UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

October 22, 2015 at 10:30 a.m.

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1. 11-94410-E-7 HSM-31 | SAWTANTRA/ARUNA CHOPRA Robert M. Yaspan | CONTINUED MOTION TO EXTEND TIME 12-12-14 [1161]

CONTINUED: 9/3/15

Final Ruling: No appearance at the October 22, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on January 14, 2015. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The hearing on the Motion to Extend Time to File Objections to Debtors' Claims of Exemptions is continued to 10:30 a.m. on December 3, 2015.

Gary Farrar, the Chapter 7 Trustee, filed the instant Motion for Order Extending Time to File Objections to the Debtors' Claims of Exemptions. Dckt. 1161.

The current deadline to file objections to the Debtors' claims of exemptions is presently set for December 15, 2014. Dckt. 1092, Notice of Conversion to Chapter 7, Meeting of Creditors, and Deadlines. The Trustee requests that the deadline for the Trustee to object to the Debtors' claims of exemptions be extended until February 16, 2015. The Motion to Extend the deadline was filed on December 12, 2014.

The Trustee argues that cause exists because, prior to the conversion of the case to Chapter 7, the Debtors filed a number of schedule amendments. The Debtors' most recent Schedule B, filed September 20, 2013, lists the following assets:

Sawtantra Chopra MD, Inc., Profit Sharing Plan Assets in the Profit Sharing Plan including the following: Chase Acct# ending in 7539 - $463,755 Wells Fargo Investment Account - Approximate value of $1 million Note & Deed of Trust in favor of Sawtantra Chopra MD, Inc., Profit Sharing Plan as Beneficiary, Onkar Inc., as Trustor secured by properties with the following APNs 033-044-099, 033-044-010, 033-044-012, 033-044-013, 033-044-014, and 033-044-019 - The face value of this note is $350,000, but Debtor is not sure of the actual value of the note due because Debtor is not sure how much equity exists in these properties. Other Notes - See Attached.	H	$1,813,755.00

In the Debtors most recent Schedule C, filed September 20, 2013, the Debtors claimed the retirement plans as exempt in their entirety pursuant to 11 U.S.C. § 522(b)(3)(C).

Prior and subsequent to the Meeting of Creditors, the Trustee and his counsel have requested current account statements for the retirement plans and original documentation related to the loans scheduled as assets of this estate, including those purportedly in the retirement plans, but non have been provided. By email dated November 6, 2014, Debtors' counsel informed the Trustee that the Debtors do not have the originals of the promissory notes although they are still looking for them. Dckt. 1165, Exhibit C.

At the Meeting of Creditors, held November 13, 2014, the Trustee requested on the record that the Debtors provide the Trustee with a current account statement for the Debtors' retirement assets. The Debtors have not provided him with the requested statements. The only documents the Trustee states the Debtors have provided in response to the Trustee's request are tax returns for their pension plan for the years 2001-2012.

Additionally at the Meeting of Creditors, the Trustee questioned the Debtors concerning the carious deeds of trust, for which the Debtors and/or the

Sawtantra Chopra MD Profit Sharing Plan were scheduled as beneficiaries the Debtors' responses did not satisfy the Trustee's inquiry into the process and reasons by which one or more deeds of trust, of which Joint-Debtor Aruna Chopra, individually, was the original beneficiary, came to be included in the Debtors' retirement plans.

Trustee states that on November 18, 2014, Trustee's counsel reiterated to Debtors' counsel the Trustee's request for current account statement for the Debtors' retirement plans and discussed issues related to the notes/deeds of trust purportedly in the plans. Trustee's counsel followed up the call with an email to Debtors' counsel. By email on November 21, 2014, Trustee's counsel followed up with a more detailed email to Debtors' counsel, reiterating the Trustee's request again. Trustee states that no current account statement has been provided to the Trustee or Trustee's counsel.

Obtaining a precise accounting of the retirement plans, their balance, and information concerning exactly what assets are currently contained in the plans, and how those assets came to be in the plans, is important to the Trustee's evaluation of the Debtors' claims of exemptions.

DEBTORS' OPPOSITION

The Debtors filed an opposition to the instant Motion on January 29, 2015. Dckt. 1187. The Debtors state that the Motion should be denied because it: (1)it fails to establish cause to grant relief; (2) the Trustee is guilty of laches; and (3) granting the Motion would significantly impair Debtors' Sixth Amendment right to representation. The Debtors make the following arguments:

1. The time frame for objection to Debtors' exemptions has expired under applicable Ninth Circuit law. Under *In re Smith*, 235 F.3d 472 (9th Cir. 2000), 11 U.S.C. § 348 "preserve[s] actions already taken in the case before conversion. . . section 348(a) establishes the general rule that, in a converted case, the dates of filing, the commencement of the case, and the order for relief remain unchanged." Id. at 477. In short, the Debtors argue that once the time frame for objecting to an exemption has expired, the exempt property revests in the debtor and is no longer subject to objection. In this case, the Debtors state that the time to object to Debtors' claim of objection expired in April 2014.

2. The recent changes to Fed. R. Bankr. P. 1019 cannot change the substantive law on the issue. The Debtors argue that 28 U.S.C. § 2075 sets forth the rule making power of the court and the limitations thereon, making the Bankruptcy Court rules procedural and not creating substantive rights. The 2010 amendment to Fed. R. Bankr. P. 1019 that added section (2)(B) cannot affect this case since it attempts to change the substantive law of the Ninth Circuit. The provision purports to create a new time period for filing objections to exemptions after a conversion. However, since the Smith court established the law on this issue in the ninth Circuit and ruled that the exempt property vested in the debtor and that there was no

provision in the Bankruptcy Code that could bring the exempt property back into an estate after conversion. The Bankruptcy Rules cannot create substantive rights that are not provided under the Bankruptcy Code. As such, the Trustee cannot rely on Fed. R. Bankr. P. 1019 to bring this Motion and the Motion should be denied.

3. The Motion fails to establish cause for the requested relief. Even if the motion were timely, the Trustee has failed to establish the requisite "cause" under Fed. R. Bankr. P. 4003. Although Rule 4003 does not provide any clarification regarding the meaning of cause, it should be presumed that cause means good cause not just any excuse. As the Bankruptcy Court are courts of equity, the issue of good cause should be determined by balancing the respective benefits and burdens of parties along with other equitable considerations including the principles of laches. The time period to object to the exemptions has been extended at least five times for a total time period of almost three years. The Trustee has been a party to the last four of the extension. The Trustee entirely fails to adequately explain why it has taken almost two years to determine whether to object to the exemptions, why he has not been able to make the decision at this time, and why he should be entitled to more time to do so. The Debtors contend that the Motion fails to provide any specificity regarding the information the Trustee is looking for and what issues, if any, he has with the exemptions. The Debtors argue that an extension of time is extremely prejudicial to Debtors because they are under criminal prosecution and need access to exempt assets to fund their defense. Debtors have been unable to use the funds to pay their criminal attorneys and will soon be deprived of representation in their cases which implicates their Sixth Amendment rights.

4. The motion should be denied because it will significantly impair Debtors' Sixth Amendment Rights. The Trustee has sent letters that have effectively frozen the accounts. Debtors have been unable to use the funds to pay for their criminal attorneys. The trustee is interfering with Debtors' Sixth Amendment right to representation and any extension of time to file the objections will further impair Debtors' constitutional rights. In the present case, the Trustee has sent letters to the investment managers for Debtors' profit sharing plan, effectively freezing the accounts in violation of the Debtors' Sixth Amendment rights. See *United States v. Stein*, 541 F.3d 130, 154 (2d Cir. 2008).

ORDER CONTINUING THE HEARING

On February 9, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1197.

On February 10, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to

10:30 a.m. on March 26, 2015.

ORDER CONTINUING THE HEARING

On March 19, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1208.

On March 23, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on May 21, 2015. Dckt. 1222.

ORDER CONTINUING THE HEARING

On May 15, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1295.

On May 18, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on June 11, 2015. Dckt 1302.

ORDER CONTINUING THE HEARING

On June 4, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1318.

On June 5, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on July 23, 2015.

ORDER CONTINUING THE HEARING

On July 16, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1346.

On July 16, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on September 3, 2015.

ORDER CONTINUING THE HEARING

On August 27, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1375.

On August 31, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on October 22, 2015.

APPLICABLE LAW

Fed. R. Bankr. P. 1019 states in relevant part:

> When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:...
>
> (2) New filing periods
>
> ....
>
> (B) A new time period for filing an objection to a claim of exemptions shall commence under Rule 4003(b) after conversion of a case to chapter 7 unless:
>
> (I) the case was converted to chapter 7 more than one year after the entry of the first order confirming a plan under chapter 11, 12, or 13; or
>
> (ii) the case was previously pending in chapter 7 and the time to object to a claimed exemption had expired in the original chapter 7 case.

Fed. R. Bankr. P. 1019

The court may, on motion and after a hearing on notice, extend the time for objecting to the entry of discharge for cause. Fed. R. Bankr. P. 4004(b)(1). The court may extend this deadline, so long as the request for the extension of time was filed prior to the expiration of the deadline. Fed. R. Bankr. P. 4004(b)(1).

DISCUSSION

On October 16, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1390.

The court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on December 3, 2015.

2. 11-94410-E-7 SAWTANTRA/ARUNA CHOPRA
HSM-32 Robert M. Yaspan

CONTINUED MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR
12-23-14 [1167]

CONTINUED: 9/3/15

Final Ruling: No appearance at the September 3, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on December 23, 2014. By the court's calculation, 51 days' notice was provided. 28 days' notice is required.

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

The hearing on the Motion to Extend Deadline to File a Complaint Objecting to Discharge of the Debtor is continued to 10:30 a.m. on October 22, 2015.

Gary Farrar, the Chapter 7 Trustee, filed the instant Motion to Extend Deadline to File a Complain Objecting to Discharge of the Debtor on December 23, 2014. Dckt. 1167.

The Trustee states that the deadline to file a complaint objecting to the discharge of the Debtors is set for December 29, 2014. The Trustee requests that the deadline for the Trustee to file a complaint objecting to the discharge of the Debtors be extended until February 27, 2015.

The Trustee argues that cause exists because this is an extraordinarily complex case, involving many assets, and intense disputes between the Debtors and creditors regarding allegations of pre-petition criminal wrongdoing. This case was pending for some time in a Chapter 11 to provide the Debtors an

opportunity to confirm a plan based around the Dale Road Project. The efforts to reorganized failed and all the estate's real property assets were abandoned except a single Dale Road Parcel and an office building in Modesto. The case was converted to a Chapter 7 and the Trustee is attempting to administer the estate's remaining assets.

The Trustee states that he has been diligent in his investigation of the Debtors' financial affairs. An undisclosed issue which arose in the Debtors' disclosure statement filed prior to the conversion of the case was a $310,000.00 loan from the Debtors' adult son and daughter-in-law which was discovered at the Meeting of Creditors. The Trustee requires additional time to consider the responses of the Debtors concerning this loan and whether additional investigation is needed. Furthermore, the Debtors stated that they would file amended schedule of creditors who were not previously listed.

The Trustee is also awaiting records of the current account statement for the Debtors' retirement assets as well as information concerning various notes and deeds of trusts, which the Debtors have not yet provided. The Trustee states that he expects the Debtors will provide this information voluntarily or the Trustee will make additional motions for the production of such information.

ORDER CONTINUING THE HEARING

On February 9, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1200.

On February 10, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on March 26, 2015.

ORDER CONTINUING THE HEARING

On March 19, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1211.

On March 22, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on May 21, 2015. Dckt. 1223.

ORDER CONTINUING THE HEARING

On May 15, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1298.

On May 18, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on June 11, 2015. Dckt. 1303.

ORDER CONTINUING THE HEARING

On June 4, 2015, the Trustee filed an ex-parte Motion to Approve

Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1322.

On June 5, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on July 23, 2015.

ORDER CONTINUING THE HEARING

On July 16, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1350.

On July 16, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on September 3, 2015.

ORDER CONTINUING THE HEARING

On August 27, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1378.

On August 31, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on October 22, 2015.

APPLICABLE LAW

Federal Rule of Bankruptcy Procedure 1017(e)(1) provides that the court may extend for cause the time for filing a motion pursuant to 11 U.S.C. § 707(b). The court may, on motion and after a hearing on notice, extend the time for objecting to the entry of discharge for cause. Fed. R. Bankr. P. 4004(b). The court may extend this deadline, so long as the request for the extension of time was filed prior to the expiration of the deadline. Fed. R. Bankr. P. 9006(b)(1).

DISCUSSION

On October 16, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1393.

The court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on December 3, 2015.

3. 15-90510-E-7 ISA/THALJIEH SALEM **MOTION TO AVOID LIEN OF UNIFUND**
WMS-1 Wilber Manuel **CCR, LLC**
9-5-15 [34]

DISCHARGED: 9/22/15

Final Ruling: No appearance at the October 22, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Unifund CCR, LLC, parties requesting special notice, and Office of the United States Trustee on September 5, 2015. By the court's calculation, 47 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Unifund CCR, LLC ("Creditor") against property of Isa M. Salem and Thaljieh Issa Salem ("Debtor") commonly known as 2716 Rivercove Drive, Riverbank, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $33,025.89. An abstract of judgment was recorded with Stanislaus County on November 7, 2013, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $183,128.50 as of the date of the petition. The unavoidable consensual liens total $136,087.58 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of $75,000.00 on Schedule C. Dckt. 1 Schedules A, D; Dckt. 32 Amended Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore,

the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) 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 judgment lien of Unifund CCR, LLC, California Superior Court for Stanislaus County Case No. 681364, recorded on November 7,2013, document No. 2013-0092813-00, with the Stanislaus County Recorder, against the real property commonly known as 2716 Rivercove Drive, Riverbank, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

4. 15-90510-E-7 ISA/THALJIEH SALEM
WMS-2 Wilber Manuel

MOTION TO AVOID LIEN OF PORTFOLIO RECOVERY ASSOCIATES. LLC
9-5-15 [40]

DISCHARGED: 9/22/15

Final Ruling: No appearance at the October 22, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Portfolio Recovery Associates, LLC, parties requesting special notice, and Office of the United States Trustee on September 5, 2015. By the court's calculation, 47 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Portfolio Recovery Associates, LLC ("Creditor") against property of Isa M. Salem and Thaljieh Issa Salem ("Debtor") commonly known as 2716 Rivercove Drive, Riverbank, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $2,198.70. An abstract of judgment was recorded with Stanislaus County on February 24, 2015, Document No. 2015-0013392-00, which encumbers the Property. Dckt. 42 ¶ 3.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $183,128.50 as of the date of the petition. The unavoidable consensual liens total $136,087.58 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730(a)(1) in the amount of $75,000.00 on Schedule C. Dckt. 1 Schedules A, D; Dckt. 32 Amended Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore,

the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) 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 judgment lien of Portfolio Recovery Associates, LLC, California Superior Court for Stanislaus County Case No. 681557, recorded on February 24, 2015, Document No. 2015-0013392-00 with the Stanislaus County Recorder, against the real property commonly known as 2716 Rivercove Drive, Riverbank, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

5. 15-90811-E-7 NB-1 — ASSN., GOLD STRIKE HEIGHTS HOMEOWNERS — MOTION TO EMPLOY CLIFFORD W. STEVENS AS ATTORNEY(S) 9-22-15 [10]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on October 8, 2015. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Employ is xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

TRUSTEE'S MOTION TO EMPLOY COUNSEL

Chapter 7 Trustee, Gary Farrar, seeks to employ Counsel Clifford W. Stevens pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks to employ Counsel to provide advice and assistance with the rights and remedies of the estate's assets, to represent Trustee in suits arising or related to the case, to investigate and prosecute preference and other actions under Trustee's avoiding powers, to prepare pleadings, motions, and orders, and to advise Trustee in the termination of the operation of Debtor's business. Dckt. 10.

Clifford W. Stevens, an associate of Neumiller & Beardslee ("Applicant"), filed a declaration on September 22, 2015. Dckt. 12. Applicant testifies from his personal knowledge to the following to the following:

1. On or about August 31, 2015, Trustee requested the employment of Neumiller & Beardslee;

2. On or about September 21, 2015, Trustee and the firm entered into a letter fee agreement;

3. Neumiller & Beardslee does not have any connection with the Debtor, Debtor's accountants, creditors, any other party in interest, the U.S. Trustee, or any person employed by the US. Trustee, except:

   a. On February 5, 2013, attorney Gregory Maxim emailed Applicant background information regarding Gold Strike Heights Homeowners Association and asked Applicant if he was interested in discussing bankruptcy options. In the email, Maxim indicated he was reaching out to multiple local bankruptcy attorneys.

   b. On February 13, 2013, Applicant met Maxim and Maxim's client through two members of the board of directors. Neumiller & Beardslee was not retained by Gold Strike, was never invoiced, and was never paid for any services.

   c. During the February 13, 2013 meeting and in a subsequent email from Mr. Maxim, Applicant and Maxim discussed a judgment against Gold Strike and the financial difficulties that Gold Strike faced. "While [Applicant] hoped that Gold Strike might engage the firm for assistance, they never did."

   d. On March 30, 2015, Mark Cooper, one of the board members, emailed Applicant to inquire on representation by the firm. The firm did not agree to represent Gold Strike, and confirmed the non-representation on April 13, 2015. Receipt of the e-mail was confirmed by Cooper on April 15, 2015, along with indications that the Gold Strike board was still looking at options for counsel and would "get back to [Applicant] once a decision on bankruptcy and counsel was made." Cooper did not contact Applicant.

   e. Applicant declares he "[does] not believe that I have any confidential information, the firm was never hired by the entity, and the firm never represented Gold Strike or any of the individual directors."

   f. The firm represented San Andreas Sanitary District in a matter adverse to Indian Village Estates, LLC and Mark Weiner. *Weiner v. San Andreas Sanitary*, Case No. 10CV36793 (Calaveras Cnty. Sup. Crt.)FN.1. Plaintiffs sought relief related to sewer connection rights and fees, and a cross-complaint for rescission of the sewer connection agreement. The matter was resolved in 2013.

FN.1. (accessible through the Calaveras Superior Court website at https://cacalaverasodyprod.tylerhost.net/Portal/).
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g. The firm represented a client concerning Calaveras County Tax Collector in matters unrelated to Debtor.

h. The firm represented a client with the surname Manly in a matter unrelated to Debtor.

i. The firm represents and represented clients with the surname Newell in matters unrelated to Debtor.

j. The firm represented a client with the surname Robinson in a matter unrelated to Debtor.

k. The firm represents and represented clients with the surname Lee in matters unrelated to Debtor.

l. The firm represents and represented clients with the surname Shannon in matters unrelated to Debtor.

m. The firm represents and represented clients with the surname Peterson in matters unrelated to Debtor.

n. The firm represents and represented clients with the surname Castro in matters unrelated to Debtor.

o. The firm represents and represented clients with the surname Cooper in matters unrelated to Debtor.

p. The firm represents and represented clients with the surname Thomas in matters unrelated to Debtor.

q. The firm represents and represented clients with the surname Weiner in matters unrelated to Debtor.

r. The firm represents Gary Farrar as trustee in other bankruptcy matters, many of whom have creditors connected with this debtor. None of the matters relate to this debtor.

4. Finally, Applicant believes the firm does not represent any entity that has an adverse interest to this case, and is a disinterested person within 11 U.S.C. §§ 101(14) and 328(c).

Dckt. 12 ¶ 3-9.

COURT'S ORDER FOR APPLICANT TO SET A NOTICED HEARING ON MOTION TO BE EMPLOYED

On September 24, 2015, this court entered an order which stated:

> **IT IS ORDERED** that Applicant shall set the Application for a noticed hearing. In addition to serving the current pleadings and notice, Applicant shall provide a supplemental points and authorities addressing the potential conflicts and

> disqualifications for an attorney and law firm in the situation where the attorney meets with a potential client does not proceed with the representation, and then seeks to represent an adverse party in connection with litigation concerning the prior matters discussed with that attorney.
>
> The court will not issue an order authorizing the employment pursuant to the Ex Parte Application.

Dckt. 14.

APPLICANT'S OCTOBER 8, 2015 MEMORANDUM OF POINTS AND AUTHORITIES

On October 8, 2015, Applicant filed the ordered Memorandum of Points and Authorities. Dckt. 17. Applicant argues that representing the Chapter 7 Trustee after contacting the Debtor corporation as a potential client is not representing adverse interests under the *Weintraub* case. Alternatively, Applicant argues that the Duties of Loyalty and Confidentiality will not be infringed by this representation, Bankruptcy law does not prohibit the representation, and there will be no appearance of impropriety.

Weintraub Case

First, Applicant argues that Applicant and his firm are not moving to be employed by an adverse party to the Debtor-corporation as provided under *Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343, 356-57 (1985). Applicant cites to *Weintraub* for the proposition that:

> a corporate-debtor is "an inanimate entity [which] must act through agents. When the corporation is solvent, the agent that controls the corporate attorney-client privilege is the corporation's management. Under our holding today, this power passes to the trustee because the trustee's functions are more closely analogous to those of management outside of bankruptcy than are the functions of the debtor's directors. An individual, in contract, can act for himself; there is no "management" that controls a solvent individual's attorney-client privilege. If control over that privilege passes to a trustee, it must be under some theory different from the one that we embrace in this case.

Id. Here, Applicant argues the privilege belongs to the bankruptcy trustee who controls any duty of loyalty and/or confidentiality that Applicant owed to the board members from their pre-bankruptcy communications. Thus, there is no conflict from Applicant representing Trustee after discussing representation with the debtor-corporation's board members. Dckt. 17 p. 3.

Duty of Loyalty to a Potential Client

Applicant acknowledges that conflict analysis is left to the bankruptcy court, and that the analysis is governed by California law.

In short, Applicant asserts that a "Client" under California Evidence Code § 951 "means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or

securing legal service or advice from him in his professional capacity...” This was explored in the State Bar of California Standing Committee on Professional Responsibility and Conduct’s Formal Opinion No. 1984-84, attached by Applicant as Exhibit A. Dckt. 18 Ex. A. There, the Committee stated “[W]here a person seeks the assistance of an attorney with a view to employing him professionally, any information acquired by the attorney is privileged whether or not actual employment results.” Thus, privilege extends to actual and potential clients.

Applicant also looks to cases analyzing conflicts arising from prior representation. Under the authority cited, courts should focus on the subject of the prior representation to see if the attorney could have received confidential information that is relevant and material to the present representation; if there is a substantial relationship between the former and current representation, the court will conclusively presume the attorney possesses confidential information adverse to the former client. However, Applicant asserts that there is no adversity between the potential client and the trustee because, as argued using *Weintraub*, the potential client and the actual client are identical. This is counter analogous to a Chapter 7 corporate debtor’s attorney representing the chapter 7 trustee in the same case because of the duties that debtor must perform, such as producing information, attending the meeting of creditors, and compensation of the attorney. Dckt. 17 p. 4-6.

In sum, Applicant asserts there is no reason to deny this motion for a conflict of interest arising from the duty of loyalty.

Duty of Confidentiality

Summarily, Applicant asserts that any confidential information owned by the potential client would be owned by trustee in this case, and thus confidentiality is not grounds for denial. Alternatively, Applicant asserts that “to the extent ownership of the privilege is not enough, and the court requires waiver of the privilege, the trustee has agreed to waive the privilege to assist in th Firm’s employment.” Dckt. 17 p. 6-7.

Application of Bankruptcy Law

Next, Applicant argues the applicable bankruptcy provisions do not support disqualification. First, 11 U.S.C. § 327(a) requires a professional be “disinterested” and “not hold or represent an interest adverse to the estate.” A person is “disinterested” if, under 11 U.S.C. § 14, the person is: (A) not a creditor, equity holder, or an insider; (B) not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and (C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor. Second, 11 U.S.C. § 327(c) requires that employment be disapproved if there is an actual conflict of interest. Third, Fed. R. Bankr. P. 2014(a) requires a showing of specific facts that, to the best of applicant’s knowledge, all the person’s connections with the debtor, creditors, parties in interest, their respective attorneys and accountants, the U.S. Trustee, or any person employed in the office of U.S. Trustee.

Applicant asserts that he does not have an interest materially adverse to the interests of the estate. At most, the meeting with debtor corporation's board member created an indirect relationship. Disqualification does not serve the policy articulated in *Rome v. Braunstein*, a 1st Circuit case that states the statutory requirements of "disinterestedness and no interest adverse to the estate - serve the important policy of ensuring that all professionals appointed pursuant to section 327(ca) tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities." *Rome v. Braunstein*, 19 F.3d 54, 58 (1st Cir. 1994).

Thus, under relevant bankruptcy law, Applicant is disinterested, or lacks an interest sufficient to violate the policies underlying the 11 U.S.C. § 327 requirements. Dckt. 17 p. 7-9.

Appearance of Impropriety

While Applicant acknowledges that the court may properly exercise its discretion to deny an application if there is an appearance of impropriety, Applicant against looks to the 1st Circuit *Rome* case for comparison. *Rome*, 19 F.3d at 58. In *Rome*, Applicant asserts the attorney was representing both the corporate debtor-in-possession and two individuals, who were officers of the debtor corporation. *Id.* at 59. Applicant merely asserts that unlike *Rome*, these facts to not give the same appearance of impropriety. Also, comparing to the *Weintraub* case, an appearance of impropriety is suggestive of an actual impropriety that indicates a tainted representation; this case does not present evidence of a tainted representation. Dckt. 17 p. 9-10.

On these grounds, Applicant asserts that the representation of Trustee is proper because there is no conflict of interest, and no adversity, between Trustee and Debtor.

SUPPLEMENTAL DECLARATION OF CLIFFORD STEVENS

Applicant filed a Supplemental Declaration on October 14, 2015. Dckt. 22.

On further investigation, Applicant discovered an additional connection requiring disclosure. This connection is to creditor Westwind Development, Inc. who is listed as a creditor in Debtor's Schedule F. From approximately November 10, 2006, through August 13, 2009, Neumiller & Beardslee represented Steven and Marie Hillberry in their individual and trustee capacities in an action filed against Westwind Development, Inc, Al Woolworth, and Frank Maegher. *Hillberry v. Westwind Development*, CV33468 (Calaveras Superior Court) (accessible through the Calaveras Superior Court website at https://cacalaverasodyprod.tylerhost.net/Portal/). The dispute was on an alleged failure to convey real property to the partnership, breach of contract, specific performance, breach of fiduciary duty, conversion, fraud, constructive fraud, constructive trust, equitable lien, breach of implied covenant of good faith and fair dealing, and accounting. Default was entered, but no judgment was issued. The case was voluntarily dismissed on August 13, 2009, which is when representation of Hillberry ceased. Applicant declares there is no current representation of Hillberry, and no current representation adverse to Westwind Development. Dckt. 22 ¶ 3-5.

In addition, Applicant notes that Frank Maegher signed the articles of incorporation for Gold Strike Heights Association, a predecessor entity, not the Debtor in this case. The Articles for non-debtor Gold Strike Heights Association was filed in California on March 5, 2002. Debtor Gold Strike Heights Homeowners Association filed its Articles of Incorporation on may 15, 2007, through signatory Don Lee. Maegher is not mentioned in the bankruptcy schedules, and Applicant has no known connection to Don Lee. Id. at ¶ 6-7.

CREDITOR DON LEE'S OCTOBER 15, 2015 OPPOSITION

Don Lee, as a Creditor *pro se* ("Creditor"), filed opposition on October 15, 2015. Dckt. 24. Creditor asserts two grounds for denying Applicant as counsel for Trustee: first, that there is an appearance of conflict, if not a real conflict; second, that Applicant failed to disclose important facts

On the apparent or actual conflict, Creditor argues without citation to legal authority. Creditor asserts that, at the meeting between the board of director officers, their counsel, and Applicant, there should be more information exchanged on the scope of potential representation. Creditor alleges that:

1. regardless of client or potential client status, Applicant owes Debtor a duty of confidentiality because of the amount of information discussed exploring Debtor employing Applicant;

2. the fact that Debtor's officers had an HOA attorney, Mr. Maxim, shows confidential information was disclosed at that meeting;

3. Applicant's firm represented parties against the largest creditor, Indian Village Estates, LLC, who is also the largest property owner in the subdivision that Debtor managed;

4. Debtor and applicant discussed its options on filing bankruptcy and "resolving its financial woes," which shows Applicant played a significant role as to the largest creditor;

5. because Debtor is an HOA, which is raises more complex issues under Chapter 7 filing, the amount of information that must have been disclosed would create an apparent or actual conflict.

Dckt. 24 p. 3-5.

Second, Creditor argues that the moving papers fail to disclose important facts. Namely, Creditor alleges that the e-mails between Debtor and Mr. Stevens, mentioned in the Declarations filed by Debtor, are not included, and thus must be protected by attorney-client privilege. This apparent tension leads to a presumption of implied attorney-client privilege. Finally, while Applicant declared that, to the extent of his knowledge, he believes no confidential information was discussed, Creditor alleges that Debtor's board members and their attorney (Mike Cooper, Paul Quent, and Gregory Maxim) may have a different belief and should have filed declarations. Dckt. 24 p. 5-6

On these two grounds, Creditor asserts that Applicant's Motion to Employ should be denied.

APPLICABLE LAW

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.

Section 327(a) authorizes the employment of professional persons, only if such persons do not hold or represent an interest adverse to the estate and are "disinterested persons," as that term is defined in section 101(14) of the Code. Section 101(14) defines "disinterested person" as a person that

> (A) is not a creditor, an equity security holder, or an insider;
>
> (B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and
>
> (C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.

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

The U.S. Bankruptcy Appellate Panel for the Ninth Circuit agrees that a court should apply a totality-of-circumstances analysis in determining lack of disinterestedness under § 101(14)(C). *Dye v. Brown (In re AFI Holding, Inc.)*, 355 B.R. 139, 152 (B.A.P. 9th Cir. 2006).
The court does not subscribe to a rigid application of factors, however, but views them as aids for the court's discretionary review. *Id.*

Section 101(14)(C) has been described as a "catch-all clause" and appears broad enough to include anyone who in the slightest degree might have some interest or relationship that would color the independent and impartial attitude required by the Code. COLLIER, supra at 327.04[2][a]. Examples of such materially adverse interests include:

-- a prepetition claim against the debtor;

-- representation of a shareholder;

-- representation of an adversary;

-- representation of certain investors of the debtors; and

-- performance of services for an entity whose subsidiary is a member of the creditors' committee.

Id.

A professional failing to comply with the requirements of the Code or Bankruptcy Rules may forfeit the right to compensation. *Lamie v. United States Tr.*, 540 U.S. 526, 538-39 (2004). The services for which compensation is requested should be performed pursuant to appropriate authority under the Code and in accordance with an order of the court. 3 COLLIER ON BANKRUPTCY ¶ 327.03[c] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.)

Until proper disclosure has been made, it is premature to award fees because employment is a prerequisite to compensation and until there is proper disclosure it cannot be known whether the professional was validly employed. *See First Interstate Bank of Nevada v. CIC Inv. Corp. (In re CIC Inv. Corp.)*, 175 B.R. 52, 55-56 (9th Cir. BAP 1994)(§ 327(a) "clearly states that the court cannot approve the employment of a person who is not disinterested" and "bankruptcy courts cannot use equitable principles to disregard unambiguous statutory language").

DISCUSSION

With respect to Applicant's reliance on *Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343, 356-57 (1985), it misses the mark. While the Trustee controls the privilege rights for information concerning claims and rights of the estate, that is not what is at issue. A corporation sought to engage counsel. Though the corporation filed bankruptcy and its assets went into the bankruptcy estate, the corporate entity exists and is a party to this bankruptcy case.

What counsel and the Trustee propose is taking an attorney who had some dealings, though never retained by the pre-petition Debtor, and have that attorney affirmatively advocate against potential interests of the Debtor corporation. This is the same as if no bankruptcy case was filed, the corporation interviewed and disclosed information to potential counsel, and then an adverse party sought to hire that counsel to advocate against the corporation.

At the hearing, xxxxxx

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is xxxx.

6. 14-90012-E-7 ICE-1 **JOE/CHRISTI MARTINEZ** **Ashley R. Amerio** **MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH MIGUEL RAMIREZ 9-4-15 [15]**

DISCHARGED: 4/17/14

Final Ruling: No appearance at the October 22, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, and Office of the United States Trustee on September 4, 2015. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

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

The Motion for Approval of Compromise is granted.

Irma Edmonds, the Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Jimmy Gonzalez ("Settlor"). The claims and disputes to be resolved by the proposed settlement are a preferential payment or fraudulent conveyance by the Debtors to Settlor in the amount of $2,500.00 made within one year preceding the case.

Movant and Settlor has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (No copy of a Settlement Agreement was provided as an exhibit. Instead, the Movant provided the following as to the proposed compromise):

A. Approval of a gross settlement of the claim in favor of the Debtors' estate for $2,500.00.

B. Release by the estate and any other and further claims against Jimmy Gonzalez in their entirety.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328

(9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

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

Under the Settlement Movant shall recover $2,500.00 in satisfaction of the estate's claim for preferential payment or fraudulent conveyance from Settlor. Movant asserts that the property can be recovered for the estate as a preference or as a fraudulent conveyance against Settlor. This proposed settlement allows Movant to recover for the estate $2,500.00 without further cost or expense.

Probability of Success

The Movant states that while the probability of success is high, the need to litigate in light of the settlement is unnecessary. The Movant argues that the settlement provides the estate with as much money as it would if there was litigation. The settlement amount is for 100% of the claim.

Difficulties in Collection

The Movant argues that collection is not an issue since there has already been prompt payment.

Expense, Inconvenience and Delay of Continued Litigation

Movant argues that litigation would result in significant costs, which are projected based on the unsettled nature of the claim, given the questions of law and fact which would be the subject of a trial. The Movant estimates that if the matter went to trial, litigation expenses would consume a substantial amount of an expected recovery. Movant projects that the proposed settlement nets approximately the same or a grater recovery for the Estate then if the case proceed to trial, but without the costs of litigation.

Paramount Interest of Creditors

Movant argues that settlement is in the paramount interests of creditors since as the compromise provides prompt payment to creditors which could be consumed by the additional costs and administrative expenses created by further litigation.

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to the Movant to purchase or prosecute the property, claims, or interests of the estate to present such offers in open court.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Irma Edmonds, the Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Approve Compromise between Movant and Jimmy Gonzalez ("Settlor") is granted and the respective rights and interests of the parties are settled on the Terms set forth in the Motion as follows:
>
> A. Approval of a gross settlement of the claim in favor of the Debtors' estate for $2,500.00.
>
> B. Release by the estate and any other and further claims against Jimmy Gonzalez in their entirety.

7. 15-90717-E-11 MRG-3 — PLASMA ENERGY PROCESSES, INC. — Michael R. Germain — MOTION TO INCUR DEBT — 10-7-15 [37]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors, parties requesting special notice, and Office of the United States Trustee on October 7, 2015. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Incur Debt was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Incur Debt is granted.

Plasma Energy Processes, Inc. ("Debtor-in-Possession") filed the instant Motion for Authorization to Incur Secured Debt on October 7, 2015. Dckt. 37. The Debtor-in-Possession is seeking to incur a secured debt through a loan brokered by Stockton Mortgage Real Estate Loan Servicing Corporation ("Creditor") in the amount of $75,000.00 secured by one of the two real properties of the estate (namely the real property commonly known as 1041 Mark Twain Road, Angels Camp, California). The purpose of the loan is to pay in-ful, through escrow, the existing first and second deed of trust on the Mark Twain Property held by Nationstar Mortgage and Franz Sanden.

A motion to incur debt is governed by Federal Rule of Bankruptcy Procedure 4001(c). In re Gonzales, No. 08-00719, 2009 WL 1939850, at *1 (Bankr. N.D. Iowa July 6, 2009). Rule 4001(c) requires that the motion list or summarize all material provisions of the proposed credit agreement, "including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions." Fed. R. Bankr. P. 4001(c)(1)(B). Moreover, a copy of the agreement must be provided to the court. Id. at 4001(c)(1)(A). The court must know the details of the collateral as well as the financing agreement to adequately review post-confirmation financing agreements. *In re Clemons*, 358 B.R. 714, 716 (Bankr. W.D. Ky. 2007).

The Motion states that Creditor has a deed of trust against the Debtor-in-Possession's other real property commonly known as 1219 Main Street, Angels Camp, California. While the Debtor-in-Possession admits to being in default to Creditor as to the 1219 Main property, the Debtor-in-Possession states that the creditor has agreed to await payment until the 1219 Main property is sold.

Although the Debtor-in-Possession admits to be in default to the Creditor, the Debtor-in-Possession argues that Brian and Judy Wimot, who are the principals of the Debtor-in-Possession, will be able to make payments under the proposed loan if the Debtor-in-Possession cannot.

The Debtor-in-Possession states that it is unable to obtain a loan from a conventional lender. The Debtor-in-Possession states under the proposed loan, the principal amount will be $75,000.00, with simple interest at 13% per annum and monthly payments of $812.50 (principal and interest), commencing two months after close of escrow, with a balloon payment due in five years.

The Creditor will seek out investors to fund the loan. However, the Debtor-in-Possession will sign a promissory note in favor of Creditor. The $75,000.00 will be placed in escrow and, through escrow, all existing liens against the Mark Twain Property will be paid in full. "All periodic payments under the Note to be signed be [Debtor-in-Possession] will be made to [Creditor], which will in turn write checks to the investor(s) for interest payments, pursuant to [Creditor's] servicing agreement with the investor(s)." Dckt. 37, pg. 5.

In addition to the loan paying off the two secured creditors, the following costs, fees and payments will be paid through escrow:

1. Escrow fee.....$450.00

2. Notary fee.....$150.00

3. Recording fee.....$150.00

4. Credit Investigation.....$50.00

5. Administration and Processing....$956.00

6. Document preparation.....$695.00

7. Underwriting.....$695.00

8. Funding Fee.....$300.00

9. One Advance Monthly Note payment...$812.50

10. Property tax research fee.....$80.00

11. Notary and Recording fees for assignments.....$64.00

12. Wire Transfer fee......$65.00

13. Title Insurance......$895.00

14. Creditor Broker's Commission......$3,750.00

Essentially, what the Debtor-in-Possession is requesting is the court authorization for the Creditor to front a loan to the Debtor-in-Possession at 13% interest for the Creditor to then find investors to lend money to it at a lower rate so that the Creditor can make whatever marginal profit it can.

While the Motion does not specifically lay out the terms as the court would typically require, namely the fact that the Debtor-in-Possession alternates between representing the Creditor as the actual creditor and then the servicer. The Debtor-in-Possession does explain that the principals of the Debtor-in-Possession attempted to find other loans but the one offered by the Creditor was the best. Unfortunately, the Debtor-in-Possession does not provide any further specifics as to why those other proposed loans were not as favorable.

Additionally, the Debtor-in-Possession appears to not only seek authorization to incur a loan with the Creditor as the creditor, but also to pay the Creditor a commission on finding investors to fund a loan that the Creditor, in the end, will be reaping the benefits.

While not fully convinced, the court finds that the proposed credit, based on the unique facts and circumstances of this case, is reasonable. There being no opposition from any party in interest and the terms being reasonable, the motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Incur Debt filed by 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 Plasma Energy Processes, Inc. ("Debtor") are authorized to incur debt with Stockton Mortgage Real Estate Loan Servicing Corporation pursuant to the terms outlined in the Escrow Closing Statement, Exhibit 1, Dckt. 40, in which the payee of any note and beneficiary under the deed of trust is Stockton Mortgage Real Estate Loan Servicing Corporation.

8. **12-92723-E-7 JOHN/KRISTINE ROBINSON** **MOTION TO DISMISS CAUSE(S) OF**
13-9004 SSA-1 **ACTION FROM COMPLAINT AND/OR**
GRANT BISHOP MOTORS, INC. V. **MOTION FOR CLOSURE OF CASE**
ROBINSON, IV ET AL **9-30-15 [108]**

No Tentative Ruling: The Motion to Dismiss Causes of Action from Complaint and Motion for Closure of Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendants, Defendant's Attorney, Plaintiff's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on September 30, 2015. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

The Motion to Dismiss Causes of Action from Complaint and Motion for Closure of Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Dismiss Causes of Action from Complaint and Motion for Closure of Case is xxxxxxxxxxxxxxxxxxxxxx.

Grant Bishop Motors, Inc., dba Modesto European ("Plaintiff") and John and Kristine Robinson ("Defendant-Debtor") filed the instant Joint Motion for Dismissal of Portion of Adversary Claims (Objection to Debtors' Discharge), Closure of Case, and Entry of Order on September 30, 2015. Dckt. 108.

The parties state that the Plaintiff filed the instant Adversary Proceeding on January 17, 2013. The parties state that following extensive discovery and litigation, the parties entered into substantive settlement discussions. On August 19, 2015, the parties were able to reach a confidential integrated settlement agreement concerning the adversary proceeding, which the parties state is confidential.

The parties seek the following:

1. The instant Adversary Proceeding be closed, subject to being reopened.

2. Plaintiff waives and releases all objections to entry of discharge against Defendant-Debtor under 11 U.S.C. § 727 as to their general bankruptcy discharge, save and except as to Plaintiff's claims under 11 U.S.C. § 523 which are not waived, and an Order dismissing all claims under 11 U.S.C. § 727 issue.

3. The court will maintain jurisdiction to oversee the terms and conditions of this Settlement and enforcement in case of breach.

4. The court will allow Plaintiff to reopen the instant Adversary Proceeding without filing fees or costs to have a dismissal or judgment entered.

APPLICABLE LAW

Federal Rule of Civil Procedure 41, as incorporated by Federal Rule of Bankruptcy Procedure 7041, states the following:

(a) Voluntary Dismissal.

(1) By the Plaintiff.

(A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(I) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

The effect of discharge in a bankruptcy case is outlined in 11 U.S.C. § 524. In relevant part, § 524 provides:

> (a) A discharge in a case under this title--
>
> > (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
> >
> > (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and
> >
> > (3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.
>
> (b) Subsection (a)(3) of this section does not apply if--
>
> > (1)(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and
> >
> > (B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or
> >
> > (2)(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and
> >
> > (B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination

> under section 727 of this title of whether a debtor is granted a discharge.

DISCUSSION

The court's reading of the Motion is that the parties are essentially requesting the court stay the remaining Adversary Proceeding complaints (the remaining causes of action being to the nondischargeability of Plaintiff's debt) after dismissing the First Cause of Action pursuant to § 727.

The court is left lacking necessary information to craft an order that will dismiss the § 727 cause of action while allowing the specter of the remaining nondischargeable to remain. The Motion speaks to a confidential settlement agreement but is requesting that the court essentially stay the nondischargeable action to allow the discharge of the Defendant-Debtor to be entered.

However, the existence of the remaining causes of action essentially make the discharge of the Defendant-Debtor, which will be entered once the 11 U.S.C. § 727 objection to discharge cause of action is dismissed, a quasi-discharge since, according to the Motion, the Plaintiff may at any point in time move to have the Adversary Proceeding reopened. The Motion does not state what conditions must be met for the Plaintiff to have the right to reopen (or lift the stay essentially) the Adversary Proceeding to prosecute the unresolved nondischargeable causes of action.

The Motion does not discuss the ramifications of such a stay. The Motion does not discuss issues over whether there is an automatic stay in place following the discharge while there remains unresolved causes of action in the Adversary Proceeding. The Motion does not discuss issues as to whether there will be a violation of the discharge injunction if the remaining causes of action remain stayed to only later be "resurrected" by the Plaintiff through "reopening the Adversary Proceeding."

Without more information, the Motion, as it is currently presented cannot be granted.

At the hearing, xxxxx

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 Causes of Action from Complaint and Motion for Closure of Case filed by Debtor(s) 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 xxxx.

9. 09-90828-E-7 JOHN/JODENA RAMIREZ
PBG-1 Patrick B. Greenwell

NOTICE OF DEATH AND MOTION TO SUBSTITUTE A REPRESENTATIVE IN THE BANKRUPTCY CASE
8-27-15 [43]

DISCHARGED: 7/13/09
REOPENED: 4/28/15

Tentative Ruling: The Motion to Substitute has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 10, 2015. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion to Substitute has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Substitute is denied without prejudice..

Joint Debtor, Jodena Ramirez, seeks an order approving the motion to substitute the Joint Debtor for the deceased Debtor, John Ed Ramirez. This motion is being filed pursuant to Federal Rule Of Bankruptcy Procedure 1004.1.

The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

A. YOU ARE HEREBY NOTIFIED, that Debtor, John Ed Ramirez died on February 15, 2013 between the date the case was originally closed and reopened. A copy of the Death Certificate is submitted separately as an Exhibit.

B. Co-Debtor Jodena Ramirez is the surviving spouse of John Ed Ramirez and hereby moves this Court to appoint her as the decedent's successor and representative in this bankruptcy case pursuant to Fed Rules of Civ Pro 25(a) and Local Rule 1016-1.

The Motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not state with particularity the grounds upon which the requested relief is based. The motion merely states that Debtor John Ed Ramirez passed away in 2013 and that Jodena Ramirez is the successor and representative in this bankruptcy case. This is not sufficient.

There are no grounds stated as to whether a probate proceeding has been opened, whether a personal representative has been appointed for the estate of the Deceased Debtor in any other judicial proceeding, and why the surviving Debtor is an appropriate personal representative.

This bankruptcy case was closed on August 28, 2009. The surviving Debtor and the Deceased Debtor received their discharges on July 9, 2009. The Deceased Debtor passed away on February 15, 2013, now more than two years ago. The Motion does not state what interests, if any, remain in the Deceased Debtor's estate or who the successors to those interests are who would or could be the proper party in interest in this bankruptcy case.

The U.S. Trustee requested on April 27, 2015, that the court reopen this bankruptcy to allow the Trustee to administer a theretofore undisclosed asset. Motion, Dckt. 36. The Chapter 7 Trustee stated that he had learned of a possible $15,285.30 pre-petition claim of the estate relating to a settlement with Wells Fargo Bank, N.A.

Before the court appoints a personal representative for the Deceased Debtor, the court must determine that the proposed representative does not have an adverse interest to whomever is the successor to the rights and interests of the Deceased Debtor. The court cannot determine from the grounds stated with particularity in the Motion, as they may be properly supported by admissible evidence, whether the surviving spouse qualifies as the representative for whomever is the successor to the Deceased Debtor's interests in this bankruptcy case.

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 for Substitute After Death filed by 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 denied without prejudice.

10. 13-91856-E-7 BENITO HURTADO
HCS-4 Thomas O. Gillis

MOTION FOR COMPENSATION BY THE LAW OFFICE OF HERUM\CRABTREE\SUNTAG FOR DANA A. SUNTAG, TRUSTEE'S ATTORNEY(S)
9-24-15 [43]

DISCHARGED: 1/27/14

Final Ruling: No appearance at the October 22, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on September 24, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

Herum\Crabtree\Suntag, the Attorney ("Applicant") for Gary R. Farrar the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period January 17, 2014, through October 22, 2015. This period covers services provided by The Suntag Law Firm from January 17, 2015, through February 1, 2015, as well as services provided by Applicant. Dckt. 45 ¶ 3. The order of the court approving employment The Suntag Law Firm was of The Suntag Law Firm was entered on January 14, 2014. Dckt. 16. The motion approving employment of Applicant was entered on June 18, 2014. Dckt. 39. Applicant requests fees and costs in the reduced amount of $4,000.00.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

> (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?
>
> (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including general case administration, significant motions, and other contested matters. The estate has $12,462.00 of unencumbered monies to be administered as of the filing of the application. Dckt. 46 ¶ 3. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable. As discussed below, Counsel has agreed to reduce fees and costs in this case to $4,000.00, waiving the amounts in excess thereof incurred by the Trustee to obtain this recovery for the estate.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 6.5 hours in this category. Applicant assisted Client by preparing the motions for employment and compensation for Applicant. Dckt. 45 ¶ 5.

Significant Motions and Other Contested Matters: Applicant spent 28.9 hours in this category. Applicant investigated and assisted with the sale of real property, contacted third parties to investigate the title on the real property, drafted motions t employ a realtor, negotiated the sale on behalf of Client, drafted a motion to approve the settlement (which was never filed with the court), and followed-up on the settlement payments with Debtor. Dckt. 45 ¶ 6-14.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**

Dana A. Suntag, Shareholder (January 13, 2014, through March 31, 2015)	1.3	$315.00	$409.50
Dana A. Suntag, Shareholder (April 1, 2015, through October 22, 2015)	.5	$325.00	$162.50
Loris L. Bakken, Associate	9.1	$295.00	$2,684.50
Ricardo Aranda, Associate	9.9	$250.00	$2,475.00
Wendy A. Locke, Associate	10.5	$225.00	$2,362.50
Audrey Dutra, Paralegal	1.9	$90.00	$171.00
Deanna Fillon, Paralegal	0	$90.00	$0.00
	0	$0.00	$0.00
Total Fees For Period of Application			$8,265.00

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $88.86 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage		$38.46
Copying	$0.10 per page	$50.40
		$0.00
Total Costs Requested in Application		$88.86

FEES AND COSTS & EXPENSES ALLOWED

Applicant seeks to be paid a single sum of $4,000.00 for its fees and expenses incurred for the Client. First and Final Fees and Costs in the amount of $4,000.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees, Costs, and Expenses $4,000.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Herum\Crabtree\Suntag (“Applicant”), Attorney for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Herum\Crabtree\Suntag is allowed the following fees and expenses as a professional of the Estate:
>
> Herum\Crabtree\Suntag, Professional Employed by Trustee
>
> Fees, Costs, and Expenses in the amount of $4,000.00
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

11. 11-93765-E-7 JACK BIDDLE **OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS**
SSA-7 **9-23-15 [58]**

DISCHARGED: 2/8/12

Tentative Ruling: The Objection to Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Defendant's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on September 23, 2015. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Objection to Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The hearing on the objection to Debtor's claimed of exemptions is continued to 10:30 a.m. on xxxxxx, 2015. Movant shall file and serve on or before xxxxx, 2015, a supplemental Points and Authorities citing to the court grounds upon which the court may require payment of a monetary obligation of Debtor from exempt property. Replies, if any, shall be filed and served on or before xxxxx, 2015.

Irma Edmonds, the Chapter 7 Trustee objects to the Debtor's use of the California exemptions pertaining to Debtor's purported attempt to exempt his

one-half interest in probate proceeding proceeds arising from the estate of Debtor's late father, Jack Williams Biddle Sr.

Debtor's amended Schedule C attempts to exempt the sum of $22,500.00 from the estate under the wild card exemption pursuant to California Code of Civil Procedure § 703.140(b)(5). Dckt. 19.

The Trustee argues that the basis of the objection is the findings in the Stanislaus Superior Probate Court where that court found that the Debtor and his sister, Sandra Biddle, should be removed as co-administrators of their father's estate and surcharged.

The Trustee states that as a result of these post-petition events, the events have given rise to surcharge against the Debtor (in the amount of $46,000.00), the Trustee submits it is both warranted and appropriate that the court sustain the Trustee's objection to Debtor's amended Schedule C exemption in probate proceeds in the amount of $22,5000.00, or any amount, arising under California Code of Civil Procedure § 703.140(b)(5), up to the amount of surcharge found in the underlying State Court probate proceedings to the sum of $46,000.00.

The Superior Court of Stanislaus County found that Debtor and Debtor's sister both breached their duties as co-administrators and fiduciaries of their father's estate and both were ordered removed as co-administrators of their father's estate. The court surcharged Debtor $46,000.00 and Debtor's sister $13,457.00. The court found both Debtor and debtor's sister mismanaged and intentionally breached their fiduciary duties and their discharge as administrators was warranted under Probate code section 8502(a), (c), and (d).

The Trustee argues that based on this surcharge, the findings by the Superior Court subsumes the Debtor's claim of exemption in the principal amount of $22,500 (in residual probate proceeds) and, as such, the court should sustain the Trustee's Objection.

LEGAL AUTHORITIES CITED BY TRUSTEE

In the Trustee's Points and Authorities, the Trustee argues that this Objection does not run afoul *Law v. Siegel* because the Debtor's misconduct arises post-petition and post-amended exemption claim and it is not the Trustee attempting to surcharge the Debtor's exemptions to pay administrative expenses.

The Ninth Circuit has discussed post-Law v. Siegel effects on objections to debtor's exemptions. In In re Elliott, the Ninth Circuit stated the following:

> A debtor's bad faith is not a statutorily created exception to the exemption but rather is a judge-made exception under Ninth Circuit authority. The Supreme Court has now mandated in *Law v. Siegel* that "[t]he Code's meticulous ... enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions." *Id.* Accordingly, courts can no longer deny claimed exemptions or bar amendments to exemptions on the ground that the debtor acted in bad faith, when no statutory basis exists for doing so. As such, despite Elliott's apparent bad faith, his claimed

> homestead exemption must stand absent some statutory basis for its denial.

In re Elliott, 523 B.R. 188, 194 (B.A.P. 9th Cir. 2014).

The Trustee, while citing to some Ninth Circuit cases, does not provide to any statutory basis for disallowing the exemption. The court understands the Trustee's argument that the post-petition finding of the probate court and that the Debtor's breach of his fiduciary duties resulted in a surcharge on his inheritance. However, this boils down to an argument of bad faith post-petition being grounds to disallow the exemptions. As the Ninth Circuit has found post-Siegel, such an argument, without some sort of statutory exception, is not permitted.

The Points and Authorities does not cite the court any legal authority by which the court can issue a judgment (order) which can be enforced against exempt property. The one case cited by Objector is *England v. Golden*, 789 F.2d 698 (9th Cir. 1986). That case does not hold a court may order a judgment (order) be enforced against exempt property. To the contrary, the decision was that California law provided that the asset at issue could not be claimed as exempt.

The court's reading of the Motion and Points and Authorities is that the Objector is relying on "the Status which shall not be named" (11 U.S.C. § 105(a)). That judicially created general power to "do what is right" and deny (euphemistically called a "surcharge") has been repudiated by the Supreme Court. The Hon. Deborah Saltzman provides a detailed discussion of this point in *In re Lua*, 529 B.R. 766, 773 (Bankr. C.D. Cal. 2015). ("The Supreme Court emphasized that 'federal law provides no authority for bankruptcy courts to deny an exemption on a ground not specified in the Code,' and that any basis for denial of a state law exemption must arise under state law. *Id.* at 1197-98.") Judge Saltzman goes on to analyze various state law doctrines which are implicated in a debtor's ability to assert an exemption against a monetary obligation owed another.

Additionally, while "the Statute that shall not be named" cannot be the basis for taking an exemption away, this court has applied other federal law principles with respect to the ability of a party to assert claims or rights in a federal court proceeding. This has been in addition to the state law rights and obligations.

As required by the Supreme Court in *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 L. Ed. 2d 158, 173 n.14 (2010); this court is to make the correct decision based on the law, and not merely grant whatever relief is requested. The court requires more legal authority for the proposition that Debtor's conduct warrants an order requiring payment from otherwise exempt assets, determination that the exemption does not apply, determining that the property at issue is property of the estate free and clear of an exemption, or that the exemption can be terminated.

Therefore, the court sets a further briefing schedule on the Objection.

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 Debtor's Claim of Exemptions filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the objection to Debtor's claimed of exemptions is continued to 10:30 a.m. on xxxxxx, 2015. Movant shall file and serve on or before xxxxx, 2015, a supplemental Points and Authorities citing to the court grounds upon which the court may require payment of a monetary obligation of Debtor from exempt property. Replies, if any, shall be filed and served on or before xxxxx, 2015. Objection is overruled.

12. 14-91565-E-11 RICHARD SINCLAIR — **CONTINUED HEARING RE: ORDER ON NOTICE OF DISABILITY**
Pro Se — **9-24-15 [251]**

CONTINUED: 10/1/15

No 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Order on Notice of Disability is xxxxx.

On September 24, 2015, the court issued the instant Order on Notice of Disability. Dckt. 251. In the order, the court ordered the following:

Therefore, upon review of the second statement on not being legally competent (at least temporarily) due to the July 2015 auto accident filed by Mr. Sinclair (Dckt. 244), documents which appear to have been prepared by Mr. Sinclair for Dr. Machado in this case after Mr. Sinclair's law license was placed in involuntary inactive status, Dr. Machado and Mr. Sinclair stating that they have been in contempt of court, Dr. Machado failing to substitute counsel (for herself personally and in her capacity as trustee and managing member of entities ordered to produce documents) to respond to the Contempt Motion, and good cause appearing;

IT IS ORDERED that the hearing on the issues concerning the legal capacity of Mr. Sinclair and ability of

Kathryn Machado to participate individually and as the representative of other entities in light of Mr. Sinclair not being allowed to practice law, and the effect of Mr. Sinclair and Kathryn Machado having each stated that they are in contempt of court, shall be conducted at 2:00 p.m. on October 1, 2015, in conjunction with the Status Conference in this case and the Contempt Motion.

BACKGROUND

On August 31, 2015, this court issued an order denying the request of Richard Sinclair, the Chapter 11 Debtor and Debtor in Possession ("Mr. Sinclair"), to stay all matters until September 15, 2015. Order, Dckt. 233. That order included a brief survey of this case, the parties, and the pleading deficiencies. The court denied the request for the stay in light of there (1) being no hearings pending prior to September 15, 2015, (2) Mr. Sinclair stating that the disability was expected to abate August 31, 2015, and (3) the upcoming hearings would be conducted in conjunction with the Status Conference in this bankruptcy case, at which time the court would conduct a preliminary consideration of Mr. Sinclair's legal capacity to proceed without the appointment of a personal representative pursuant to Federal Rule of Civil Procedure 25 and Federal Rules of Bankruptcy Procedure 1016, 7025, and 9014.

On September 8, 2015, Mr. Sinclair filed the document titled "Declaration of Richard C. Sinclair, Request For Notice of Disability and Delay of All Time Frames and Actions, Memorandum of Points and Authorities, Status Report." Dckt. 244. In addition to again failing to comply with the basic document requirements under the Local Bankruptcy Rules in this District, the Points and Authorities portion of the document only cites to California law and California Rules of Court. The only case law cited is from the state courts. Neither federal rules nor federal case law as apply in federal court is cited.

These documents filed by Mr. Sinclair follow shortly after Andrew Katakis, California Equity Management Group, Inc., and Fox Hollow of Turlock Owners' Association filed a motion to have Mr. Sinclair held in contempt for failure to comply with the Rule 2004 subpoenas. ("Contempt Motion") Dckt. 238.

As discussed in a separate Order to Appear, Kathryn Machado, PhD, who, individually and as the managing member or trustee of KMC LLC, Sun-One, LLC, Gold Hills, Chinese Camp, LLC, and Richard C. Sinclair Family Trust, was formerly represented by Mr. Sinclair until the California State Bar placed Mr. Sinclair on Involuntary Inactive status. Dckt. 235. The court issued the Order to Appear for Dr. Machado in light of Mr. Sinclair being placed on involuntary inactive status by the State Bar and his inability to practice law or represent other persons (individual or entities) in legal proceedings.

On September 16, 2015, Mr. Sinclair filed a document identifying himself as an "attorney at law." Dckt. 250. This document is signed by Mr. Sinclair, stating that Mr. Sinclair does not oppose the Contempt Motion. While signed by Mr. Sinclair, the document makes statements attributed to not just to Mr. Sinclair, but a third-party, "Richard Sinclair and I have another tub to deliver when we appear on the 1st of October." It also makes reference to "we" in several locations.

The non-opposition filed by Mr. Sinclair is in the same form, style, and formatting as other pleadings that Mr. Sinclair has filed for himself and while serving as the attorney for Dr. Machado prior to Mr. Sinclair being placed on involuntary inactive status.

An almost identical document, for which Richard Sinclair is listed in the upper left hand corner as the person preparing the document, was also filed on September 16, 2015. Dckt 249. This document is signed by Kathryn Machado and states a non-opposition to the Contempt Motion, and contains the following identical language to Mr. Sinclair's non-opposition:

> Richard Sinclair and I have another tub to deliver when we Appear on the 1st of October. The court reporter delivered to Greg Durbin, my original documents attached to the deposition, which I would like returned.

Non-Opposition, p. 2: unnumbered lines 3-5. The balance of the non-opposition of Dr. Machado is almost identical with the following exceptions:

1. A statement that Dr. Machado will be filing a substitution of attorney "shortly" for Iain MacDonald to substitute in as her attorney. (As of the court's September 24, 2015 review of the docket in this case, no substitution has been filed.)

2. Dr. Machado "was never sent the deposition to proof by the Court Reporter." (Richard Sinclair does not state he did not receive a copy of his 2004 Examination or a copy of the 2004 Examination of Dr. Machado in his non-opposition.)

Mr. Sinclair has been a licensed attorney for several decades in California and has represented to the court on several occasions his experience, success, and abilities as an attorney. Presumably, he understands the significance of his not being allowed to practice law in California.

From reviewing the two non-oppositions in which Mr. Sinclair and Dr. Machado admit that "we were in contempt of court...," it appears all-but-obvious that Mr. Sinclair has continued to prepare pleadings for Dr. Machado, a third-party, to be filed in this case.

ADDITIONAL INFORMATION FROM OCTOBER 1, 2015 PROCEEDING

At the Status Conference, Richard Sinclair and explained that he believes he had a stroke, which caused his car to go into a ditch. He further believes that by the end of October he could be able to participate in the bankruptcy case and adversary proceedings. However, the only medical information provided by a doctor is the "Mr. Sinclair should be able to return to work/school August 31, 2015. The court addressed with Mr. Sinclair the need for the court to be satisfied that he is legally competent, or to appoint a personal representative. The court requested that Mr. Sinclair's doctor provide a professional opinion declaration concerning Mr. Sinclair's condition and legal competency (as a represented party or as pro se party).

SUPPLEMENTAL ORDER

On October 9, 2015, the court issued a supplemental order. Dckt. 275. The Order stated the following:

> **IT IS ORDERED** that for the 2:00 p.m. October 22, 2015 Status Conference in this bankruptcy case, the court requests that Upinder K. Basi, M.D., the person identified as signing a form stating that Richard Sinclair should be excused from "work/school due to illness" provide a written declaration under penalty of perjury providing the court with the nature, scope, and projected duration of the "illness." Further, in light of Richard Sinclair identifying it as something which constitutes a legal incapacity for which these proceedings should be stayed, at least temporarily, the court requests that Dr. Basi also provide his professional opinion and medical diagnosis of: (1) the legal competency of Mr. Sinclair to proceed in this bankruptcy case, both as a party and a pro se party representing himself; (2) the basis for determining that he should be excuses from work or school activities until September 30, 2015; (3) any concerns, limitations, or inabilities of Mr. Sinclair to proceed as a party or in representing himself in these legal proceedings; (4) and any other factors, limitations, conditions, or matters which Dr. Basi believes the court should consider in determining how these judicial proceedings will be conducted, Mr. Sinclair's ability to participate as a party, the need of the court to appoint a personal representative in the place of Mr. Sinclair, and Mr. Sinclair being able to represent himself.
>
> The Order does not compel Upinder K. Basi, M.D. to provide any declaration or other testimony, but is a request for the doctor to provide information which would be of great assistance in the court addressing the competency issues raised by Mr. Sinclair, Dr. Basi's patient.
>
> **IT IS FURTHER ORDERED** that Dr. Basi's declaration shall be filed under seal, not to be disclosed to any party or the public except upon further order of this court. The declaration shall be filed by Dr. Basi personally, or a member of Dr. Basi's staff, in paper form at the United States Bankruptcy Court for the Eastern District of California (Modesto Division), Suite 4 (2nd Floor), Modesto, California.
>
> The Clerk of the Court shall file the declaration under seal, with it not being available to any party or the public either in electronic or paper form except upon further order of the court.
>
> **IT IS FURTHER ORDERED** that the declaration of Dr. Basi, if any, shall be filed on or before October 20, 2015. A copy of the declaration shall be provided by Dr. Basi directly to Richard Sinclair, Dr. Basi's patient, on or before October 20, 2015.

REPORT OF CREDITORS CALIFORNIA EQUITY MANAGEMENT GROUP, INC., FOX HOLLOW OF TURLOCK OWNERS' ASSOCIATION AND ANDREW KATAKIS

On October 15, 2015, Andrew Katakis, California Equity Management Group, Inc., and Fox Hollow of Turlock Owners' Association ("Creditors") filed a Report. Dckt. 278. The Report states that following the October 1, 2015 status conference, Creditors' counsel telephoned the records department for the Stanislaus County Sheriff's Department to obtain the report of Mr. Sinclair's alleged accident on July 11, 2015. According to counsel, the Sheriff's Department informed Creditors' counsel that they had no record of the incident.

The Creditors provide a copy of a follow up letter Creditors' counsel sent to the Sheriff's Department to confirm that no such record of the incident exists. Dckt. 278, Exhibit A. The Creditors provide the response received by the Sheriff's Department which states:

> A NAME SEARCH AS OF 10/15/15 FAILS TO REVEAL ANY RECORD
> SHERIFF'S OFFICE, MODESTO, CA

Dckt. 278, Exhibit B. There is a signature underneath the stamped language. The cover letter from the Sheriff's Department states that it was sent From the "Stanislaus County Sheriff's Dept. Records," and the Sender was "Trish S." Id.

DISCUSSION

The court conducted a preliminary review of Mr. Sinclair's statement that he has been rendered legally incompetent to proceed, at least temporarily, in this case at the October 1, 2015 at 2:00 p.m. hearing.

The court continued the hearing to 10:30 a.m. on October 22, 2015. Dckt. 265.

No papers have been filed in connection with the instant Order, outside of the Report filed by Creditors.

At the hearing, xxxxx

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 on Notice of Disability 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 is xxxxx

13. 14-91565-E-11 RICHARD SINCLAIR **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 11-24-14 [1]**

CONTINUED: 10/1/15

Debtor's Atty: Pro Se

Notes:

Continued from 10/1/15 in conjunction with other matters on calendar.

Supplemental Order on Notice of Disability Filing of Doctor's Declaration Under Seal filed 10/9/2015 [Dckt. 275]

Report of Creditors California Equity Management Group, Inc., Fox Hollow of Turlock Owners' Association and Andrew Katakis for Case Status Conference filed 10/15/15 [Dckt 278]

OCTOBER 1, 2015 STATUS CONFERENCE

This voluntary Chapter 11 case was filed on November 24, 2014. The Debtor has continued as Debtor in Possession, in pro se. Debtor has been licensed as an attorney, but is no longer authorized to practice law in California.

Significant claims in this case are based upon judgments in state court proceedings. One is a judgment for more than $1,000,000 which was entered by the State Superior Court and affirmed on appeal. Debtor in Possession has stated that he will diligently prosecute a motion to vacate that final judgment based on alleged fraud having been committed on the State Court judge by the plaintiff judgment creditor in that case. Another substantial claim is based on an alleged claim of malpractice by a former client of Debtor. The litigation was one in which the client was a co-plaintiff with the Debtor. Both claims relate to the pre-petition real estate development activities of Debtor and the litigation flowing therefrom.

Debtor has previously stated that there have been transfers of assets (substantial) real property into self-settled trusts, other entities, and Debtor's ex-spouse. While Debtor assures the court that such transfers are bona fide valid transactions and not subject to attack, the transfers appear to have taken place during either the state law fraudulent conveyance period or that provided in 11 U.S.C. § 548. For the trusts and other entities, Debtor's sister (Kathryn Machado, Ph.D.) is the trustee, managing member, or principal. Dr. Machado has (prior to his eligibility to practice law having been terminated) employed the Debtor as the attorney and developer expert for the properties transferred by Debtor into the trust and other entities.

After this court ruled that the bankruptcy judge could not vacate judgments and order entered by State Court and U.S. District Court judges, Debtor requested that the court dismiss the case. In light of the disclosed transfers of property within the state or federal law fraudulent conveyance

periods, the court denied the motion to dismiss. Order and Civil Minutes; Dckts. 115, 113.

ABILITY OF DEBTOR TO FULFILL OBLIGATIONS AND DUTIES OF DEBTOR IN POSSESSION AND PERSONALLY PARTICIPATE AS DEBTOR

Debtor has filed two sets of pleadings advising the court that because of an automobile accident in July 2015 (from which Debtor was rendered unconscious, which Debtor states was not due to alcohol), Debtor has been, at least temporarily, unable to participate in these proceeds as either the Debtor or Debtor in Possession. The court has addressed this stated incapacity in two prior rulings. Dckts. 233, 251.

Federal Rule of Bankruptcy Procedure 1016 provides that, in the event the Debtor passes away or suffers from an incapacity, in the case pending under chapter 11, chapter 12, or chapter 13 "the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Consideration of dismissal and its alternatives requires notice and opportunity for a hearing. *Hawkins v. Eads*, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991).

Federal Rule of Bankruptcy Procedure 7025 provides "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representation. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." *Hawkins v. Eads*, 135 B.R. at 384.

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16TH EDITION, §7025.02, which states [emphasis added],

> Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005** and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.
>
> The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for

> substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. 5 The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004...**

See also, *Hawkins v. Eads*, *supra*. While the death of a debtor in a Chapter 13 case does not automatically abate due to the death of a debtor, the court must make a determination of whether "[f]urther administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Fed. R. Bank. P. 1016. The court cannot make this adjudication until it has a substituted real party in interest for the deceased debtor.

FEDERAL RULES OF CIVIL PROCEDURE AND BANKRUPTCY PROCEDURE CONCERNING COMPETENCY

As a basic requirement for a person to have his or her rights determined in federal court, that person must meet the basic requirements for legal competency. FN.1. To be clear for all parties in interest, the court is addressing the issue of whether a personal representative must be appointed to act in the place of the Debtor (as Debtor and Debtor in Possession, if a bankruptcy trustee is not appointed). The COURT IS NOT DETERMINING WHETHER A CONSERVATOR SHOULD BE APPOINTED.

MOORE'S FEDERAL PRACTICE, CIVIL § 17.21, provides a good survey of the federal competency requirement.

> § 17.21 Capacity of Individual Litigant Acting on Its Own Behalf Determined by Law of Domicile
>
> [1] Domicile Tested at Time of Filing

The capacity of an individual engaged in litigation to enforce its own right, not acting as a representative of another, is determined by the law of the litigant's domicile...

[3] Persons Lacking Legal Capacity Must Have Adequate Representation

[a] Court May Appoint Guardian

Although persons lacking legal capacity may not sue or be sued, Rule 17(c) provides that their interests may be represented in litigation in federal courts (see also § 17.10[3][c] (guardian's and guardian *ad litem's* real party in interest status); § 17.22 (capacity of representatives of persons lacking legal capacity)). If a minor or other incompetent person has a representative appointed by law, such as a guardian, committee, conservator, or other similar fiduciary, this representative may sue or defend on behalf of the minor or incompetent person. A minor or incompetent who has no duly appointed representative may sue by a next friend or by a guardian ad litem. If a minor or incompetent is sued and is not represented in the action, the court must appoint a guardian ad litem or make some other proper order to protect the minor or incompetent. Similarly, if a party becomes incompetent during the course of the litigation, the court must appoint a guardian ad litem or make some other proper order. The language of the rule is mandatory and requires the court to appoint a guardian ad litem or make some other provision once the court determines that the individual is incompetent. However, the rule does not place an affirmative obligation on the district court to inquire *sua sponte* into the individual's capacity unless evidence showing that the individual has been adjudged incompetent or other clear evidence of incompetence is brought to the district court's attention. Bizarre behavior alone is insufficient to trigger a mandatory inquiry into a litigant's competency.

The function of the representative or guardian *ad litem* is to make decisions concerning the litigation on behalf of the minor or incompetent person, and not necessarily to represent the person as an attorney. [With limited parent child exceptions.]...

If a general guardian fails or refuses to sue or defend in a particular case, or if there is a conflict of interest between the minor or incompetent person and the guardian or next friend, federal courts may appoint a guardian or attorney ad litem to protect the interest of the represented party in the case.

To determine whether an individual is considered a minor or incompetent person, Rule 17(c) must be read in conjunction with Rule 17(b). Under Rule 17(b)(1), the capacity of an individual to sue or be sued is determined by the law of the individual's domicile. Once the court applies the law of the

> individual's domicile and determines that the individual is underage or is otherwise incompetent, the provisions of Rule 17(c) come into play. If the minor or incompetent already has a general guardian, conservator, or like fiduciary, that representative may sue or defend on behalf of the minor or incompetent. Whether an individual or entity is the type of fiduciary that has the legal authority to represent the minor or incompetent person is also determined according to state law. If the minor or incompetent has no such representative, the court must appoint a guardian *ad litem* or make some other provision for the protection of the individual. At this stage in the process, the court is not guided by state law but rather should be guided by the protection of the individual's interests. The court is not required to follow procedures set out by state law to determine incompetency, but may follow whatever procedures are appropriate within the bounds of due process.
>
> [b] Protective Measures Implemented at Court's Discretion
>
> The directive that courts protect the interests of persons lacking legal capacity is not tantamount to a requirement that courts appoint a representative. Rather, when the court finds that a litigant lacks legal capacity, the court may either appoint a guardian *ad litem* "or issue another appropriate order ... to protect a minor or incompetent person who is unrepresented in an action." The necessity of a guardian is determined at the court's discretion. The court need only inquire whether the incompetent's interests are adequately protected.

FN.1. The court provides the extensive citations and quotations in these Minutes for the Status Conference for several reasons. First, to make it clear to all parties, whether represented by counsel or in pro se, the Federal Rule of Civil Procedure, Federal Rule of Bankruptcy Procedure, and federal case law provide a well established basis for this court to determine the legal competency of any party. Second, to clearly set out the statutes and case law of what constitutes legal competency for all parties in interest. Third, the Debtor and several other parties have been “challenged” in this case to cite the court to the relevant federal law on issues presented to the court. The court wants to avoid further confusion from parties in interest casting about trying to construct what they might believe (or want to believe) is the law and the obligations of this court.

Some of the authorities cited by MOORES in the section above include the following cases.

Gibbs v. Carnival Cruise Lines, 314 F.3d 125, 134-135 (3rd. Cir. 2002).

> “While the New Jersey Court Rule is relevant to our inquiry and will be discussed further in the next section, we do not begin our analysis with this Court Rule. Instead, we must look to Federal Rule of Civil Procedure 17, which explains the

capacity of a party to sue or be sued, and may therefore be used to determine how a person is appointed a 'legal representative' within the meaning of § 183b(c). We apply the Federal Rules instead of the New Jersey Court Rules because state rules regarding the appointment of guardians *ad litem* are procedural and therefore do not apply, in the first instance, to cases brought in federal courts. See *M.S. v. Wermers*, 557 F.2d 170, 174 n.4 (8th Cir. 1977); 6A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1571, at 511-12 (1991); see generally *Hanna v. Plumer*, 380 U.S. 460, 471-72, 14 L. Ed. 2d 8, 85 S. Ct. 1136 (1965) (federal courts apply on-point Federal Rules of Civil Procedure instead of state procedural practices).

United States v. Mandycz, 447 F.3d 951, 962 (6th Cir. 2006).

"So while the commencement of a civil case does not suspend the Due Process Clause, it does alter the fairness requirements of the Clause. Whereas due process protects incompetent criminal defendants by imposing an outright prohibition on trial, it protects incompetent civil parties by requiring the court to appoint guardians to protect their interests and by judicially ensuring that the guardians protect those interests. See Fed. R. Civ. P. 17(c) ('The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.'); see also *Ferrelli v. River Manor Health Care Ctr.*, 323 F.3d 196, 203 (2d Cir. 2003) ('[T]he district judge should be aware that due process considerations attend an incompetency finding and the subsequent appointment of a guardian ad litem.'); *Salomon Smith Barney, Inc. v. Harvey*, 260 F.3d 1302, 1309 (11th Cir. 2001), vacated on other grounds, 537 U.S. 1085, 123 S. Ct. 718, 154 L. Ed. 2d 629 (2002)*; Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 652 (2d Cir. 1999); *Garrick v. Weaver*, 888 F.2d 687, 693 (10th Cir. 1989)*; Genesco, Inc. v. Cone Mills Corp.*, 604 F.2d 281, 285 (4th Cir. 1979). Independent of the court's duty to appoint a guardian to look after his interests, Mandycz of course also is entitled to the other basic protections of due process in a civil setting. See *United States v. Kairys*, 782 F.2d 1374, 1384 (7th Cir. 1986) ('[B]ecause denaturalization is civil and equitable in nature, due process [is] satisfied by a fair trial before an impartial decisionmaker. [concluding that there is no right to jury trial for denaturalization proceeding]')."

Berrios v. N.Y. City Housing Authority, 564 F.3d 130, 134 (2nd Cir. 2009).

"A minor or incompetent person normally lacks the capacity to bring suit for himself. See, e.g., N.Y. C.P.L.R. 1201 (McKinney 1997); Fed. R. Civ. P. 17(b)(1) (capacity of an individual claim owner to sue is determined by 'the law of the individual's domicile'). Rule 17(c) provides that a minor or incompetent person may be represented by a general guardian,

a committee, a conservator, or a similar fiduciary, see Fed. R. Civ. P. 17(c)(1), and that

> ‘[a] minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem--or issue another appropriate order--to protect a minor or incompetent person who is unrepresented in an action,’

Fed. R. Civ. P. 17(c)(2) (emphasis added). Thus, as to a claim on behalf of an unrepresented minor or incompetent person, the court is not to reach the merits without appointing a suitable representative.

...

On remand, the district court should first determine whether Berrios is a suitable guardian *ad litem* for Travieso. If it finds that he is not suitable and that it is not clear that a substantial claim could not be asserted on Travieso's behalf, the court should appoint another person to be Travieso's guardian *ad litem*. If the court either finds that Berrios is a suitable guardian or if it appoints a suitable guardian who is a non-attorney, it should not dismiss the action without affording such guardian the opportunity to retain counsel or to seek representation from a pro bono attorney or agency. If the guardian secures an attorney or is an attorney, the court should not dismiss the complaint for failure to state a claim without giving counsel an opportunity to file an amended complaint. If the guardian is not an attorney and does not obtain counsel, and if it is not clear to the court whether a substantial claim might be asserted on Travieso's behalf, the court should decide whether to appoint counsel, taking into "consider[ation] the fact that, without appointment of counsel, the case will not go forward at all," *Wenger*, 146 F.3d at 125. If counsel is not secured or appointed, the court may dismiss the complaint, but without prejudice.”

Sam M. v. Carcieri, 608 F.3d 77, 85-86 (1st Cir. 2010).

“Rule 17(c) of the Federal Rules of Civil Procedure governs a minor or incompetent's access to federal court. It directs that a minor or incompetent may sue in federal court through a duly appointed representative which includes a general guardian, committee, conservator, or like fiduciary. Fed. R. Civ. P. 17(c)(1). If a minor lacks a general guardian or a duly appointed representative, Rule 17(c)(2) directs the court either appoint a legal guardian or Next Friend, or issue an order to protect a minor or incompetent who is unrepresented in the federal suit. Fed. R. Civ. P. 17(c)(2).

The appointment of a Next Friend or guardian *ad litem* is not mandatory. Thus, where a minor or incompetent is represented by a general guardian or a duly appointed representative, a Next Friend need not be appointed. See *Developmental*

Disabilities Advocacy Ctr., Inc. v. Melton, 689 F.2d 281 (1st Cir. 1982) (declining to appoint Next Friend where plaintiffs had general guardians or duly appointed guardians who opposed the federal suit); *Garrick v. Weaver*, 888 F.2d 687, 693 (10th Cir. 1989)(holding that a minor's mother lacked authority to proceed as Next Friend in federal suit where the federal court had appointed a guardian ad litem to represent the child). However, Rule 17(c) 'gives a federal court power to authorize someone other than a lawful representative to sue on behalf of an infant or incompetent person where that representative is unable, unwilling or refuses to act or has interests which conflict with those of the infant or incompetent.' *Ad Hoc Comm. of Concerned Teachers v. Greenburgh No. 11 Union Free Sch. Dist.*, 873 F.2d 25, 29 (2d Cir. 1989); *Melton*, 689 F.2d at 285 (stating that Rule 17(c) allows federal courts to appoint a Next Friend or guardian ad litem where there is a conflict of interest between the minor and her general representative).

The minor's best interests are of paramount importance in deciding whether a Next Friend should be appointed, but the ultimate 'decision as to whether or not to appoint [a Next Friend or guardian ad litem] rests with the sound discretion of the district court and will not be disturbed unless there has been an abuse of its authority. *Melton*, 689 F.2d at 285. See also *Fernandez-Vargas v. Pfizer*, 522 F.3d 55, 66 (1st Cir. 2008)."

Garrick v. Weaver, 888 F.2d 687, (10th Cir. 1989).

"Rule 17(c) flows from the general duty of the court to protect the interests of infants and incompetents in cases before the court. See *Dacanay v. Mendoza*, 573 F.2d 1075, 1079 (9th Cir. 1978); *Noe v. True*, 507 F.2d 9, 11-12 (6th Cir. 1974). Garrick through her attorney requested the appointment of the guardian ad litem because her interests might be adverse to her children's interests as they were each claimants to the same finite fund. When the court determines that the interests of the infant and the infant's legal representative diverge, appointment of a guardian *ad litem* is appropriate. *Noe*, 507 F.2d at 11-12. Once appointed, the guardian *ad litem* is 'a representative of the court to act for the minor in the cause, with authority to engage counsel, file suit, and to prosecute, control and direct the litigation.' *Id.* at 12. We hold that a guardian ad litem sufficiently meets the "other fiduciary" requirement of Rule 17(c) so as to deprive Garrick of standing to represent her children in the same action for which the guardian ad litem was appointed. Garrick's standing to represent her minor children in other actions remains unaffected."

Dacannay v. Mendoza, 573 F.2d 1075, 1079 (9th Cir. 1978).

"It is an ancient precept of Anglo-American jurisprudence that infant and other incompetent parties are wards of any court

called upon to measure and weigh their interests. The guardian *ad litem* is but an officer of the court. *Cole v. Superior Court*, 63 Cal. 86, 89 (1883); *Serway v. Galentine*, 75 Cal. App. 2d 86, 170 P.2d 32 (1940). While the infant sues or is defended by a guardian *ad litem* or next friend, every step in the proceeding occurs under the aegis of the court. See generally Solender, Guardian *Ad Litem*: A Valuable Representative or an Illusory Safeguard, 7 Tex.Tech.L.Rev. 619 (1976); Note, Guardians *Ad Litem*, 45 Iowa L. Rev. 376 (1960)."

Robidoux v. Rosengren, 638 F.3d 1177, (9th Cir. 2011).

"District courts have a special duty, derived from Federal Rule of Civil Procedure 17(c), to safeguard the interests of litigants who are minors. Rule 17(c) provides, in relevant part, that a district court 'must appoint a guardian *ad litem*—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.' Fed. R. Civ. P. 17(c). In the context of proposed settlements in suits involving minor plaintiffs, this special duty requires a district court to 'conduct its own inquiry to determine whether the settlement serves the best interests of the minor.' *Dacanay v. Mendoza*, 573 F.2d 1075, 1080 (9th Cir. 1978); see also *Salmeron v. United States*, 724 F.2d 1357, 1363 (9th Cir. 1983) (holding that 'a court must independently investigate and evaluate any compromise or settlement of a minor's claims to assure itself that the minor's interests are protected, even if the settlement has been recommended or negotiated by the minor's parent or guardian *ad litem*')."

Scannavino v. Florida Department of Corrections, 242 F.R.D. 622, 664, 666-667 (M.D. Fla. 2007).

"Although under Rule 17(b) a district court determining a party's capacity must use the law of that party's domicile, the court need not adopt any procedure required by state law but must only satisfy the requirements of due process. *Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1296 (11th Cir. 1999) (explaining that 'if the state law conflicts with a federal procedural rule, then the state law is procedural for *Erie/Hanna* purposes regardless of how it may be characterized for other purposes.'); *Thomas*, 916 F.2d at 1035 ('[W]e reject the notion that in determining whether a person is competent to sue in federal court a federal judge must use the state's procedures for determining competency or capacity.'). In the absence of a clear test for determining a party's incapacity or incompetence under Florida law, 'a federal procedure better preserves the integrity and the interests of the federal courts.' *Id.* at 1035.

'It is a well-understood tenant of law that all persons are presumed to be competent' and that the 'burden of proof of incompetency rests with the party asserting it.' *Weeks v. Jones*, 52 F.3d 1559, 1569 (11th Cir. 1995). Because '[a] person may be competent to make some decisions but not

others,' the test of a party's competency 'varies from one context to another.' *United States v. Charters*, 829 F.2d 479, 495 n.23 (4th Cir. 1987). In general, "to be considered competent an individual must be able to comprehend the nature of the particular conduct in question and to understand its quality and consequences." *Id.* (quoting B. FREEDMAN, COMPETENCE, MARGINAL AND OTHERWISE: CONCEPTS AND ETHICS, 4 INT'L. J. OF L. & PSYCHIATRY 53, 56 (1981)). In the context of federal civil litigation, the relevant inquiry is whether the litigant is 'mentally competent to understand the nature and effect of the litigation she has instituted.' *Bodnar v. Bodnar*, 441 F.2d 1103, 1104 (5th Cir. 1971); *Donnelly v. Parker*, 158 U.S. App. D.C. 335, 486 F.2d 402, 407 (D.C. Cir. 1973) (stating that Rule 17(c) may require an inquiry into the plaintiff's 'capacity to understand the meaning and effect of the litigation being prosecuted in her name').

...

The rights of an incompetent litigant in a federal civil proceeding are protected by Rule 17(c), Federal Rules of Civil Procedure, which provides that a district court 'shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.' Fed. R. Civ. P. 17(c). An incompetent litigant is 'not otherwise represented' under Rule 17(c) if she has no 'general guardian, committee, conservator, or other like fiduciary.' *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 656 (2d Cir. 1999). The parties stipulated at the competency hearing that the plaintiff lacks a general guardian and is not otherwise represented within the meaning of Rule 17(c).

The decision to appoint a 'next friend' or guardian ad litem rests with the sound discretion of the district court and will be disturbed only for an abuse of discretion. *In re Kloian*, 179 Fed. Appx. 262, 265 (6th Cir. 2006) (quoting *Gardner v. Parson*, 874 F.2d 131, 140 (3d Cir. 1989)). Unlike a determination of competency, a district court's decision whether to appoint a guardian ad litem is purely procedural and wholly uninformed by state law. *Gibbs v. Carnival Cruise Lines*, 314 F.3d 125, 135-36 (3d Cir. 2002) ('A district court need not look at the state law, however, in determining what factors or procedures to use when appointing the guardian *ad litem*.'); Burke v. Smith, 252 F.3d 1260, 1264 (11th Cir. 2001) ('It is well settled that the appointment of a guardian ad litem is a procedural question controlled by Rule 17(c).').

...

Under Rule 17(c), a district court must appoint a guardian ad litem if it receives 'verifiable evidence from a mental health professional demonstrating that the party is being or has been treated for mental illness of the type that would render him or her legally incompetent.' *Ferrelli v. River Manor Health Care Ctr.*, 323 F.3d 196, 201 (2d Cir. 2003). An exhaustive review of the record, as well as the evidence adduced at the competency hearing (and other evidence properly before the

court), commends the appointment of a guardian ad litem to protect the plaintiff's interests in this case. Indeed, failure to appoint a guardian ad litem undermines the plaintiff's interests and would default both the court's obligation under Rule 17(c) and the requirements of justice."

DETERMINATION OF LEGAL COMPETENCY

California provides the following guidance to a determination of legal competency (whether partial or full).

California Probate Code §§ 810 et seq.

§ 810. Legislative findings and declarations regarding legal capacity

(a) For purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions.

(b) A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions.

(c) A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder.

§ 811. Unsound mind or incapacity

(a) A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and evidence of a correlation between the deficit or deficits and the decision or acts in question:

(1) Alertness and attention, including, but not limited to, the following:

(A) Level of arousal or consciousness.

(B) Orientation to time, place, person, and situation.

(C) Ability to attend and concentrate.

(2) Information processing, including, but not limited to, the following:

(A) Short- and long-term memory, including immediate recall.

(B) Ability to understand or communicate with others, either verbally or otherwise.

(C) Recognition of familiar objects and familiar persons.

(D) Ability to understand and appreciate quantities.

(E) Ability to reason using abstract concepts.

(F) Ability to plan, organize, and carry out actions in one's own rational self-interest.

(G) Ability to reason logically.

(3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following:

(A) Severely disorganized thinking.

(B) Hallucinations.

(C) Delusions.

(D) Uncontrollable, repetitive, or intrusive thoughts.

(4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.

(b) A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.

(c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment.

(d) The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination

that a person is of unsound mind or lacks the capacity to do a certain act.

(e) This part applies only to the evidence that is presented to, and the findings that are made by, a court determining the capacity of a person to do a certain act or make a decision, including, but not limited to, making medical decisions. Nothing in this part shall affect the decisionmaking process set forth in Section 1418.8 of the Health and Safety Code, nor increase or decrease the burdens of documentation on, or potential liability of, health care providers who, outside the judicial context, determine the capacity of patients to make a medical decision.

§ 812. Capacity to make decision

Except where otherwise provided by law, including, but not limited to, Section 813 and the statutory and decisional law of testamentary capacity, a person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following:

(a) The rights, duties, and responsibilities created by, or affected by the decision.

(b) The probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision.

(c) The significant risks, benefits, and reasonable alternatives involved in the decision.

The Due Process in Competence Determinations Act, Prob. Code, §§ 810 to 813, 1801, 1881, 3201, and 3204, offers a wide range of potential mental deficits that may support a determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act. *In re Marriage of Greenway*, 217 Cal. App. 4th 628, 640 (Cal. App. 4th Dist. 2013).

In California, a party is incompetent if he or she lacks the capacity to understand the nature or consequences of the proceeding, or is unable to assist counsel in the preparation of the case. *See* Cal. Prob. Code § 1801*; In re Jessica G.*, 93 Cal. App. 4th 1180, 1186 (2001); *Elder-Evins v. Casey*, 2012 U.S. Dist. LEXIS 92467 (N.D. Cal. July 3, 2012).

Federal Rule of Civil Procedure 17 also provides that the court "must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action." Fed. R. Civ. P. 17(c)(2). When a "substantial question exists regarding the mental competence of a party proceeding pro se," courts should "conduct a hearing to determine whether or not the party is competent, so that a representative may be appointed if needed." *Krain v. Smallwood*, 880 F.2d 1119, 1121 (9th Cir. 1989); *see also Allen v. Calderon*, 408 F.3d 1150, 1153 (9th Cir. 2005).

A guardian ad litem may be appointed for an incompetent adult only (1) if he or she consents to the appointment or (2) upon notice and hearing. *Jessica G.*, 93 Cal. App. 4th. at 1187-88.

California also consider the issue of "competency" in the context of the appointment of a conservator to take over the assets and affairs of a legally incompetent person. The court takes those factors into account as well in determining this more narrow issue of legal competency in this specific federal proceeding.

Cal Prob Code § 1801

(a) A conservator of the person may be appointed for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter, except as provided for the person as described in subdivision (b) or (c) of Section 1828.5.

(b) A conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence, except as provided for that person as described in subdivision (b) or (c) of Section 1828.5. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence.

(c) A conservator of the person and estate may be appointed for a person described in subdivisions (a) and (b).

(d) A limited conservator of the person or of the estate, or both, may be appointed for a developmentally disabled adult. A limited conservatorship may be utilized only as necessary to promote and protect the well--being of the individual, shall be designed to encourage the development of maximum self--reliance and independence of the individual, and shall be ordered only to the extent necessitated by the individual's proven mental and adaptive limitations. The conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator. The intent of the Legislature, as expressed in Section 4501 of the Welfare and Institutions Code, that developmentally disabled citizens of this state receive services resulting in more independent, productive, and normal lives is the underlying mandate of this division in its application to adults alleged to be developmentally disabled.

(e) The standard of proof for the appointment of a conservator pursuant to this section shall be clear and convincing evidence.

§ 1872. Effect of conservatorship on legal capacity of conservatee

(a) Except as otherwise provided in this article, the appointment of a conservator of the estate is an adjudication

that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate.

(b) Except as otherwise provided in the order of the court appointing a limited conservator, the appointment does not limit the legal capacity of the limited conservatee to enter into transactions or types of transactions.

§ 1873. Court order affecting legal capacity of conservatee

(a) In the order appointing the conservator or upon a petition filed under Section 1874, the court may, by order, authorize the conservatee, subject to Section 1876, to enter into transactions or types of transactions as may be appropriate in the circumstances of the particular conservatee and conservatorship estate. The court, by order, may modify the legal capacity a conservatee would otherwise have under Section 1872 by broadening or restricting the power of the conservatee to enter into transactions or types of transactions as may be appropriate in the circumstances of the particular conservatee and conservatorship estate.

(b) In an order made under this section, the court may include limitations or conditions on the exercise of the authority granted to the conservatee as the court determines to be appropriate including, but not limited to, the following:

(1) A requirement that for specific types of transactions or for all transactions authorized by the order, the conservatee obtain prior approval of the transaction by the court or conservator before exercising the authority granted by the order.

(2) A provision that the conservator has the right to avoid any transaction made by the conservatee pursuant to the authority of the order if the transaction is not one into which a reasonably prudent person might enter.

(c) The court, in its discretion, may provide in the order that, unless extended by subsequent order of the court, the order or specific provisions of the order terminate at a time specified in the order.

(d) An order under this section continues in effect until the earliest of the following times:

(1) The time specified in the order, if any.

(2) The time the order is modified or revoked.

(3) The time the conservatorship of the estate is terminated.

> (e) An order under this section may be modified or revoked upon petition filed by the conservator, conservatee, the spouse or domestic partner of the conservatee, or any relative or friend of the conservatee, or any interested person. Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

DEBTOR'S ABILITY TO UNILATERALLY CONFIRM THAT NO INCOMPETENCY CONTINUES

Where a party, such as this Debtor, affirmatively states that he is suffering from an inability to conduct his legal affairs in a federal court proceeding, the court is faced with an additional challenge of assessing the credibility of that parties statement of renewed legal competency. Merely "assuring" the court that the legal incompetency has been abated is not something which the court can blindly accept. The continuing legal incompetency may be so severe that the party could be deluding him or herself into improperly concluding that he or she is incompetent. For the court to blindly accept the assurances of the self-identified legally incompetent person could well only foster future litigation by that person contending that they were never competent, the judge was in error, and all of the orders, judgments, and other rules made during the incompetency need to be vacated. Such would cause a tremendous waste of judicial time and resources, as well as the resources of the parties in interest (not to say of the emotional toll on the incompetent party floundering through the proceedings).

The court also notes that the United States District Court recently addressed the prior asserted incapacities of Debtor in an action for which the court has modified the automatic stay. In *Fox Hollow of Turlock Owner's Association v. Mauctrust, LLC et al.*, E.D. Cal. No. 03-5439, Judge Ishi recounted the legal gyrations of the parties, asserted incapacities of Debtor, and evidence of litigation by Debtor during those alleged incapacities. 03-05429, Dckt. 1184. The District Court Judge noted that even after Debtor concurred that the legal incapacities did not occur, that Debtor did not act to comply with the orders of the court.

ADDITIONAL INFORMATION FROM OCTOBER 1, 2015 PROCEEDING

At the Status Conference, Richard Sinclair and explained that he believes he had a stroke, which caused his car to go into a ditch. He further believes that by the end of October he could be able to participate in the bankruptcy case and adversary proceedings. However, the only medical information provided by a doctor is the "Mr. Sinclair should be able to return to work/school August 31, 2015. The court addressed with Mr. Sinclair the need for the court to be satisfied that he is legally competent, or to appoint a personal representative. The court requested that Mr. Sinclair's doctor provide a professional opinion declaration concerning Mr. Sinclair's condition and legal competency (as a represented party or as pro se party).

The court also addressed with Dr. Machado the failure to substitute in as counsel for Dr. Machado and the entities for which she is the managing member, trustee, or representative. At the hearing Dr. Machado represented, several times, that she had retained as counsel for herself and the entities Ian Macdonald. Additionally, that she did not know why he was not at the

hearing, since he had been so employed. The court requested that the court's staff call Mr. Macdonald's office during the hearing to determine if he was on his way to court or was unaware of the hearing. The staff reported that he was not at the office.

The court then stated that it would issue an order for Mr. Macdonald to appear the next week in the Sacramento courtroom to address Dr. Machado's representations that Mr. Macdonald was the attorney for the doctor and the entities. Dr. Machado stated that she was available to appear. Then the court noted that if it was an inaccurate statement that Mr. Macdonald had been engaged as counsel and the court wasted Mr. Macdonald's time by bringing him to Sacramento based on Dr. Machado's representations, then the court would sanction Dr. Machado and the entities for the loss of Mr. Macdonald's time. Estimating Mr. Macdonald to have at least a $400 an hour billing rate and the hearing exhausting at least six hours of time, the sanctions could be between $2,500 and $3,000.

At that point Dr. Machado stated that while she had signed the engagement letter, she had not sent Mr. Macdonald the $10,000 retainer which was required as a condition of employment. Rather, Dr. Machado stated that she proposed that Mr. Macdonald commence the representation and that a retainer would be funded out of some future escrow. She then conceded that Mr. Macdonald had not yet been employed as counsel.

Dr. Machado then represented to the court that she would engage counsel, even if it was less expensive counsel. The court noted to Dr. Machado that Mr. Sinclair has a very distinctive writing and advocacy style. If the court were to see a newer attorney signing pleadings, but they were written in the same style and legal content as Mr. Sinclair's pleadings, then the court would be concerned that the new attorney was merely lending his or her bar license to Mr. Sinclair to engage in the unlicensed practice of law. The court expressed concern that it could appear from the file that Dr. Machado was already promoting the unlicensed practice of law by having Mr. Sinclair draft pleadings for and provide legal advise to Dr. Machado and the entities, which Dr. Machado would then sign purportedly in *pro se*.

At the Status Conference the court also notified Mr. Sinclair that his doctor needed to provide the court with a declaration provided professional medical opinion as to Mr. Sinclair's ability to proceed in this case and adversary proceedings, specifically the doctor's opinions as to Mr. Sinclair's legal competency. The court shall issue a separate order concerning this issue and the procedure for the filing of the doctor's opinion declaration under seal.

SUPPLEMENTAL ORDER

On October 9, 2015, the court issued a supplemental order. Dckt. 275. The Order stated the following:

> **IT IS ORDERED** that for the 2:00 p.m. October 22, 2015 Status Conference in this bankruptcy case, the court requests that Upinder K. Basi, M.D., the person identified as signing a form stating that Richard Sinclair should be excused from "work/school due to illness" provide a written declaration under penalty of perjury providing the court with the nature,

scope, and projected duration of the "illness." Further, in light of Richard Sinclair identifying it as something which constitutes a legal incapacity for which these proceedings should be stayed, at least temporarily, the court requests that Dr. Basi also provide his professional opinion and medical diagnosis of: (1) the legal competency of Mr. Sinclair to proceed in this bankruptcy case, both as a party and a pro se party representing himself; (2) the basis for determining that he should be excuses from work or school activities until September 30, 2015; (3) any concerns, limitations, or inabilities of Mr. Sinclair to proceed as a party or in representing himself in these legal proceedings; (4) and any other factors, limitations, conditions, or matters which Dr. Basi believes the court should consider in determining how these judicial proceedings will be conducted, Mr. Sinclair's ability to participate as a party, the need of the court to appoint a personal representative in the place of Mr. Sinclair, and Mr. Sinclair being able to represent himself.

The Order does not compel Upinder K. Basi, M.D. to provide any declaration or other testimony, but is a request for the doctor to provide information which would be of great assistance in the court addressing the competency issues raised by Mr. Sinclair, Dr. Basi's patient.

IT IS FURTHER ORDERED that Dr. Basi's declaration shall be filed under seal, not to be disclosed to any party or the public except upon further order of this court. The declaration shall be filed by Dr. Basi personally, or a member of Dr. Basi's staff, in paper form at the United States Bankruptcy Court for the Eastern District of California (Modesto Division), Suite 4 (2nd Floor), Modesto, California.

The Clerk of the Court shall file the declaration under seal, with it not being available to any party or the public either in electronic or paper form except upon further order of the court.

IT IS FURTHER ORDERED that the declaration of Dr. Basi, if any, shall be filed on or before October 20, 2015. A copy of the declaration shall be provided by Dr. Basi directly to Richard Sinclair, Dr. Basi's patient, on or before October 20, 2015.

REPORT OF CREDITORS CALIFORNIA EQUITY MANAGEMENT GROUP, INC., FOX HOLLOW OF TURLOCK OWNERS' ASSOCIATION AND ANDREW KATAKIS

On October 15, 2015, Andrew Katakis, California Equity Management Group, Inc., and Fox Hollow of Turlock Owners' Association ("Creditors") filed a Report. Dckt. 278. The Report states that following the October 1, 2015 status conference, Creditors' counsel telephoned the records department for the Stanislaus County Sheriff's Department to obtain the report of Mr. Sinclair's alleged accident on July 11, 2015. According to counsel, the Sheriff's Department informed Creditors' counsel that they had no record of the incident.

The Creditors provide a copy of a follow up letter Creditors' counsel sent to the Sheriff's Department to confirm that no such record of the incident exists. Dckt. 278, Exhibit A. The Creditors provide the response received by the Sheriff's Department which states:

> A NAME SEARCH AS OF 10/15/15 FAILS TO REVEAL ANY RECORD
> SHERIFF'S OFFICE, MODESTO, CA

Dckt. 278, Exhibit B. There is a signature underneath the stamped language. The cover letter from the Sheriff's Department states that it was sent From the "Stanislaus County Sheriff's Dept. Records," and the Sender was "Trish S." Id.

OCTOBER 22, 2015 STATUS CONFERENCE

At the conference, xxxx

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 Chapter Status Conference having been conducted by the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Chapter 11 Status Conference is continued to 10:30 a.m. on October 22, 2015.

14. 14-91565-E-11 RICHARD SINCLAIR **CONTINUED MOTION FOR CONTINUANCE OF ALL MATTERS 9-8-15 [244]**

Duplicate to Item #12.
Civil Minute Order linked to wrong leading document.

Final Ruling:

The court addressing the instant Motion in the Order on Notice of Disability, the matter is removed from the calendar.

15. 14-91565-E-11 HAR-6 RICHARD SINCLAIR Pro Se

CONTINUED AMENDED MOTION FOR CONTEMPT .
9-8-15 [245]

CONTINUED: 10/1/15

No Tentative Ruling: The Amended Motion for Contempt has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Creditors, and Office of the United States Trustee on September 8, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Amended Motion for Contempt has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Amended Motion for Contempt is xxxxxx

California Equity Management Group, Inc. and Fox Hollow of Turlock Owner's Association ("Creditor") filed this Motion for Contempt on September 8, 2015. Dckt. 245. Creditor alleges that Richard Sinclair ("Debtor"), the trustee of the Richard Sinclair Trust ("Sinclair Trust"), KCM, LLC, Sun one, LC, Dustykay, LLC, Golden Hills Camp, LLC (collectively the "LLC Witnesses"), and Kathryn Machado, PhD (Machado) have violated certain requirements, described below. Machado is alleged to be the Trustee for the Sinclair Trust and the agent for service of process for the LC Witnesses. Dckt. 245 ¶ 3.

Creditor provide a thorough review of the case history as the basis for their motion for contempt. In summation, Creditor alleges that Debtor, Machado as Trustee and agent for service, the Sinclair Trust, and the LLC Witnesses violated several discovery requirements, including disregarding various requests in the Federal Rules of Bankruptcy Procedure 2004 examination subpoenas and disobeying this court's orders to produce testimony or

documentation. Dckt. 173, 177, 200, 202 (orders relating to Richard Sinclair); Dckt. 175, 179, 192, 200, 202 (orders relating to Sinclair Trust and LLC Witnesses).

Based on the background provided, Creditor requests that the court issue an order that compels the Sinclair Trust and the LLC Witnesses to conduct a reasonable and diligent search for, and to produce, all responsive documents within their possession, custody, or control, that respond to certain listed subpoena requests. Creditor also requests this court to issue an order for Debtor to produce the one-half inch of unsigned documents and billing statements identified in a status report on May 30, 2015, and to conduct a reasonable and diligent search for, and produce, all responsive documents in his possession, custody, or control in response to listed subpoena request. Creditor requests these various documents be provided to counsel for Creditor by October 15, 2015, with a statement under oath by each that a reasonable and diligent search was conducted. In the event contemnors fail to fully and timely comply, Creditor requests the court to sanction each at $200 daily until complete compliance in made. Dckt. 245 ¶ 22.

In addition to the above, Creditor seeks to have Debtor and Machado, as Trustee of the Sinclair Trust and as a designated representative of the LLC Witnesses, to appear and resume their individual 2004 examinations.

DEBTOR AND MACHADO'S NONOPPOSITION

On September 16, 2015, Mr. Sinclair filed a document identifying himself as an "attorney at law." Dckt. 250. This document is signed by Mr. Sinclair, stating that Mr. Sinclair does not oppose the Contempt Motion. While signed by Mr. Sinclair, the document makes statements attributed to not just to Mr. Sinclair, but a third-party, "Richard Sinclair and I have another tub to deliver when we appear on the 1st of October." It also makes reference to "we" in several locations.

The non-opposition filed by Mr. Sinclair is in the same form, style, and formatting as other pleadings that Mr. Sinclair has filed for himself and while serving as the attorney for Dr. Machado prior to Mr. Sinclair being placed on involuntary inactive status.

An almost identical document, for which Richard Sinclair is listed in the upper left hand corner as the person preparing the document, was also filed on September 16, 2015. Dckt 249. This document is signed by Kathryn Machado and states a non-opposition to the Contempt Motion, and contains the following identical language to Mr. Sinclair's non-opposition:

> Richard Sinclair and I have another tub to deliver when we Appear on the 1st of October. The court reporter delivered to Greg Durbin, my original documents attached to the deposition, which I would like returned.

Non-Opposition, p. 2: unnumbered lines 3-5. The balance of the non-opposition of Dr. Machado is almost identical with the following exceptions:

1. A statement that Dr. Machado will be filing a substitution of attorney "shortly" for Iain MacDonald to substitute in as her

attorney. (As of the court's September 24, 2015 review of the docket in this case, no substitution has been filed.)

2. Dr. Machado "was never sent the deposition to proof by the Court Reporter." (Richard Sinclair does not state he did not receive a copy of his 2004 Examination or a copy of the 2004 Examination of Dr. Machado in his non-opposition.)

CREDITOR'S REPLY

On September 24, 2015, the Creditor filed a reply. Dckt. 254. Appearing to restate points in the original Motion, the Creditor restates that it has shown that the parties are in contempt of the court order for production and that Debtor's "disability" does not excuse their contempt.

Furthermore, the Creditor seeks that each of the contemnors should be required to state under oath at the hearing that he or she:

1. Has made a reasonable and diligent search for all of the documents requested int eh subpoena;

2. Has completed such search; and

3. Is producing all of the responsive documents.

Lastly, the Creditor requests that the court order new dates for the resumption and conclusion of the 2004 examinations.

APPLICABLE LAW

Bankruptcy courts have jurisdiction and the authority to impose sanctions, even when the bankruptcy case itself has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384,395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548-549 (9th Cir. 2004). The bankruptcy court judge also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (in re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); see 11 U.S.C. § 105(a).

Federal Rule of Bankruptcy Procedure 9011 imposes obligations on both attorneys and parties appearing before the bankruptcy court. This Rule covers pleadings filed with the court. If a party or counsel violates the obligations and duties imposes under Rule 9011, the bankruptcy court may impose sanctions, whether pursuant to a motion of another party or *sua sponte* by the court itself. These sanctions are corrective, and limited to what is required to deter repetition of conduct of the party before the court or comparable conduct by others similarly situated.

A bankruptcy court is also empowered to regulate the practice of law in the bankruptcy court. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right and power to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); see *Price v. Lehitine*, 564 F. 3d at 1058.

The primary purpose of a civil contempt sanction is to compensate losses sustained by another's disobedience of a court order and to compel future compliance with court orders. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1192 (9th Cir. 2003). The contemnor must have an opportunity to reduce or avoid the fine through compliance. *Id.* The federal court's authority to regulate the practice of law is broader, allowing the court to punish bad faith or willful misconduct. *Price v. Lehitine*, 564 F.3d at 1058.

OCTOBER 1, 2015 HEARING

At the hearing, Richard Sinclair and explained that he believes he had a stroke, which caused his car to go into a ditch. He further believes that by the end of October he could be able to participate in the bankruptcy case and adversary proceedings. However, the only medical information provided by a doctor is the "Mr. Sinclair should be able to return to work/school August 31, 2015. The court addressed with Mr. Sinclair the need for the court to be satisfied that he is legally competent, or to appoint a personal representative. The court requested that Mr. Sinclair's doctor provide a professional opinion declaration concerning Mr. Sinclair's condition and legal competency (as a represented party or as pro se party).

The court also addressed with Dr. Machado the failure to substitute in as counsel for Dr. Machado and the entities for which she is the managing member, trustee, or representative. At the hearing Dr. Machado represented, several times, that she had retained as counsel for herself and the entities Ian Macdonald. Additionally, that she did not know why he was not at the hearing, since he had been so employed. The court requested that the court's staff call Mr. Macdonald's office during the hearing to determine if he was on his way to court or was unaware of the hearing. The staff reported that he was not at the office.

The court then stated that it would issue an order for Mr. Macdonald to appear the next week in the Sacramento courtroom to address Dr. Machado's representations that Mr. Macdonald was the attorney for the doctor and the entities. Dr. Machado stated that she was available to appear. Then the court noted that if it was an inaccurate statement that Mr. Macdonald had been engaged as counsel and the court wasted Mr. Macdonald's time by bringing him to Sacramento based on Dr. Machado's representations, then the court would sanction Dr. Machado and the entities for the loss of Mr. Macdonald's time. Estimating Mr. Macdonald to have at least a $400 an hour billing rate and the hearing exhausting at least six hours of time, the sanctions could be between $2,500 and $3,000.

At that point Dr. Machado stated that while she had signed the engagement letter, she had not sent Mr. Macdonald the $10,000 retainer which was required as a condition of employment. Rather, Dr. Machado stated that she proposed that Mr. Macdonald commence the representation and that a retainer would be funded out of some future escrow. She then conceded that Mr. Macdonald had not yet been employed as counsel.

Dr. Machado then represented to the court that she would engage counsel, even if it was less expensive counsel. The court noted to Dr. Machado that Mr. Sinclair has a very distinctive writing and advocacy style. If the court were to see a newer attorney signing pleadings, but they were written in the same style and legal content as Mr. Sinclair's pleadings, then the court

would be concerned that the new attorney was merely lending his or her bar license to Mr. Sinclair to engage in the unlicensed practice of law. The court expressed concern that it could appear from the file that Dr. Machado was already promoting the unlicensed practice of law by having Mr. Sinclair draft pleadings for and provide legal advise to Dr. Machado and the entities, which Dr. Machado would then sign purportedly in *pro se*.

The court continued the hearing to 10:30 a.m. on October 22, 2015. Dckt. 261.

REPORT OF CREDITORS CALIFORNIA EQUITY MANAGEMENT GROUP, INC., FOX HOLLOW OF TURLOCK OWNERS' ASSOCIATION AND ANDREW KATAKIS

On October 15, 2015, Andrew Katakis, California Equity Management Group, Inc., and Fox Hollow of Turlock Owners' Association ("Creditors") filed a Report. Dckt. 278. The Report states that following the October 1, 2015 status conference, Creditors' counsel telephoned the records department for the Stanislaus County Sheriff's Department to obtain the report of Mr. Sinclair's alleged accident on July 11, 2015. According to counsel, the Sheriff's Department informed Creditors' counsel that they had no record of the incident.

The Creditors provide a copy of a follow up letter Creditors' counsel sent to the Sheriff's Department to confirm that no such record of the incident exists. Dckt. 278, Exhibit A. The Creditors provide the response received by the Sheriff's Department which states:

> A NAME SEARCH AS OF 10/15/15 FAILS TO REVEAL ANY RECORD
> SHERIFF'S OFFICE, MODESTO, CA

Dckt. 278, Exhibit B. There is a signature underneath the stamped language. The cover letter from the Sheriff's Department states that it was sent From the "Stanislaus County Sheriff's Dept. Records," and the Sender was "Trish S." Id.

DISCUSSION

The ability of the court to order Mr. Sinclair to produce documents is dependant on the court(1) determining that Mr. Sinclair is legally competent to continue in *pro se* as the Debtor and Debtor in Possession, (2) determining that Mr. Sinclair sufficiently competent to continue as the Debtor and Debtor in Possession with the assistance of legal and other professionals, (3) determining that Mr. Sinclair is legally competent to continue as the Debtor in pro se or with the assistance of legal and other professionals, but not continue as Debtor in Possession; and (4) determining that Mr. Sinclair is not legally competent appoint a personal representative to act in his place as a debtor, and (a) have the personal representative fulfill Debtor's duties as the debtor in possession, (b) appoint a Chapter 11 trustee, or (c) convert the case to one under Chapter 7.

Mr. Sinclair has twice stated under penalty of perjury that since his automobile accident in July 2015 that he is not mentally able to participate in this case as the debtor or as the debtor in possession. However, these statements are suspect because they are made at a time Mr. Sinclair states he is unable to fulfill the obligations of a party in this case and the fiduciary obligations as the Debtor in Possession to the impairment. For the court to

order a party who has stated that he is not legally competent to do something is only inviting even more litigation between these parties.

No parties have filed supplemental papers have been filed in connection with the instant Motion, outside the Report filed by Creditors.

Kathryn Machado, PhD, individually and as the trustee of the Richard Sinclair Trust, and the managing members or representative of KCM, LLC; Sun One, LLC; Dustykay, LLC; and Golden Hills Camp, LLC; have not filed a substitution of attorney.

At the hearing, xxxxx

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 Contempt filed by Creditors 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 for Contempt is continued xxxxxx

16. 14-91565-E-11 RHS-2 RICHARD SINCLAIR Pro Se

CONTINUED HEARING RE: ORDER FOR KATHRYN MACHADO, PHD AND SUBSTITUTE COUNSEL TO APPEAR RE REPRESENTATION OF THIRD PARTIES 8-31-15 [235]

CONTINUED: 10/1/15

No 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Order to Appear was served by the Clerk of the Court on Richard Sinclair ("Debtor"), Kathryn Machado, PhD., KMC, LLC, Sun-one, LLC, Hold Hills, Chinese Camp, LLC, Richard C Sinclair Family Trust, and the Office of the U.S. Trustee on September 3, 2015. The court computes that 28 days' notice has been provided.

The Order to Appear is xxxxx

On August 31, 2015, the court issued the instant Order for Kathryn Machado, PhD and Substitute Counsel to Appear RE Representation of Third Parties. Dckt. 235. In the order, the court ordered the following:

> **IT IS ORDERED** that the court shall conduct a hearing regarding representation of third parties at 2:00 p.m. on October 1, 2015, in Department E of the United States Bankruptcy Court, 1200 I Street, Second Floor, Modesto, California, for the following persons:
>
> 1. Kathryn Machado, PhD,
> 2. KMC LLC,
> 3. Sun-One, LLC,
> 4. Gold Hills,
> 5. Chinese Camp, LLC, and
> 6. Richard C. Sinclair Family Trust;
>
> for those persons to have substituted new counsel to represent each of them in the place of Richard Sinclair.
>
> **IT IS FURTHER ORDERED** that Kathryn Machado, PhD, individually and as the representative of the above listed entities and their respective attorneys who have or will substitute in place of Richard Sinclair as the attorney(s) of record shall appear at the October 1, 2015 hearing, no

telephonic appearances permitted for the parties and attorneys ordered to appear.

BACKGROUND

This voluntary Chapter 11 case was commenced by Richard Sinclair on November 24, 2015. In addition to being the Debtor, he has continuously served as the fiduciary to the Chapter 11 bankruptcy estate as the Debtor in Possession. In addition, Richard Sinclair has been the attorney of record for Kathryn Machado, PhD (his sister) personally and as the managing member, trustee, or principal of (1) KMC LLC, (2) Sun-One, LLC, (3) Gold Hills, Chinese Camp, LLC, and (4) the Richard C. Sinclair Family Trust. The California State Bar ordered Richard Sinclair's license as an attorney in the State of California into Involuntary Inactive status, effective August 27, 2015. FN.1.

FN.1. California State Bar Decision and Order of Involuntary Inactive Enrollment, with the Involuntary Inactive Status effective August 27, 2015. http://members.calbar.ca.gov/fal/Member/Detail/68238.

Richard Sinclair, his license to practice law being in Involuntary Inactive status, cannot serve as the attorney for Dr. Machado or any of the entities for which she is the responsible representative. Cal. B&P § 6125. While Dr. Machado could elect to appear in pro se for herself personally, she may not do so for any of the other entities for which she is the trustee, managing member, officer, or other representative. Those non-individual, legal entities must be represented by a licensed attorney. Rowland v. California Men's Colony, 506 U.S. 194, 201-202 (1993); In re America West Airlines, 40 F3d 1058, 1059 (9th Cir 1994) ("Corporations and other unincorporated associations must appear in court through an attorney."); Church of the New Testament v United States, 783 F2d 771, 773 (9th Cir 1986); and Multi Denominational Ministry of Cannabis and Rastafari, Inc., et al v. Gonzales, 474 F.Supp. 1133 (N.D. Cal. 2007), affrm. 2010 U.S. App. LEXIS 2976 (9th Cir. 2010).

OCTOBER 1, 2015 HEARING

At the hearing, Dr. Machado represented, several times, that she had retained as counsel for herself and the entities Ian Macdonald. Additionally, that she did not know why he was not at the hearing, since he had been so employed. The court requested that the court's staff call Mr. Macdonald's office during the hearing to determine if he was on his way to court or was unaware of the hearing. The staff reported that he was not at the office.

The court then stated that it would issue an order for Mr. Macdonald to appear the next week in the Sacramento courtroom to address Dr. Machado's representations that Mr. Macdonald was the attorney for the doctor and the entities. Dr. Machado stated that she was available to appear. Then the court noted that if it was an inaccurate statement that Mr. Macdonald had been engaged as counsel and the court wasted Mr. Macdonald's time by bringing him to Sacramento based on Dr. Machado's representations, then the court would sanction Dr. Machado and the entities for the loss of Mr. Macdonald's time. Estimating Mr. Macdonald to have at least a $400 an hour billing rate and the

hearing exhausting at least six hours of time, the sanctions could be between $2,500 and $3,000.

At that point Dr. Machado stated that while she had signed the engagement letter, she had not sent Mr. Macdonald the $10,000 retainer which was required as a condition of employment. Rather, Dr. Machado stated that she proposed that Mr. Macdonald commence the representation and that a retainer would be funded out of some future escrow. She then conceded that Mr. Macdonald had not yet been employed as counsel.

Dr. Machado then represented to the court that she would engage counsel, even if it was less expensive counsel. The court noted to Dr. Machado that Mr. Sinclair has a very distinctive writing and advocacy style. If the court were to see a newer attorney signing pleadings, but they were written in the same style and legal content as Mr. Sinclair's pleadings, then the court would be concerned that the new attorney was merely lending his or her bar license to Mr. Sinclair to engage in the unlicensed practice of law. The court expressed concern that it could appear from the file that Dr. Machado was already promoting the unlicensed practice of law by having Mr. Sinclair draft pleadings for and provide legal advise to Dr. Machado and the entities, which Dr. Machado would then sign purportedly in *pro se*.

The court directed that Dr. Machado needed to have counsel in place to address the pending discovery. If she did not, the court would not further delay the discovery. Failure to comply could then result in discovery sanctions.

The court also provided Dr. Machado of the recent decision issued by Judge Ishi in connection with Richard Sinclair's motion to vacate orders in the District Court action. Dr. Machado stated that she had not been provided with a copy of that ruling. The court provided the copy not to embarrass Richard Sinclair (Dr. Machado's brother), but so that Dr. Machado would be fully informed as to another's judge's view of Mr. Sinclair as an attorney and a party, and Dr. Machado would be an informed consumer in seeking replacement counsel.

The court continued the hearing to 10:30 a.m. on October 22, 2015. Dckt. 270.

DISCUSSION

There being ongoing discovery which is pending involving all of the entities and Dr. Machado, as well as Richard Sinclair as the Debtor, it is necessary and proper for Dr. Machado to obtain counsel for these various entities and have that attorney substitute in the place of Richard Sinclair as their attorney. Additionally, Dr. Machado must either substitute in pro se for Richard Sinclair if she now intends to represent herself personally, or have an attorney substitute in to represent her. These substitutions must be obtained immediately.

The court also notes that May 19, 2015, the court addressed with the Debtor in Possession and Dr. Machado the apparent legal conflict which could exist with Dr. Machado hiring the Debtor in Possession to represent her in her personal capacity with respect to the transactions with the Debtor (including the transfer of properties from Debtor to trusts and other entities). Civil

Minutes, p. 11; Dckt. 200. At that time Dr. Machado expressed displeasure about possibly not being able to be represented by her brother, acting as the attorney for Dr. Machado and the various entities for which she is the trustee, managing member, or principal. At a subsequent hearing the court was advised the Dr. Machado was in the process of considering replacement counsel.

The potential conflict arises due to the fiduciary duty when the Debtor in Possession owes a bankruptcy estate. In this bankruptcy case, Debtor stating that he has transferred properties (apparently without consideration) into trusts and other entities in which he asserts he has no interests, the fiduciary Debtor in Possession must in good faith evaluate the merits of claims of the estate to recover the properties for the benefit of the bankruptcy estate. How the Debtor in Possession could evaluate such claims against Dr. Machado (personally and in her various representative capacities) while having an attorney client relations with Dr. Machado (personally and in her representative capacities) concerning those transfers and those entities, was not explained to the court.

The court has allowed the parties in interest to proceed, in part based on the prior representation that Dr. Machado was investigating hiring new counsel. Additionally, during the early stages of this case the court relief upon the creditors and their attorneys to engage in initial discovery, and Dr. Machado to not feel her brother, the Debtor in Possession, was given the "bums rush" out the door before Dr. Machado was given an opportunity to investigate the issues and obtain independent legal advice.

As of the court's October 19, 2015, review of the Docket for this case, no substitution of attorney has been filed for Dr. Machado or any of the entities for which she is the trustee, managing member, or representative.

Kathryn Machado, PhD, individually and as the trustee of the Richard Sinclair Trust, and the managing members or representative of KCM, LLC; Sun One, LLC; Dustykay, LLC; and Golden Hills Camp, LLC; have not filed a substitution of attorney.

No papers have been filed in connection with the instant Order.

At the hearing, xxxxxx

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 Appear 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 Appear is xxxxx

17. 14-91565-E-11 RICHARD SINCLAIR
15-9009
KATAKIS ET AL V. SINCLAIR

CONTINUED STATUS CONFERENCE RE: COMPLAINT
2-23-15 [1]

CONTINUED: 10/1/15

Plaintiff's Atty: Hilton A. Ryder
Defendant's Atty: Pro Se

Adv. Filed: 2/23/15
Answer: 3/30/15

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud
Dischargeability - fraud as fiduciary, embezzlement, larceny
Dischargeability - willful and malicious injury

Notes:

Continued from 10/1/15

18. 14-91565-E-11 RICHARD SINCLAIR
15-9055
FLAKE V. SINCLAIR

CONTINUED STATUS CONFERENCE RE: COMPLAINT
7-24-15 [1]

CONTINUED: 10/1/15

Plaintiff's Atty: Kelly L. Pope; Jamie P. Dreher
Defendant's Atty: unknown

Adv. Filed: 7/24/15
Answer: none

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud
Dischargeability - fraud as fiduciary, embezzlement, larceny
Dischargeability - willful and malicious injury

Notes:

Continued from 10/1/15

19. 15-90782-E-7 MARK/PIRET LEONETTI MOTION TO COMPEL ABANDONMENT
MLP-1 Martha Lynn Passalaqua 9-22-15 [15]

Final Ruling: No appearance at the October 22, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, creditors, and Office of the United States Trustee on September 22, 2015. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

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

The Motion for Motion to Abandon Property is granted and the Trustee is ordered to abandon the Property.

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

The Motion filed by Mark Alden Leonetti and Piret Leonetti ("Debtors") requests the court to order the Trustee to abandon certain personal assets. Here, the personal property that the Debtors seek to abandon consists of:

1. business checking account with a balance of $123.43;

2. Miscellaneous carpenter tools valued at $400.00;

3. 2004 Ford Expedition XLS Sport valued at $3,553.00;

4. Inventory, as outlined in Exhibit B, Dckt. 18, valued at $2,270.00; and

5. Business name of "Leonettis Lost Treasures" valued at $0.00

for a total of $6,346.43. These assets were disclosed in the Debtors' Schedule B, and claimed as fully exempt on the Debtors' Schedule C, attached to the motion as Exhibits "A" and "C," respectively. Because the assets are fully exempt, the property has no available equity.

Chapter 7 Trustee filed a non-opposition to the Debtor's Motion to Compel on October 9, 2015.

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

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 Abandon Property filed by Mark Alden Leonetti and Piret Leonetti ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the Property identified as:
>
> | | | |
> |---|---|---|
> | 1. | Business Checking Account | $123.43 |
> | 2. | Miscellaneous Carpenter Tools | $400.00 |
> | 3. | 2004 Ford Expedition XLS Sport | $3,553.00 |
> | 4. | Inventory, Exhibit B, Dckt. 18. | $2,270.00 |
> | 5. | The Business Name of "Leonettis Lost Treasures" | $0.00 |
>
> and listed on Schedule B by Debtor is abandoned to Mark Alden Leonetti and Piret Leonetti by this order, with no further act of the Trustee required.

20. 13-91994-E-7 THERESA FINLEY
HCS-3 Anthony T. Wilson

MOTION FOR COMPENSATION BY THE LAW OFFICE OF HERUM, CRABTREE AND SUNTAG FOR DANA A. SUNTAG, TRUSTEES ATTORNEY(S)
9-24-15 [64]

DISCHARGED: 2/24/14

Final Ruling: No appearance at the October 22, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 24, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

Herum\Crabtree\Suntag, the Attorney ("Applicant") for Eric J. Nims the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period August 18, 2014 through October 22, 2015. The order of the court approving employment of Applicant was entered on October 7, 2014, Dckt. 34. Applicant requests fees and costs in the reduced amount of $7,000.00.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or

professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

> (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?
>
> (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including preparing, filing, and attending hearings on various applications and motions (e.g., Opposition to the Motion for Relief, Application for Compensation, Application for Employment, etc.), sale negotiation advice, reviewing relevant documents, and conducting research and advising the Trustee as to the Motion for Relief, sale of real property, and exemption issues. The estate has $16,474.00 of unencumbered monies to be administered as of the filing of the application. Applicant has agreed to reduce its fees and costs to a total of $7,000.00 in this bankruptcy case. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Legal Case Administration: Applicant spent 4.10 hours in this category. Applicant assisted Client with preparing both the employment application, and the instant application for compensation.

Motion for Relief from Stay on Steinbeck Drive Property: Applicant spent 10.40 hours in this category. Applicant, believing there to be equity in the property, prepared and filed a motion to employ a realtor to list and market the Property. Applicant prepared and filed an opposition to the Motion for Relief from Automatic Stay, and appeared at both the hearing and the continued hearing. Applicant drafted and filed a stipulation removing the Relief Motion after the sale of the Property closed.

Sale of Steinbeck Drive Property: Applicant spent 14.60 hours in this category. Applicant counseled the Trustee through sale negotiations of the property. Applicant reviewed the preliminary title report and advised the Trustee. Applicant appeared at the hearing on the Sale Motion.

Review of Exemption of Steinback Drive Property: Applicant spent 5.70 hours in this category. Applicant researched and advised the Trustee as to the viability of pursuing a legal malpractice claim against Debtor’s counsel for an error that significantly impacted the amount of funds available to unsecured creditors.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Dana A. Suntag, Esq.	7.2	$325.00	$2,340.00
Loris Bakken, Esq.	1.7	$295.00	$501.50
Wendy A. Locke, Esq.	23.2	$225.00	$5,220.00
Audrey Dutra, paralegal	2.3	$90.00	$207.00
Deanna Fillon, paralegal	0.4	$90.00	$36.00
Total Fees For Period of Application			$8,304.50 FN.1

FN.1. The court notes that the total alleged by the Applicant is $7,989.50. However, the court's own calculation comes up with a total $8,304.50. However, in light of the Applicant requesting a reduced amount of $7,000.00, the error is waived.

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $87.90 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage		$31.90
Copying Cost		$30.50
Certified Copies		$25.50
Total Costs Requested in Application		$87.90

FEES AND COSTS & EXPENSES ALLOWED

Fees

Reduced Rate

Applicant seeks to be paid a single sum of $7,000.00 for its fees and expenses incurred for the Client. First and Final Fees and Costs in the amount of $7,000.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

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

Fees, and Costs and Expenses $7,000.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed Herum\Crabtree\Suntag (“Applicant”), Attorney for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Herum\Crabtree\Suntag is allowed the following fees and expenses as a professional of the Estate:
>
> Herum\Crabtree\Suntag, Professional Employed by Trustee
>
> Fees, Costs and Expenses - Single sum of $ 7,000.00,
>
> The Fees and Costs pursuant to this Applicant in the single sum of $7,000.00 are approved as final fees and costs pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

21. 14-91197-E-7 SSA-3 — NICOLAS PEREZ AND MARIA MOSQUEDA DEPEREZ — TRUSTEE'S MOTION TO SELL FREE AND CLEAR OF LIENS 8-3-15 [119]

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Joint Debtor, Joint Debtor's Attorney, Chapter 7 Trustee, Creditors, parties requesting special notice, and Office of the United States Trustee on August 3, 2015. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties are entered.

The Motion to Sell Property is granted.

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

A. 4904 Ebbett Way, Modesto, California

The proposed purchaser of the Property is Maria G. Guardado and Patricia Cerrillo and the terms of the sale are:

A. Purchase Price is $125,000.00

B. Buyer shall make an initial escrow deposit of $5,000.00

C. The Seller is to pay natural hazard zone disclosure report, smoke alarm and carbon monoxide device installation and water heating bracing, if required by state and local law, unless Seller is exempt.

D. Seller to pay county transfer tax or fee seller's choice, standard one-year home warranty of Seller's choice not to exceed $350.00, Seller to pay for owner's title insurance policy.

E. Buyer and Sellers each split one-half standard city transfer fee or tax and one-half of standard escrow fees for area.

F. Standard commission of 6% split equally between Bob Brazeal of PMZ Real Estate and Cayo Gonzalez of RW Capital Estates, Inc.

G. The sale is "as is" "where is" and "without any warranty of any kind."

The Motion seeks to sell Property free and clear of the liens of Modesto Irrigation District ("Creditor"). The Bankruptcy Code provides for the sale of estate property free and clear of liens in the following specified circumstances,

> "(f) The trustee [debtor in possession or Chapter 13 debtor] may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if–
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."

11 U.S.C. § 363(f)(1).

LIMITED OPPOSITION OF DEBTOR MARIA MOSQUEDA DE PEREZ

Debtor Maria Mosqueda De Perez filed a limited opposition to the instant Motion on August 17, 2015. Dckt. 134. Debtor De Perez opposes the payment to Modesto Irrigation district. The Debtor states that the payment will be the subject of litigation if a global settlement with Modesto Irrigation District is not reached. Debtor intends to file an objection to the two claims of Modesto Irrigation District prior to the hearing if negotiations break down.

Debtor De Perez also opposes paying $23,000.00 as estimated capital gains taxes to the State of California and U.S. Government.

Debtor De Perez has supplied proof to the Trustee that she paid $70,000.00 for the Property. She also claims to have made improvements of which she is gathering proof. Debtor De Perez states that, leaving repairs aside, the sales price of $125,000.00 is reduced by $7,500.00 brokers commission. If the Trustee's commission of $7,500.00 is deducted, there is only a net sales price of $115,000.00, leaving a profit of $45,000.00. The Federal Capital Gains rate is 15%. The probable tax is $6,750.00 to the U.S. Government.

Debtor De Perez believes that $7,500.00 will be sufficient to pay as an estimated income tax for the estate and the estate will have funds remaining from the sale to pay the additional taxes, if any. Debtor De Perez argues that paying over $23,000.00 leaves little for other creditors and administrative costs.

MODESTO IRRIGATION DISTRICT'S LIMITED OPPOSITION

Modesto Irrigation District ("MID") filed a limited opposition on August 20, 2015. Dckt. 141. MID states that the Motion seeks to sell the Property free and clear of liens pursuant to § 363(f)(3) or (4). Specifically, the Trustee requests that the court approve the sale procedures and handling of sale proceeds, including an order that allows the residual sale proceeds, after payment of reasonable closing costs, brokerage expense, and $40.00 to the City of Modesto, to be placed in a segregated account, subject to the statutory lien of MID in the amount of $30,860.09. The Trustee proposes that MID's lien be paid thereafter only upon further court order.

MID argues that its lien should be paid in full at the time of sale and close of escrow. MID asserts that its claim is not in bona fide dispute nor is it the estate's best interest to delay payment because it continues to accrue interest at a rate of 18% per annum.

MID argues that its lien is not in dispute and is actually intended to be paid by the Trustee under the terms of the sale. MID states that it has a lien and an unsecured claim, which represents the trebling of damages pursuant to California Civil Code § 1882.2. MID understands that the MID unsecured claim is disputed and MID does not assert that the unsecured claim as part of its statutory lien and does not require its payment in order to release the MID lien.

For the MID lien, MID argues that it is not disputed and the Motion does not satisfy § 363(f)(4).

MID asserts that if the court does authorize the sale fee and clear of its lean, the Trustee must provide adequate protection for the MID lien pursuant to § 363(e). If the sale is approved, MID states that the court should direct the Trustee to segregate sufficient funds for the protection of that lien, including interest that may accrue until any dispute is resolved in an amount no less than $40,000.00.

TRUSTEE'S REPLY

The Trustee filed a reply on August 25, 2015. Dckt. 150. The Trustee address both oppositions in turn.

First, to Debtor De Perez's opposition, the Trustee asserts that the Debtor nor her counsel have given grounds for the secured portion of the MID claim not to be paid from the sale proceeds. The Trustee contends that, absent bona fide objective proof disputing the claim, the Trustee should pay the MID claim.

Additionally, Debtor opposes the sale contending that the Federal Capital Gains rate is 15%, yielding a probable tax of $6,750.00 to the U.S. Government. The Trustee states this was proposed because the Debtor initially did not provide sufficient tax information. Debtor has since provided the information. As such, the Trustee's CPA has calculated the revised tax burden to be approximately $5,800.00

As to the MID's objection, the Trustee states that since MID has distinguished its secured claim from its challenged unsecured claim in the estate, the Trustee has no evidentiary grounds to challenge the secured MID claim. As such, if the court grants the Trustee's sale motion, the MID claim should be paid from gross sale proceeds of this estate.

SEPTEMBER 3, 2015 HEARING

At the hearing, the court granted the Motion. Specifically, the court ordered the following:

> **IT IS ORDERED** that the Michael D. McGranahan, the Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) and 11 U.S.C. § 363(f)(5) as to the lien of Modesto Irrigation District as stated in this order, to Maria G. Guardado and Patricia Cerrillo or nominee ("Buyer"), the Property commonly known as 4904 Ebbett Way, Modesto, California ("Property"), on the following terms:
>
> 1. The Property shall be sold to Buyer for $125,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit 2, Dckt. 123, and as further provided in this Order.
>
> 2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
>
> 3. The Property is sold free and clear of the liens and interests of Modesto Irrigation District pursuant to the statutory lien described as follows:

Creditor Asserting Statutory Liens	Modesto Irrigation District
Recording Date, Location, and Information	Recorded May 16, 2013; Stanislaus County, California; Recorder's Serial No. 2013-0042484. Recorded December 5, 2013; Stanislaus County, California; Recorder's Serial No. 2013-0100840

pursuant to 11 U.S.C. § 363(f)(5), with the lien of such creditor attaching to the new proceeds which are retained by [the Trustee] after payment of the costs of sale, commissions, expenses, and senior liens as provided by this Order and the Contract for the sale of the Property.

4. The Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.

5. The Trustee be and hereby is authorized to pay a real estate broker's commission in an amount equal to six percent (6%) of the actual purchase price upon consummation of the sale. The six percent (6%) commission shall be split and paid to the Trustee's broker, PMZ Real Estate, Bob Brazeal, agent, the broker for the Trustee, and RW Capital Estates, Inc., Cayo Gonzales, agent, the broker for buyer, as provided in the Contract for the sale of the Property.

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

IT IS FURTHER ORDERED that the Trustee shall hold the net proceeds from the sale and not disburse the monies except on further order of the court.

IT IS FURTHER ORDERED that the court shall conduct a Sales Proceeds Distribution Hearing at **10:30 a.m. on October 22, 2015**, to determine if bona fide dispute grounds exist for the court not to order that all or part of the $22,076.33, plus interest, asserted by Modesto Irrigation District to have been secured by the Property. The only issue to be addressed at the hearing is the distribution of the sales proceeds to Modesto Irrigation District. The court sets the following briefing scheduling for the October 22, 2015 hearing:

A. On or before **September 17, 2015**, any party in interest may (but no parties in interest are required)

file and serve supplemental pleadings stating the grounds and legal authorities for asserting that the secured claim of Modesto Irrigation District or the lien securing the claim is in bona filed dispute and the monies should not be disbursed.

B. If supplemental pleadings are timely filed asserting that a bona fide dispute exists, Responses thereto shall be filed and served on or before **October 1, 2015.**

C. Replies to any such Responses shall be filed and served on or before **October 8, 2015**.

If no timely Supplemental Pleadings asserting a bona fide dispute are timely filed and served, counsel for the Chapter 7 Trustee shall lodge with the court a proposed order authorizing the Trustee to disburse the $22,076.33, plus interest, from the sales proceeds to Modesto Irrigation District. The proposed order shall expressly state that the court has not made any determination as to the validity, extent, or amount of the secured claim and the distribution is without prejudice to any further proceedings objecting to the claim or relating to the extent, validity, priority, and amount of the claim or asserted lien.

Dckt. 164.

MID'S SUPPLEMENTAL MEMORANDUM

MID filed a supplemental memorandum on September 17, 2015. Dckt. 173. MID argues that no bona fide dispute exists and that the claim should be paid immediately without the prospect of later disgorgement or further objection to the secured claim.

MID asserts that Debtor has failed to demonstrate that a bona fide dispute exists. MID argues that the factual background as to the secured claim do not appear to be in dispute and that the Debtor has not provided any evidence to the contrary. MID argues that the Debtor should not be permitted to continue to reargue that a bona fide dispute exists, absent a showing of vacating pursuant to Fed. R. Civ. P. 60(b).

Additionally, MID argues that payment of the secured claim subject to potential disgorgement is unfair. Namely, MID asserts that it would be prejudiced by a risk of disgorgement because it would be unable to take fund into its treasury and credit the payment against Debtor's obligation given the risk of possible disgorgement and yet will no longer accrue interest on its claim.

DISCUSSION

To date, the Debtor has failed to file any supplemental papers in support of her position that there is a bona fide dispute. Pursuant to the court's order on September 3, 2015, the Trustee was to file a proposed order authorizing the Trustee to disburse the $22,076.33, plus interest, from the

sales proceeds to Modesto Irrigation District. However, the Trustee has not filed such an order to date.

As stated at the earlier hearing, there cannot be a bona fide dispute because the Debtor does not present sufficient facts to "establish" that there is a bona fide dispute. This is only further emphasized by the Debtor failing to file any supplemental papers asserting actual, factual, and legal grounds as to the actual existence of a bona fide dispute.

This ignores the prior proceedings in this case in which the Debtor has contended that a tenant was in the premises and responsible for the electricity used. Debtor, in her minimalistic pleading did not do herself any favors by not stating a basis for contending that a bona fide dispute exits. Rather, she left it to the Trustee stating in the motion that Debtor made such a contention.

Debtor has filed an objection to the secured claim. Dckt. 155. In the Objection to Claim Debtor De Perez alleges:

1. Debtor De Perez rented the house to a person (not identified in the Objection) in good faith.

2. Debtor De Perez did not engage in any acts which would subject her to liability under California Civil Code §§ 1882 et seq.

3. MID did not file a complaint alleging that Debtor De Perez owed a nondischargeable debt. (It is not alleged how failing to sue Debtor De Perez under 11 U.S.C. § 523 is a basis for disallowing an otherwise valid claim.)

4. Debtor De Perez did not control the Property.

In this Objection, while Debtor De Perez contends that she did not engage in conduct upon which a claim could be based, there are no allegations as to the co-Debtor, who was a co-owner of the Property.

Debtor has not done herself any favors in filing the Objection to the MID Proof of Claim. It appears to be have been prepared and filed solely for the sake of saying an objection has been filed, but not state grounds sufficient to overcome the prima facie value of a proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); see also *United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006). No points and authorities has been filed with the Objection stating the actual legal bases supporting a contention that because Debtor De Perez rented the Property she is not liable for electricity provided pursuant to a contract she had with MID.

As to MID's argument that the Debtor should be barred from filing any further objection to MID's claim or possibility of disgorgement because it would be unfair, the court finds that MID has not provided sufficient grounds for such extraordinary relief. The language of Fed. R. Bankr. P. 3007 does not set any limitations on parties of interest on filing objection to claim. There is no time limitation nor any procedural walls preventing a debtor or party in interest from filing an objection to claim later in the case if new facts appear. The relief sought by MID appears to be a court ordered estoppel,

preventing the Debtor from asserting any objection later on if, for instance, new grounds for an objection arises. While a Motion to Vacate pursuant to Fed. R. Civ. P. 60(b) may be one means the Debtor can assert a later objection, if new evidence or grounds arise, the Debtor is not precluded from filing another objection.

MID's argument that the funds would need to be held in a limbo is equally unpersuasive. MID appears to be suggesting that it is unable to have sufficient funds if, at some point, the Debtor files a legitimate and substantive objection to its claim. Unless MID is representing to the court that it is so insolvent that paying a portion back of the estimated $33,000.00 would be highly unlikely, the court does not see a need to insulate MID from a proper adjudication of its claim.

Therefore, in light of the Debtor filing supplemental papers arguing that a bona fide dispute exists, the court overruling the Debtor's Objection to Claim, and the arguments set forth by MID, the court authorizes the Trustee to disburse the $22,076.33, plus interest, from the sales proceeds to Modesto Irrigation District.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Michael D. McGranahan the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Michael D. McGranahan, the Trustee, is authorized to disburse the $22,076.33, plus interest, from the sales proceeds to Modesto Irrigation District. The court has not made any determination as to the validity, extent, or amount of the secured claim and the distribution is without prejudice to any further proceedings objecting to the claim or relating to the extent, validity, priority, and amount of the claim or asserted lien.
>
> **IT IS FURTHER ORDERED** that the lien of Modesto Irrigation District continues in full force and effect, to the same extent, validity, and priority which it existed in the Property sold, to secure any additional amounts which may constitute its claim in this case until there is a final determination of the secured claim of Modesto Irrigation District pursuant to an objection thereto or the final distribution in this bankruptcy case and there not having been an objection to claim.

22.	**14-91197-E-7 TOG-3**	**NICOLAS PEREZ AND MARIA MOSQUEDA DEPEREZ Thomas O. Gillis**	**OBJECTION TO CLAIM OF MODESTO IRRIGATION DISTRICT, CLAIM NUMBER 1-1 AND/OR OBJECTION TO CLAIM OF MODESTO IRRIGATION DISTRICT, CLAIM NUMBER 5-1 9-1-15 [155]**

Tentative Ruling: The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

Local Rule 3007-1 Objection to Claim - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Chapter 7 Trustee, and Office of the United States Trustee on September 1, 2015. By the court's calculation, 51 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The court has issued its order setting an evidentiary hearing on the Objection to Proof of Claim Number 1 and 5 of Modesto Irrigation District for xxxx a.m. on xxxxxxxxx, 2016.

Maria Mosqueda De Perez, the Co-Debtor ("Objector") requests that the court disallow the claim of Modesto Irrigation District ("Creditor"), Proof of Claim No. 1 and 5 ("Claim"), Official Registry of Claims in this case. The Claim No. 1 is asserted to be unsecured in the amount of $22,076.33 and Claim No. 5 is asserted to be unsecured in the amount of $66,228.99.

Objector asserts, first, that the house was rented in good faith by Objector and co-Debtor Nicolas Perez to a renter. Objector argues that she did not do any of the acts listed under California Civil Code 1882 et seq that would render Objector and co-Debtor liable for damages for electricity that was stolen by tenant.

The Objector also states that the Creditor failed to file a timely adversary complaint requesting the debts be non dischargeable.

Lastly, the Objector states that the Creditor has not met its burden of proof because Objector did not control the premises, use or directly benefit from the utility services and that Objector is permitted "to present a skeleton case whereupon the claimant has the burden of proof."

CREDITOR'S RESPONSE

The Creditor filed a response on October 8, 2015. Dckt. 181. The Creditor first states that Proof of Claim No. 1-1 is for a secured claim in the amount of $22,076.33, plus late fees and interest at the rate of 18% per annum, based on the service agreement between Objector and Creditor. Proof of Claim No. 5-1 is an unsecured claim in the amount of $66,228.99 which represents the additional trebled damages (less the principal amount of Claim No. 101) that may be available to Creditor for tampering and power theft under California Civil Code § 1882 et seq.

As to Proof of Claim No. 1-1, the Creditor states that Objector contracted with the Creditor for utility service on January 21, 2011. In November 2012, Creditor states that its personnel discovered tampering at the service location. The Creditor determined that unauthorized use of electricity had occurred at the property since the contract date, which resulted in Objector being under billed for electricity use. Therefore, Creditor billed Objector for the under billed electricity in the amount of $22,076.22 and filed a lien in that amount with Stanislaus County pursuant to Cal. Water Code § 25086. Proof of Claim 1-1 represents its secured claim for unpaid utilities. The Creditor states that since the assessment, the lien has accrued interest at the rate of 1.5% per month pursuant to the Service Rules. As a result and as of August 31, 2015, the lien was in the amount of $32,219.57.

As to the unsecured claim in Proof of Claim 5-1, the Creditor states it is based on the trebling of damages permitted by Cal. Civil Code § 1882.2 in specified circumstances, reduced by the principal amount of the secured claim (Proof of Claim 1-1). The Creditor argues that there is no question that the equipment was tampered with, allowing for unauthorized power to be used on the Property. The Creditor argues that it most only show that Debtor committed, authorized, solicited, aided, abetted, or attempted any of the acts listed in subsections of § 1882.1. Creditor asserts that while the presumption arising from "control" may well be applicable here, its absence would not disprove Proof of Claim No. 5-1. The Creditor argues that the Debtor failed to appear at the Rule 2004 examination or to produce any court-ordered documents for the Creditor to examine.

The Creditor requests that the Objection be overruled or, if the Objection as to Proof of Claim No. 5-1 is allowed to go forward, that the court set a discovery schedule to allow the Creditor to examine the Debtor and documents.

DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

In the Objection to Claim Debtor De Perez alleges:

1. Debtor De Perez rented the house to a person (not identified in the Objection) in good faith.

2. Debtor De Perez did not engage in any acts which would subject her to liability under California Civil Code §§ 1882 et seq.

3. MID did not file a complaint alleging that Debtor De Perez owed a nondischargeable debt. (It is not alleged how failing to sue Debtor De Perez under 11 U.S.C. § 523 is a basis for disallowing an otherwise valid claim.)

4. Debtor De Perez did not control the Property.

In this Objection, while Debtor De Perez contends that she did not engage in conduct upon which a claim could be based, there are no allegations as to the co-Debtor, who was a co-owner of the Property.

Based on the evidence and legal argument presented to the court, this matter will be resolved only after an evidentiary hearing. The court sets the following schedule for an evidentiary hearing:

A. Evidence shall be presented according to Local Bankruptcy Rule 9017-1.

B. On or before ----------, 201x, Maria Mosqueda de Perez ("Objector-Debtor") shall file and serve on Modesto Irrigation District ("Respondent-Creditor") a list of witnesses which Debtor will present as their witnesses for their case in chief (excluding rebuttal witnesses).

C. On or before ----------, 201x, Respondent-Creditor, shall file and serve on the Objector-Debtor, a list of witnesses which Creditors will present as their witnesses for their case in chief (excluding rebuttal witnesses).

D. Objector-Debtor, shall lodge with the court and serve their Testimony Statements and Exhibits on or before xxxxx, 201x.

E. Respondent-Creditor, shall lodge with the court and serve Direct Testimony Statements and Exhibits on or before ----------, 201x.

F. Evidentiary Objections and Hearing Briefs shall be lodged with the court and served on or before ----------, 201x.

G. Oppositions to Evidentiary Objections shall be lodged with the court and served on or before —----------, 201x.

H. The Evidentiary Hearing shall be conducted at ------- a.m. on ----------, 201x.

23. 15-90697-E-7 ELIZABETH ZYLSTRA MOTION FOR TURNOVER OF PROPERTY
ICE-2 Pro Se O.S.T.
10-7-15 [34]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), creditors, and Office of the United States Trustee on October 7, 2015. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion for Turnover was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion for Turnover is granted.

Irma Edmonds, Chapter 7 Trustee, ("Movant") in the above entitled case and moving party herein, seeks an order for turnover as to the property of the estate known as the USDA Hispanic & Women Farmers and Ranchers credit claim funds in the sum of $62,500.00, held in possession by Elizabeth Zylstra ("Debtor").

Movant alleges that Debtor did not schedule the USDA Hispanic & Women Farmers and Ranchers credit claim funds in the sum of $62,500.00 asset in Schedule B or Schedule C of her bankruptcy petition.

Movant made an oral demand that Debtor turnover the funds, at the meeting of creditors. Movant made an inquiry with the USDA Hispanic & Women Farmers and Ranchers regarding Debtor's award and requested a turnover of the

assets, but was informed that the Debtor had already received the monies. Debtor subsequently filed amendments to her Schedule B and Schedule C, which lists the amount of the funds to be $50,000.00. Dckt. 21. Debtor's amended Schedule C exempts $26,925.00 of the $50,000.00 from the USDA Hispanic & Women Farmers and Ranchers pursuant to California Code of Civil Procedure § 703.140(b)(5).

Movant requests that Debtor turnover of the non-exempt funds in the amount of $35,575.00, using the $62,500.00 figure testified to by the Debtor at the Meaning of Creditors.

DISCUSSION

11 U.S.C. § 542 and Federal Rule of Bankruptcy Procedure 7001(1) permit a motion to obtain an order for turnover of property of the estate if the debtor fails and refuses to turnover an asset voluntarily. Federal Rule of Bankruptcy Procedure 7001(1) defines an adversary proceeding as,

> (1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002.

In this case, Trustee has initiated this proceeding to compel Debtors deliver property to the Trustee. Federal Rule of Bankruptcy Procedure permits the trustee to obtain turnover from the Debtor without filing an adversary proceeding. This Motion for the injunctive relief, in the form of a court order requiring that Debtors turnover specific items of property, is therefore appropriate under Federal Rule of Bankruptcy Procedure 7001(1).

The filing of a bankruptcy petition under 11 U.S.C. §§ 301, 302 or 303 creates a bankruptcy estate. 11 U.S.C. § 541(a). Bankruptcy Code Section 541(a)(1) defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." If the debtor has an equitable or legal interest in property from the filing date, then that property falls within the debtor's bankruptcy estate and is subject to turnover. 11 U.S.C. § 542(a).

A bankruptcy court may order turnover of property to debtor's estate if, among other things, such property is considered to be property of the estate. *In re Hernandez*, 483 B.R. 713 (B.A.P. 9th Cir. 2012); *See also* 11 U.S.C.A. §§ 541(a), 542(a). Section 542(a) requires one in possession of property of the estate to deliver such property to the Trustee. Pursuant to 11 U.S.C. § 542, a Trustee is entitled to turnover of all property of estate from Debtors. Most notably, pursuant to 11 U.S.C. § 521(a)(4), the Debtor is required to deliver all of the property of the estate and documentation related to the property of the estate to the Chapter 7 Trustee.

No opposition has been filed to this motion by the Debtors or other parties in interest.

Debtor has filed a second ex parte motion to dismiss the case. Dckt. 54. In reviewing that ex parte motion, the court identified several significant, and highly prejudicial economic issues for both the estate and

Debtor if the case was dismissed. The court addressed those in the order setting the Debtor's ex parte motion for hearing. Order, Dckt. 57.

On October 19, 2015, Debtor filed two exhibits in response to the current motion. Dckts. 56 and 57. These exhibits are to show several things. First, that the net check made to Debtor was for $50,000.00. This is after $12,500.00 was withheld for the Debtor's taxes. The second is a letter from the Chapter 7 Trustee, in which the Trustee states that she demands the turnover of the non-exempt monies in the amount of $23,075.00. This conflicts with the amount plainly stated in the Motion of $35,575.00. It appears that the difference is whether the estate computes its share of the gross proceeds from the $62,500.00 gross amount of the check or only from the net amount after the Debtor has had $12,500.00 paid for the Debtor's taxes.

The court determines that the correct amount of the estate's interest in the gross proceeds is computed from the amount of the gross proceeds. The fact that Debtor has chosen to act in a manner by which $12,500 of the gross proceeds has been paid for the benefit of the Debtor by paying her taxes, does not reduce the amount of the Estate's interest in the gross proceeds. The Chapter 7 Trustee will have to address the administrative taxes which will be the obligation of the bankruptcy estate. (It also appears from the financial information provided under penalty of perjury by Debtor on Schedules I and J, and in response to Questions 1 and 2 of the Statement of Financial Affairs, it is likely that Debtor will receive a substantial tax refund from the $12,500.00 which has been paid to the taxing agencies for her benefit.) The non-exempt amount of the $62,500.00 claim amount which is property of the estate is correctly computed to be $35,275.00.

The court finds that the non-exempt funds from the USDA Hispanic & Women Farmers and Ranchers credit claim funds in the amount of $35,275.00 to be property of the estate and that the Debtor is ordered to turnover the non-exempt funds to the Trustee on or before November 13, 2015.

Therefore, the Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Turnover of Property filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Turnover of Property is granted.
>
> **IT IS FURTHER ORDERED** that Elizabeth Zylstra, shall deliver on or before November 13, 2015, possession of the non-exempt funds of the USDA Hispanic & Women Farmers and Ranchers claim funds in the sum of $35,275.00 to the Chapter 7 Trustee.

24. 15-90899-E-7 ROB ROCHA **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Pro Se **10-2-15 [14]**

DEBTOR DISMISSED: 10/6/2015

Final Ruling: No appearance at the October 22, 2015 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Rob J. Rocha ("Debtor"), Trustee, and other such other parties in interest as stated on the Certificate of Service on October 2, 2015. The court computes that 20 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required feed in this case ($335.00 due on September 18, 2015).

The Order to Show Cause is discharged as moot.

The court having dismissed this bankruptcy case by prior order filed on October 6, 2015 (Dckt. 16), the Order to Show Cause is discharged as moot, with no sanctions ordered.

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 as moot, and no sanctions are ordered.