuant to 11 U.S.C. § 503(b)(1).