UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

October 31, 2013 at 10:30 a.m.

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1. 13-91405-E-7 MARCUS/CATANYA JONES — MOTION TO COMPEL ABANDONMENT
RJA-4 Robert J. Anaya — O.S.T.
10-7-13 [24]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee and Office of the United States Trustee on October 17, 2013. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Compel Abandonment 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion to Compel Abandonment without prejudice. 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:

Debtors seek an order compelling abandonment of the estate's interest of Debtor's business and business assets.

However, the declaration offered by the Movant states that it is under penalty of perjury and that the statements are "true and correct to the best of my knowledge and belief." This could be read two ways. The first is that "whatever I have said is true, to the extent that I have any knowledge about what I am talking about." The second interpretation is that "I am telling you the truth to the best of my ability to testify in this proceeding."

The requirements for what constitutes an adequate declaration are set out in 28 U.S.C. § 1746, which provides:

> § 1746. Unsworn declarations under penalty of perjury
>
> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
>
> (1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).
>
> (Signature)".
>
> (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
>
> (Signature)".

This does not provide for any qualification on stating that the information is true and correct, or let the witness provide a declaration based on information and belief. Counsel is advised that his firm should update its declaration forms to be in unqualified compliance with § 1746 as the next time this court, or other judges sitting in this District may well find the declaration to be insufficient and deny the motion without prejudice and without a hearing.

The motion also fails to describe the personal property sought to be abandoned. The court does not have sufficient information regarding the property to be abandoned. In the Debtor’s Motion to Compel Abandonment, the Debtor referred to the property as “tools of the trade, equipment, accounts receivable and other business-related assets.” For the court to grant this motion, the Debtor needs to specify what business assets are being abandoned. For instance, the business name, specific business accounts, office supplies, office hardware (laptop, computer, printer), and office furniture (chairs, tables, industrial lights). This court will not issue vague orders.

Based on the lack of competent evidence before the court and the failure to properly identify the property sought to be abandoned, the motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon Property filed by the Debtors 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.

2. 11-94410-E-11 WGS-3 — SAWTANTRA/ARUNA CHOPRA — Evan D. Smiley — MOTION TO VALUE COLLATERAL OF THE BLEDSOE-FISCHER CREDITORS 10-3-13 [613]

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

Correct Notice Provided. Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 11 Trustee, respondent creditor, and Office of the United States Trustee on October 3, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Value Collateral 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 to Value Collateral is continued to 10:30 a.m. on December 19, 2013. No appearance at the October 31, 2013 hearing required.

The parties reached an agreement to continue the hearing on the Motion to Value Collateral to December 19, 2013, in return for the immediate payment from a non-estate source of $99,256.16 in unpaid property taxes to

the Stanislaus County Tax Collector which relates to APN 029 and APN 030 on the Dale Road Project located at 4754 Dale Road, Modesto, California. The moving party submitted a Stipulation based on the agreement, and the court has granted the Stipulation. Dckt. 632. Therefore, the motion is continued.

3. 12-91010-E-7 DAVID SCOTT
SLF-8 Jared A. Day

MOTION FOR COMPENSATION BY THE LAW OFFICE OF THE SUNTAG LAW FIRM FOR DANA A. SUNTAG, TRUSTEE'S ATTORNEY(S), FEES: $8,000.00, EXPENSES: $39.60
10-3-13 [64]

DISCHARGED 10-15-13

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, all creditors, parties requesting special notice, and Office of the United States Trustee on October 3, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The First and Final Application for 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 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 First and Final Application for Fees is granted. No appearance required.

FEES REQUESTED

The Suntag Law Firm ("Movant"), Counsel for the Chapter 7 Trustee, Gary R. Farrar 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 May 21, 2012 through January 17, 2013. The order of the court approving employment of counsel was entered on June 29, 2012.

Description of Services for Which Fees Are Requested

General Case Administration: Counsel spent 14 hours in this category for total fees of $3,192.50. Counsel describes the tasks performed as reviewing Debtor's schedules to determine if there is a need for an objection to Debtor's discharge or exemptions, preparing Movant's employment application, preparing a stipulation to extend Trustee's deadline to object to exemptions and file a complaint against the discharge and prepare application for compensation.

Relief from Stay Motion: Counsel spent .50 hours in this category for total fees of $147.50. Counsel describes the tasks performed as reviewing the Creditor's Motion for Relief from Automatic Stay and conducting an investigation to ensure that there is no equity for the estate. Additionally, Counsel assisted the Trustee in determining that Motion to Abandon the property was not necessary.

Compromise of a Dispute: Counsel spent 19.90 hours in this category for total fees of $5,186.50. Counsel describe tasks performed as entering in negotiation and eventually settling the issue of transfer of $30,000 from Debtor to family members within two years of filing this case. Counsel prepared a settlement agreement and filed a motion to compromise.

DISCUSSION

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).

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 as legal 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 legal services undertaken 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 [legal fee] tab 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 is obligated to consider:

(a) Is the burden of the probable cost of legal 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 Counsel’s services rendered a successful investigation and compromise regarding a fraudulent transfer of property as well as general successful administration of the estate. The Trustee is holding approximately $23,000. The total attorneys' fees are in the amount of $8,566.10. However, Movant is requesting the approval of $7,960.40 in fees. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are $315.00/hour for counsel admitted to California State Bar in 1986 for 11.8 hours, $295.00/hour for counsel admitted to California State Bar in 2001 for 7.7 hours, and $195.00/hour for counsel admitted to California State Bar in 2011 for 11.4 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys’ fees are in the amount of $8,566.10. However, Movant is only asking $7,960.40 in fees. These fees are approved

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.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of $39.60 for copies and postage. The total costs in the amount of $39.60 are approved 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.

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

Attorneys' Fees	$ 7960.40
Costs and Expenses	$ 39.60

For a total final allowance of $8000.00 in Attorneys' Fees and Costs in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Counsel 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 Suntag Law Firm is allowed the following fees and expenses as a professional of the Estate:
>
> The Suntag Law Firm, Counsel for the Trustee
> Applicant's Fees Allowed in the amount of $7960.40
> Applicants Expenses Allowed in the amount of $39.60,
>
> **IT IS FURTHER ORDERED** that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

4. 11-93411-E-11 SANJIV/SHEENA CHOPRA
RHG-2 Robert M. Yaspan

MOTION FOR SUBSTANTIVE CONSOLIDATION AND APPOINTMENT OF CHAPTER 11 TRUSTEE
9-26-13 [741]

Motion - Opposition Filed.

Correct Notice Not Provided. A Proof of Service was not filed in connection with this Motion and the court cannot determine whether the parties were properly served.

Tentative Ruling: The Motion for Substantive Consolidation and Appointment of a Chapter 11 Trustee has not been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) or (f)(2).

The court's tentative decision is to deny the Motion for Substantive Consolidation and Appointment of Chapter 11 Trustee. 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:

MOTION PRESENTED BY CREDITORS

Creditors Karen Sethi and Nagra, LLC move (1) to substantively consolidate the Chapter 11 estate with each of the affiliated entities and (2) for the appointment of a chapter 11 trustee. Creditors contend that there has been a disregard of corporate formalities and commingling of assets and that consolidation would benefit creditors. Creditors argue that once the cases are consolidated, a Chapter 11 trustee would be required to run the ongoing businesses in order for the Creditors to receive as much benefit as possible from the estate.

The Motion was filed on September 26, 2013, almost two years to the day after this case was commenced (Petition filed on September 27, 2011). Nagra, LLC filed Proof of Claim 35-1 in the amount of $3,050,000.00 on January 24, 2012. It was filed by the managing member of Nagra, LLC, and states that he is attempting to find counsel for Nagra, LLC. Proof of Claim No. 35-1 was objected to by the Debtors in Possession (Dckt. 107), which objection was sustained with leave to file an amended proof of claim which stated the grounds for the claim.

On June 27, 2012, with the assistance of counsel, Nagra, LLC filed Amended Proof of Claim 35-2 which states an alter ego theory upon which its claim against the Debtors in Possession is based. On January 7, 2013, the Debtors in Possession filed an Adversary Proceeding to recover alleged fraudulent conveyances to Nagra, LLC and objecting to its claim (Fed. R. Bankr. 3007(b), 7001). Trial for that Adversary Proceeding is schedule for the week of February 19, 2013.

Karen Sethi is represented by the same counsel as Nagra, LLC. The Debtors in Possession have objected to Karen Sethi's Proof of Claim No. 11-2, which was filed on April 24, 2012. The Objection to the Karen Sethi claim was filed on October 9, 2012 (DCN: RMY-20), with the evidentiary hearing set for November 22, 2013. The Karen Sethi claim is based on a personal guaranty and "contractual fraud."

Motion

Some confusion has been created by Movant failing to comply with Federal Rule of Bankruptcy Procedure 9013 (requiring the motion to state with particularity the grounds for the relief requested) and Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents which require that the motion, points and authorities, each declaration, and the exhibits document to be filed as separate electronic documents. When a party combines the motion with the points and authorities (creating a "Mothorities") the grounds become lost in the extensive citations, quotations, factual arguments, and legal arguments. The motion must clearly state the grounds. The Mothorities hides the grounds, assigning to the court the responsibility to tease the grounds from the rest of the clutter.

From the arguments in the Mothorities, the court teases out the following grounds stated with particularity.

A. The Disclosure Statement valuation for the entities owned by the estate includes the statement that the assets, income, and liabilities of the entities have been commingled.

B. The income and resources of one of the entities subsidizes other entities.

C. The Debtors cannot account for monies generated from the sale of properties or invested in the entities owned by the estate.

D. The Debtors cannot account for the $175,000.00 paid by Karen Sethi to purchase a minority interest in Roman Real Estate Development.

E. Nagra, LLC has received transfers from the Debtors and from another of the entities to pay an obligation owed by Premier Real Estate Development.

F. The Chapter 11 plan proposed by the Chopras is very good for them and very bad for creditors.

G. The value of the gyms, which are preserved under the plan for the benefit of the Debtors, and not properly used to pay creditor claims.

H. If the entities were consolidated into this case, the Debtors creditors would get paid more money (without regard to claims of creditors of the entities which would also be brought into the case).

I. Appointment of a Chapter 11 Trustee is in the best interest of creditors if the case was substantively consolidated;

1. To get value from the estate the gyms must continue to operate as they are worth more if they are going concerns.

2. Leaving Mr. And Mrs. Chopra in charge is not in the best interest of creditors as Mr. Chopra has never shown any concern for treating creditors fairly.

SERVICE

No proof of service was filed with this Motion and supporting pleadings and the court cannot determine whether the parties were properly served. This includes the gym entities that the Movant requests be consolidated under this bankruptcy proceeding.

NOTICE

The Local Rules also require that movant's notice of the hearing disclose whether or not written opposition to the motion is required. *See* Local Bankr. R. 9014-1(d)(3). The notice provided here did not so specify. This is improper. Failure to comply with the local rules is grounds to deny the motion. *See* Local Bankr. R. 9014-1(l).

Furthermore, as no proof of service was provided, the court is unable to determine if the requisite amount of notice was provided.

EVIDENCE

The only evidence provided in support of the motion is the Declaration of Counsel as to the authenticity of deposition transcripts. None of the contentions set forth in the Motion are supported by evidence presented to the court.

OPPOSITION

Debtors-in-Possession oppose on several grounds, including Movants failure to meet the applicable standards for substantive consolidation, no evidence has been presented, and the motion was filed 15 days before the hearing on confirmation to block their attempts at confirming their proposed plan of reorganization.

Debtors-in-Possession also argue that the motion was not served on any of the Gym Entities that they seek to consolidate with this case. Debtors-in-Possession state these entities have many secured and unsecured creditors that have not been put on proper notice of these Chapter 11 proceedings.

Additionally, Debtors-in-Possession argue the following:

A. The only co-mingling of any kind is in a statement by the business appraiser in 2012 commenting on the accounting procedures among the gym entities

1. The gym entities are not in bankruptcy and there is no contention or evidence that there are any issues regarding Debtors' own accounting for their individual affairs;

2. The four gym entities operate eleven fitness facilities and have many secured and unsecured creditors but they use and promote the same franchise name and honor memberships among the clubs; they also share the same vendors and leasing companies; there has been some cross-over between the entities income and expenses that has led to accounting issues that have since been corrected;

3. The appraisal done by the expert has since been updated (August 2013) and the report eliminates the accounting issues among the gym entities;

B. The Debtors did not loot the entity that owned the Crows Landing project, but Premier Real Estate actually profited approximately $137,671.28.

C. There was no commingling in the exchange of the promissory note issued to Premier Real Estate to Nagra, LLC for an equity interest in GGD Oakdale, LLC.

D. The Debtors did not look the entity that owned the Watt Avenue Property, but Mr. Chopra lost $78,615.

E. The Debtors did not loot the entity that owned Yosemite Avenue; Mr. Chopra actually lost $11,246.23.

F. Mr. Chopra lost approximately $84,263 on the Yuba City transaction.

MOVANT'S REPLY

Movant replies, stating they have met the standard for substantive consolidation and that Debtor's opposition does not address that the plan is not fair to creditors.

Movant also states that service was proper and that this motion was served on all parties, according to the proof of service (which the court cannot located on the docket). Movant states they did not serve the creditors of the affiliates because it does not have their names or addresses because Debtors did not provide it in discovery.

Movant also argues that it has standing as a creditor to bring a motion for substantive consolidation.

DISCUSSION

The assets and liabilities of different legal entities may be consolidated and dealt with as if the assets were held by and the liabilities were owed by a single legal entity. 2 COLLIER ON BANKRUPTCY ¶ 105.09

(Alan N. Resnick & Henry J. Sommer eds. 16th ed.). While there is no statutory authority specifically authorizing this concept of substantive consolidation, the authority of a bankruptcy court to order substantive consolidation derives from its general discretionary equitable powers. 11 U.S.C. § 105(a).

Collier on Bankruptcy states the following in regards to consolidation of a debtor with non-debtor entities:

> The courts are divided on whether they may order consolidation of a debtor with a nondebtor. Most decisions have permitted such consolidation. If the related corporations were mere fictions and were in fact the alter egos of the debtor parent, the court can justify the result on the theory that the subsidiary corporations were not really separate. In circumstances that would justify piercing the corporate veil, the courts have also substantively consolidated the assets and liabilities of the nondebtor shareholder with the estate of the debtor subsidiary where the misconduct has been sufficiently egregious. However, some courts have hesitated to consolidate a nondebtor with a debtor affiliate, reasoning that to do so would circumvent the procedures and protections of the requirements for commencing an involuntary bankruptcy case against the nondebtor entity.

3 COLLIER ON BANKRUPTCY ¶ 105.09[d]. Because the doctrine is based on equity, there are judicially developed standards and the analysis is highly fact-specific. *Id.*

The Ninth Circuit Court of Appeals adopted the Second Circuit's independent test which requires the consideration of two factors: "(1) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit; or (2) whether the affairs of the debtor are so entangled that consolidation will benefit all creditors." *Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 766 (9th Cir. Alaska 2000). The presence of either factor is a sufficient basis to order substantive consolidation. *Id.* Appellate courts have ratified substantive consolidation orders when, for example, the debtors have abused corporate formalities, or creditors have treated the separate entities as a single unit and the business affairs of the consolidated entities were hopelessly entangled. *Meruelo Maddux Properties-760 S. Hill St., LLC v. Bank of Am., N.A. (In re Meruelo Maddux Props., Inc.)*, 667 F.3d 1072, 1075 (9th Cir. Cal. 2011).

Here, even if the court waived the procedural deficiencies, the Movant has not provided sufficient evidence on either prong to warrant substantive consolidation. Movant appears to argue the second prong, that the affairs of the debtor are so entangled with the gym entities that consolidation will benefit all creditors. Based on the evidence submitted with the motion, the court is not convinced that the accurate identification and allocation of assets is not possible.

First, most of the allegations are that the business operations of these entities are commingled, not that they are part of the Debtors personal or individual finances. Second, some of the "commingling" with the Debtors alleged relates to the Debtors transferring their interests in entities as part of the consideration for the entities purchasing assets.

The evidence is merely the depositions of Mr. Chopra. No documents of the transaction are provided in support of the motion. In trying to wade through the Mothorities, it appears that the citation to the deposition transcript does not match the argument being made in the Mothorities. For example, it is argued that the Debtors "looted" $500,000 from the Lodi Project. Movant directs the court to Deposition 2, pages 47-49 for this proposition. It is argued that the property was purchased for $1,600,000.00, the Debtor's invested $100,000.00, and the remaining $1,500,000 was financed by the seller.

Beginning on page 47 of this deposition transcript (Exhibit A-2, Dckt. 746), the discussion relates to a property in Riverbank and a property in Stockton. For the property in Stockton, it cost around $880,000 open the project (for which $550,000 was provided for the "TI"). Then there is discussion about a property in Fresno, for which the tenant improvements are projected to be around $350,000.00. The court cannot divine the "two properties purchased in Lodi" from this cited reference or the cost.

The Mothorities then directs the court to p. 49:8-1, for the argument that the Debtors, personally, sold one of the Lodi parcels for $1,600,000.00 and paid the seller $1,000,000.00 (of $1,500,000 seller carry-back financing). The actual deposition transcript reads,

> "Q: This is not open, this is all planned at this point; would that be fair?
>
> A: Yes.
>
> Mr. Yaspan: The plan gets to do certain...."

Exhibit A-2, physical page 5 of the exhibit, Dckt. 746.

The Mothorities further states that the Debtors personally made a profit of $500,000.00 on the alleged sale of one of the Lodi parcels. The evidence of this argument is cited as Depo. #2, pg. 49:17-19. In reality, this excerpt of the deposition transcript actually states,

> "Mr. Gibson: Of course.
>
> Q. Okay. So this was a Rite-Aid. Do we have an estimate of what the tenant improvements will be here."

It appears that this Mothorities suffers from the basic defect of most Mothorities – an attempt to use arguments, citations, and quotations to create a smokescreen illusion that (1) grounds exist and (2) the arguments are supported by actual, admissible, credible evidence. Other citations to the deposition transcript either do not provide evidence of what was argued or are citations to pages which were not provided. These include:

A. Argument that the Watt Avenue Property was sold by Zeus Enterprises for $2,100,000, was subject to a deed of trust to secure $1,800,000.00 of seller financing, and the Debtors personally profited $300,000.00 from the sale. The citations to the deposition transcript as evidence in support of this argument are Depo. #3, p 53:15-17, 19-21, and pg 60 (entire page).

1. The actual statements made at the deposition were:

    a. Purchase price for the property was $1,800,000, majority of which was seller carry-back financing. A portion was paid by the Debtors putting money into Zeus Enterprises for the purchase.

    b. The sales price was $2,100,000.00 paid to Zeus Enterprises. In addition to paying the $1,800,000.00 seller carry-back financing (no statement is made as to what portion was paid by Zeus Enterprises), there was $90,000.00 paid for brokers' fees and some portion paid for common area maintenance charges (unspecified amount).

    c. The transcript statements are that Zeus Enterprises received net monies of around $200,000.00 from the sale (assuming a modest amount for common area expenses), not that the Debtors obtained a $300,000 profit from the sale.

B. Argument that the Debtors looted $360,000 from the Yosemite Avenue Property. It is alleged that the property was owned by Paramount Real Estate, with the purchase price having been $450,000. It is argued that the Debtors invested $75,000.00 for the purchase, with the balance provided by the seller in carry-back financing. The Debtors then raised $574,000.00 from investors by selling minority interests in the project. The monies for selling these interests was paid to the Debtors personally. The Debtors then spent $100,000.00 for development, thereby profiting $360,000. This property was lost to foreclosure. The evidence for these arguments is cited as Depo. #2, p. 88:15-22; p 89:15-17, 18-25; p 86: 7-8; p. 92: 21-p. 93; and p. 90:19-22.

1. The actual statements in the deposition are:

    a. Paramount Real Estate Development owned one parcel of land, which was intended to be developed.

    b. The property was purchased in 2006 or 2007 and was lost to foreclosure in 2010 or 2011.

    c. The purchase price was $450,000.00, which was paid as follows:

(1) $75,000.00, which was paid by the Debtors from their brokers' commission for this property and a commission from the sale of the Debtor's father's property.

(2) Seller carry-back note for the balance.

d. Property was zoned for retail and entitlements were obtained to develop a shopping center. No physical development work was done.

e. The costs for obtaining the permits was $60,000 to $100,000.00.

f. There were some interest payments made to the seller for the carry-back financing.

g. When the investors bought in for $600,000.00, the $380,000.00 seller carry-back note was refinanced.

h. Approximately $220,000 of the money" (referencing the $600,000) was used to pay down the debt.

i. A $160,000 loan was taken out for the refinancing the remaining $160,000 balance due on the Seller carry-back note.

j. The $600,000.00 paid by the investors was paid to the Debtor's personally to buy a portion of their interests in Paramount Real Estate Development. Mr. Chopra's testimony at the bottom of page 92 is,

> "Q. All right. Now, the investors, if I'm understanding, brought about 600 into it. What was the investor money used for?"
> "A. They bought my interest, so they valued that, so that was my personal money. So I put money back in....[page 93 and the completion of this statement not provided by Movant]."

Though extensive discovery may be conducted by 2004 examinations to develop evidence to support such contentions, all the court has been presented with is counsel's declaration to authenticate excerpts of deposition transcripts (2004 examination) of Sanjiv Chopra. There are no bank records, copies of contracts, discovery conducted with respect to the operation of these alleged alter-ego entities, or the transactions of third-parties with these alleged alter-ego entities. The Movants appear to have ignored the ability to conduct discovery and present the court with clear grounds and supporting evidence, instead electing to just throw arguments and allegations against the wall and see what will stick (or how much the court can be buffaloed). While making arguments, it appears that the Movants are not relying on these inaccurate arguments as grounds subject to the requirements of Federal Rule of Bankruptcy Procedure 9011.

The above depositions were taken in May 2013. Now, five months after the depositions and two years after the case is filed the Movants are so gravely concerned about these dealings as "evidenced" by the deposition that they seek a motion to substantively consolidate and appoint a trustee. This coincides not only with the confirmation hearing, but also the evidentiary hearing at which Karen Sethi will provide the basis for his claim. Rather than a good faith, bona fide motion, it appears to the court that this is merely a Hail Mary motion in an effort to delay Mr. Sethi's day in court. If the Movants had a good faith belief that substantive consolidation was proper or that a trustee was required based on the "evidence" presented, they would have been before the court no later than June 2013 with the motion. Further, if they had such concerns, Movants would have availed themselves of the discovery available and presented the court with records, or confirm the lack of records, for the transactions and conduct of the Debtors.

Third, these entities and their value appears to be a substantial part of the Movant's arguments in opposition to the motion to confirm the Chapter 11 Plan. By the time of the initial confirmation hearing the court will have ruled on whether the Movant has a claim in this bankruptcy case. Merely because there is no substantive consolidation does not mean that the values of these various entities owned by the estate cannot and will not be made available to fund a plan. It may be shown that the Debtors' plan is not in good faith because it undervalues these entities or that is it inequitably subsidizing unprofitable businesses with profitable ones which could otherwise be sold for a substantial recovery.

Further, the Movants have not shown cause pursuant to 11 U.S.C. § 1104 for the appointment of a Trustee. The evidence presented is not sufficient to support the arguments made in the Mothorities. Requesting the appointment of a trustee on the eve of the confirmation hearing and the evidentiary hearing on the objection to the Karen Sethi claim appears to be merely a device to improperly delay prosecution of the bankruptcy case.

As the court denies the Movant's request for substantive consolidation, the court will not address the request for appointment of a Chapter 11 Trustee, as the request was contingent on the case being consolidated.

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 Substantive Consolidation and Appointment of Chapter 11 Trustee 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 is denied. Denial of the Motion is without prejudice to motions to consolidate or appoint a trustee being filed by other parties in interest,

or by Movants, after obtaining leave from the court upon noticed motion.

5. 11-93411-E-11 SANJIV/SHEENA CHOPRA — MOTION FOR TEMPORARY ALLOWANCE OF CLAIM
RHG-3 Robert M. Yaspan — 10-15-13 [787]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors' Attorney, and Office of the United States Trustee on October 15, 2013. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion for Temporary Allowance of Claim 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to continue the hearing on the Motion for Temporary Allowance of Claim to 9:30 a.m. on November 22, 2013. 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:

Creditor Karen Sethi ("Creditor") moves for a temporary allowance of his claim. The Debtors-in-Possession objected to Creditor's claim and trial has not been held. Creditor argues that it has a colorable claim, as it has a personal guarantee from the Debtor. The Motion states with particularity (Fed. R. Bankr. P. 9013) the following grounds upon which the requested relief if based.

A. "Karen Sethi moves for temporary allowance of his claim."

B. Federal Rule of Bankruptcy Procedure 3018(a) allows for the temporary allowance of a claim or interest for purposes of accepting or rejecting a plan.

C. Karen Sethi's proof of claim includes a document signed by the Debtor which is a personal guaranty. This creates a colorable claim for Karen Sethi.

D. Therefore, the claim of Karen Sethi should be temporarily allowed (the Debtors having filed an objection to the claim) for purposes of voting to accept or reject a plan.

Motion, Dckt. 787. The evidence in support of the Motion is the Karen Sethi proof of claim filed on April 24, 2012, Proof of Claim No. 11-2. The unsecured claim is asserted in the amount of $254,908.92, the basis for which is stated to be "contractual fraud." Several documents are attached to the Proof of Claim No. 11-2. The first is an order for entry of judgment in the amount of $254,908.92 in *Sethi v. Chopra, et al.*, Los Angeles County Superior Court action, case no. LC91002. The order provides for the entry of a default judgment in favor of Karen Sethi and against Sanjiv Chopra.

Proof of Claim 11-2 does not have attached to it a document "labeled" personal guaranty as represented in the Motion. However, Karen Sethi directs the court to review the Declaration of Karen Sethi in opposition to the Objection to Proof of Claim 11-2 filed by the Debtors. Exhibit A, Dckt. 789. Attached to the Declaration is a copy of a document titled "Sanjiv Chopra Personal Guarantee."

DEBTORS-IN-POSSESSION'S OPPOSITION

Debtors-in-Possession assert the motion is untimely, as it was filed after the closing of the ballots and approximately two weeks prior to the confirmation hearing on the plan. The Debtors-in-Possession also state that the Motion lacks any evidence to support it.

Debtors-in-Possession state there is no surprise regarding the objection to claim, as it was filed over a year prior to this motion and that this is merely a tactic for Creditor to stall the confirmation process.

Further, the Debtors in Possession argue that Karen Sethi has not provided evidence in support of the asserted claim. The only evidence presented is the Declaration of Karen Sethi and the disputed documents.

DISCUSSION

A creditor may vote if its claim is deemed allowed or if its claim has been allowed by the court. 11 U.S.C. § 1126(a). A claim is deemed allowed unless an objection is filed to it. 11 U.S.C. § 502. Thus, any creditor with a claim to which an objection has been filed may not vote on a plan. *See In re M. Long Arabians*, 103 B.R. 211, 215 (B.A.P. 9th Cir. 1989).

Federal Rule of Bankruptcy Procedure 3018(a) allows temporary allowance of a claim in such amount as the court deems proper after notice and hearing on any pending objections. 9 COLLIER ON BANKRUPTCY ¶ 3018.01[5] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.) If the claim objection has been pending for a long enough time to have permitted its resolution, the court may decline to allow the claim or any part of it for voting purposes if the delay in hearing the objection is attributable to the claimant. The court, however, regardless of the circumstances, has the discretion to allow or disallow all or part of the claim for voting purposes. *Id.* A motion seeking temporary allowance for voting purposes may be filed at any time before votes are tallied. *Id.*

Here, the voting deadline for tallying votes was October 9, 2013. This motion was filed October 15, 2013. Movant has had over one year since the objection to their claim was filed to seek temporary allowance of their claim for voting purposes. Conversely, the Debtors in Possession have had one year to prosecute the objection to this claim. The evidentiary hearing on the Objection is scheduled for November 22, 2013.

The Debtors in Possession opposition is built substantially on their reading of the decision *Jacksonville Airport, Inc. v. Michkeldel Inc.*, 434 F.3d 729 (4th Cir. 2006). In *Jacksonville Airport, Inc.*, the creditor did not file any opposition to the objection to claim (none being required under the local rules of that bankruptcy court). Only at the time of the confirmation hearing did the creditor orally petition the court that the creditor's claim be temporarily allowed for voting purposes. The bankruptcy court deemed the oral request untimely. The Court of Appeals affirmed the bankruptcy judge rejecting the creditor's request because it was not made until after the time to vote had expired.

Under the facts of the present case, this court finds that the request is timely. The motion was filed on October 15, 2013, two weeks prior to the scheduled confirmation hearing. This was filed with the backdrop of the evidentiary hearing on the Objection to claim set to be conducted on November 22, 2013, less than one month after the confirmation hearing date. October 9, 2013 was set as the last day for filing ballots for the Chapter 11 plan now before the court. Order, Dckt. 734.

In reviewing the Docket, the court has identified the following tabulation of ballots which the Debtors in Possession have included in the Declaration of Robert Yaspan (counsel who received the ballots). Rather than a straight forward tabulation of ballots chart, it is a detailed narrative of the ballots. From this, the court has created the following table.

Class	Voting	
Class 1 Internal Revenue Service	No Ballot	
Class 2 General Unsecured Claims in the Amount of $2,000 or less	2 Ballots Submitted For Confirmation: Not Stated Against Confirmation: Not Stated	Not Impaired

Class 3 General Unsecured Claims (excluding Class 2, 4 and 5 Claims, but including a $2,730,000 claim of Edenathan, LLC) Only one ballot for Edenathan has been provided by the Debtors in Possession, and it fails to state a voting amount or class in which the this creditor purports to be voting. The court does not count the Edenathan Claim in Class 3.	4 Ballots Submitted 3 Votes for Confirmation...$288,349 1 Vote Against Confirmation...$13,959	Impaired The Debtors in Possession attempt to count the "votes" of creditor who failed to cast ballots but with whom the Debtors in Possession have cut side deals. The Bankruptcy Code does not provide for non-voting creditors to "vote" by cutting side deals with the Debtor in Possession. If the court were to allow the non-voting creditors to vote for the plan, then it should allow the non-voting creditor to vote against the plan.
Class 4 Claim of Edenathan, LLC	1 Ballot Submitted 1 Vote for Confirmation....Unstated Claim amount or Class within which creditor was voting.	
Class 5 Nagra, LLC	1 Ballot Submitted 1 Vote Against Confirmation	This claim is the subject of an objection by the Debtors in Possession and for which a motion for temporary allowance for voting purposes was filed after the deadline for submitting ballots to counsel for the Debtors in Possession.
Class 6 The Debtors		

It appears that a serious question exists as to the votes for and against confirmation, and that the Karen Sethi claim may be a key vote for the class of general unsecured claims. From reviewing the extensive narrative of the ballots submitted, the copies of the ballots, and the failure of the Debtors in Possession to set forth a simple table of ballots, it could well appear that such was done to create confusion with the court as to who actually voted, the amount of claim they asserted, the class in which they would properly vote, and the correct tabulation of the ballots actually cast.

The Second Amended Plan now before the court expressly creates a separate class for the Edenathan unsecured claim for $2,511,600 (with proof of claim filed for $2,730,000, with $218,400 to be paid in Class 3). Pursuant to an agreement with Edenathan, it is to receive an 8% dividend on its claim, which is the same percentage as other creditors with general unsecured claims. Eight percent of the $2,730,000 claim is $218,400.00.

Edenathan is not part of the Class 3 Claims, the Debtor in Possession's Second Amended Plan expressly excluding that claim. However, the tabulation of ballots set forth in counsel's declaration expressly misrepresents not only the classification of this claim, but attempts to double count it. There is no basis for the court inferring that such misrepresentation was inadvertent. This raises significant good faith issues for these Debtors in Possession and whether they can now meet the minimum requirement of proposing and prosecuting a Chapter 11 Plan, and prosecuting the Chapter 11 case in good faith.

In light of this case having been pending now for two years, the confirmation hearing set for October 31, 2013, an evidentiary hearing on the actual objection to the Karen Sethi claim, and the active prosecution of claim by Karen Sethi, the court will determine the Karen Sethi claim at the evidentiary hearing prior to conducting a confirmation hearing on the Second Amended Plan filed by the Debtors in Possession. If no appeal is taken from the ruling after the evidentiary hearing, then the court will have finally determined this claim. If an appeal is taken, the court will make its ruling the temporary allowance, if any, of this claim for voting purposes.

Further, in light of the questionable tabulation of ballots, the active participation of this creditor may be necessary for the court to have a truthful and accurate presentation of evidence for any confirmation hearing and to consider whether the Debtors in Possession have and are proceeding in good faith.

The hearing on the motion is continued to 9:30 a.m. on November 22, 2013.

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 Temporary Allowance of Claim filed by Creditor 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 motion is continued to 9:30 a.m. on November 22, 2013.

6. 11-93411-E-11 SANJIV/SHEENA CHOPRA — MOTION FOR TEMPORARY ALLOWANCE OF CLAIM
RHG-4 Robert M. Yaspan — 10-15-13 [783]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors' Attorney and Office of the United States Trustee on October 15, 2013. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion for Temporary Allowance of Claim 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion for Temporary Allowance of Claim. 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:

Creditor Nagra LLC("Creditor") moves for a temporary allowance of his claim. The Debtors-in-Possession objected to Creditor's claim and trial has not been held. Creditor argues that it has a colorable claim, as it has a personal guarantee from the Debtor. The Motion states with particularity (Fed. R. Bankr. P. 9013) the following grounds upon which the requested relief if based.

A. Nagra, LLC moves for temporary allowance of its claim.

B. Federal Rule of Bankruptcy Procedure 3018(a) allows for the temporary allowance of a claim or interest for purposes of accepting or rejecting a plan.

C. Nagra, LLC's proof of claim asserts that the Debtors are personally liable for the debts of Premier Real Estate Development, LLC.

D. Nagra, LLC and Karen Sethi have filed a motion to substantively consolidate the Debtors' and various entities they control, including Premier Real Estate Development, LLC, into this one bankruptcy case.

E. Nagra, LLC has pending an Adversary Proceeding (13-9033), for which trial is scheduled for February 19, 2013. Nagra, LLC's defense of this fraudulent conveyance action is based on the contention that the various entities controlled by the Debtors are the alter egos of the Debtors.

F. Nagra, LLC has filed a proof of claim in the amount of $3,064,503.21 (unsecured claim). Proof of Claim 35-2. Nagra, LLC amended the proof of claim to expressly set out the basis for its unsecured claim, setting them forth with the precision required for pleadings a compliant pursuant to Federal Rule of Civil Procedure 8 and 9, and Federal Rule of Bankruptcy Procedure 7008 and 7009.

The Debtors in Possession objected to Proof of Claim No. 35-1 filed by Nagra, LLC. The court sustained the objection, and order the filing of an amended proof of claim setting out the basis of the claim. This amended claim is Proof of Claim No. 35-2. It is through this Adversary Proceeding, since relief is requested by the Debtors in Possession for which an adversary proceeding is require pursuant to Federal Rule of Bankruptcy Procedure 7001, that the objection to the Nagra, LLC's Proof of Claim No. 35-2 is being prosecuted.

DEBTORS-IN-POSSESSION'S OPPOSITION

Debtors-in-Possession assert the motion is untimely, as it was filed after the closing of the ballots and approximately two weeks prior to the confirmation hearing on the plan. The Debtors-in-Possession also state that the Motion lacks any evidence to support it.

Debtors-in-Possession state there is no surprise regarding the objection to claim, as it was filed over a year prior to this motion and that this is merely a tactic for Creditor to stall the confirmation process.

DISCUSSION

A creditor may vote if its claim is deemed allowed or if its claim has been allowed by the court. 11 U.S.C. § 1126(a). A claim is deemed allowed unless an objection is filed to it. 11 U.S.C. § 502. Thus, any creditor with a claim to which an objection has been filed may not vote on a plan. *See In re M. Long Arabians*, 103 B.R. 211, 215 (B.A.P. 9th Cir. 1989).

Federal Rule of Bankruptcy Procedure 3018(a) allows temporary allowance of a claim in such amount as the court deems proper after notice and hearing on any pending objections. 9 COLLIER ON BANKRUPTCY ¶ 3018.01[5] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.) If the claim objection has been pending for a long enough time to have permitted its resolution, the court may decline to allow the claim or any part of it for voting purposes if the delay in hearing the objection is attributable to the claimant. The court, however, regardless of the circumstances, has the discretion to allow or disallow all or part of the claim for voting purposes. *Id.* A motion seeking temporary allowance for voting purposes may be filed at any time before votes are tallied. *Id.*

Here, the voting deadline for tallying votes was October 9, 2013. This motion was filed October 15, 2013. The Adversary Proceeding was filed on January 7, 2013. Movant has had almost one year since the Adversary Proceeding was filed to seek temporary allowance of their claim for voting purposes. Furthermore, Movant failed to provide any evidence in support of their motion. No declaration has been filed providing this court with admissible evidence in support of the relief sought.

As opposed to the situation involving the Karen Sethi claim objection, the evidentiary hearing for which is but a month away, the trial in the Adversary Proceeding is four months from being conducted. The court cannot conveniently rule on the present motion, without having to delay the confirmation hearing almost six months.

Further, the basis for the alleged Nagra, LLC claim arises out of complex allegations of alter-ego. Merely giving the court the allegations used for the proof of claim is not sufficient evidence. The court has set at least three days for the trial in the Adversary Proceeding (even with the use of Alternative Direct Testimony pursuant to Local Bankruptcy Rule 9017-1).

Waiting to request that the court temporarily allow such a complex claim, after the close of voting, and on the eve of the confirmation hearing, and not providing any evidence is too little, too late under Federal Rule of Bankruptcy Procedure 3018(a). The nature of the claim, the complexity of the issues, the objection to the claim, and the Adversary Proceeding have been known of by Nagra, LLC since filing of the objection on March 19, 2012, to the Proof of Claim No. 35-1 (which was sustained and pursuant to the order thereon Nagra, LLC filed Amended Proof of Claim No. 35-1).

The Motion to temporarily allow the claim of Nagra, LLC for voting purposes is denied. FN.1.

FN.1. Denying to temporary allowance of a claim for voting purposes is not a determination of whether Nagra, LLC has standing as a party in interest to participate in the confirmation hearing. *Johnson v. JEM Dev. Co. (In re Johnston)*, 149 B.R. 158, 161 (B.A.P. 9th Cir. 1992); *In re De la Salle*, Bankr. E.D. Cal. 10-29678, Civil Minutes for Motion to Dismiss or Convert (DCN: MBB-1), Dckt. 230 (Bankr. E.D. Cal. 2011), *affirm.*, *De la Salle v. U.S. Bank, N.A. (In re De la Salle)*, 461 B.R. 593 (B.A.P. 9th Cir. 2011).

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 Temporary Allowance of Claim filed by Creditor 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.

7. 12-91912-E-7 GEORGE/LORI AZEVEDO
SSA-2 Brian S. Haddix

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH TERESINHA NEVES SILVA
10-2-13 [36]

DISCHARGED 10-22-12

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 2, 2013. By the court's calculation, 29 days' notice was provided. 21 days' notice is required.

Tentative Ruling: The Motion to Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and Federal Rule of Bankruptcy Procedure 2002(a)(3). 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Compromise. 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:

Chapter 7 Trustee Michael D. McGranahan, seeks approval of the Settlement Agreement between he and Teresinha Neves Silva. During his investigation, the Trustee states he discovered that the debtors had paid the creditor, Teresinha Neves Silva, the sum of $22,344.00 on or about June 6, 2012, which was within ninety days of the date of the Debtors' Chapter 7 filing, July 10, 2012. The Trustee demanded repayment of the sum and ultimately filed an adversary proceeding to recover the preference and seek turnover (Adv. No. 13-09020). The parties agreed to the satisfaction of the Trustee's claims in this matter for $16,768.00, subject to court approval.

The Trustee argues that the compromise is in the best interests of the estate and meets the standard for this court's approval of compromises.

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).

Here, the Trustee argues that the four factors have been met.

Probability of Success

Trustee believes the result achieved by Stipulation of the parties is approximately the same when weighed against the probable fees and costs expended in prosecuting an outright contested preference litigation matter. Trustee's counsel bills at the rate of $250 per hour plus costs, and states this is modest for his education, experience and training in the bankruptcy area. Estimated time to litigate the present preference action is between fifteen to twenty hours of legal time plus court costs: as such the estate would easily expend between $3750 to $5000, or more, plus costs, in this matter. Additionally, Trustee argues that there is a "remote" possibility defendant Silva's affirmative defenses would prevail to defeat the claims advanced by the Trustee.

Difficulties in Collection

Trustee argues that with the exception of the expenditure of time, attorneys fees and costs, the additional difficulty encountered would be collection from Mrs. Silva. With the prospect of a settlement and agreement, the requisite funds of $16,7 58 will be turned over timely to the estate, pending bankruptcy approval of this settlement.

Expense, Inconvenience and Delay of Continued Litigation

The Trustee argues that the litigation is not overly complex and most issues are factual. Trustee asserts the claim by defendant Silva that there was an ordinary course of business or contemporaneous defense present in the negotiations and settlement with defendants may pose to be a mixed question of fact and law.

Paramount Interest of Creditors

The Trustee 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 shall announce the proposed settlement and request any other parties interested in making an offer to the Trustee for the claims or interests in the property to state their 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 Compromise 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 to Compromise Controversy against the Trustee, Michael D. McGranahan and Teresinha Neves Silva, is granted and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed as Exhibit 1 in support of the motion on October 2, 2013(Docket Number 39).

8. 13-91016-E-7 THA-1 — MIGUEL/JOANN VALENCIA — Ted A. Greene — MOTION TO EMPLOY THOMAS H. ARMSTRONG AS ATTORNEY(S) 9-25-13 [26]

DISCHARGED 9-10-13

The Court set the Application for Appointment of General Counsel per Order on October 4, 2013. Dckt. 29. 27 days notice was provided.

The court's tentative decision is to deny the Application to Employ. 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:

Chapter 7 Trustee, Michael D. McGranahan, seeks to employ counsel Thomas Armstrong from the Law Office of Thomas Armstrong as General Counsel,

pursuant to Bankruptcy Code Section 327(a) and 330. Trustee seeks the employment of counsel to assist the Trustee in administering the estate.

However, document prepared includes the motion, declaration and exhibits in this matter as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." *Revised Guidelines for the Preparation of Documents*, ¶(3)(a). The court's expectation is that documents filed with this court comply with the *Revised Guidelines for the Preparation of Documents* in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). This failure is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

If the court considers the documents improperly filed, the court will issue the following tentative ruling:

Thomas H. Armstrong, testifies that he is an attorney admitted to practice before this court, practicing in the area of bankruptcy. Counsel states he has no connection with the application, creditors, or any other party in interest, their attorneys or accountants, the U.S. Trustee, or any other person employed by the U.S. Trustee, besides the connections described in Exhibit A. Exhibit A lists the following connections:

Creditor	Relationship
Ally Financial	Counsel's vehicle is financed through Creditor
Bank of America	Counsel holds his business and client trust accounts with Creditor
Chevron	Counsel has a Chevron account
Comcast Cable	Counsel receives cable television through Creditor
Macy's	Counsel has an account with Creditor
Sears	Counsel has an account with Creditor

DISCUSSION

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate, and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Taking into account all of the relevant factors in connection with the employment and compensation of counsel, considering the declaration demonstrating that counsel does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Thomas H. Armstrong as counsel for the Chapter 7

estate. The approval of any attorney fees are subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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 granted and the Chapter 7 Trustee is authorized to employ Thomas H. Armstrong as counsel for the Chapter 7 Trustee.
>
> **IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.
>
> **IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.
>
> **IT IS FURTHER ORDERED** that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.
>
> **IT IS FURTHER ORDERED** that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

9. 13-91018-E-7 APRIL MOITOZO — MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA), N.A.
JAD-1 Jessica A. Dorn — 9-12-13 [17]

DISCHARGED 9-10-13

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, respondent creditors, and Office of the United States Trustee on September 12, 2013.

By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Avoid a 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 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 to Avoid a Judicial Lien is granted. No appearance required.

A judgment was entered against the Debtor in favor of Capital One Bank (USA), N.A. for the sum of $6,107.63. The abstract of judgment was recorded with Sacramento County on February 5, 2013. That lien attached to the Debtor's residential real property commonly known as 12071 Combine Dr, Waterford, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $192,519.00 as of the date of the petition. The unavoidable consensual liens total $236,865.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $3,500.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. 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 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 Capital One Bank (USA), N.A., Stanislaus County Superior Court Case No. 674522, Document No. 2013-0010520-00, recorded on February 5, 20131, with the Stanislaus County Recorder, against the

real property commonly known as 12071 Combine Dr, Waterford, California, is avoided 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.

10. 13-90323-E-12 PLF-5 **FRANCISCO/ORIANA SILVA** **Peter L. Fear** **MOTION TO APPROVE LEASE AGREEMENT** **10-3-13 [57]**

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 Debtors', Chapter 12 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 3, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Approve Lease Agreement 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 to Approve Lease Agreement is granted. No appearance required.

Debtors-in-Possession Francisco and Oriana Silva move for authorization to lease Debtor's dairy facilities on the property located at 300 East Barnhart Road, Ceres, California. Debtors state that before filing bankruptcy they sold their dairy herd and all proceeds, but still farm acreage located on the property. Debtor has received an offer from Jeff Whalen Dairy Farms, LLC to rent the dairy facilities on the property for a payment of $5,500.00 per month. The lease is for five years, beginning November 1, 2013 and automatic renewal for subsequent five year terms until written notice of a desire not to renew the lease.

DISCUSSION

The Bankruptcy Code permits the Debtor in Possession to lease property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b).

Here, the terms are set forth in the Purchase Agreement, filed as Exhibit A in support of the Motion. Dckt. 59.

Based on the evidence before the court, the court determines that the proposed lease is in the best interest of the Estate. The Motion to Permit Debtor to Lease Property is granted, subject to the court considering any additional offers from other potential purchasers at the time set for the hearing for the sale of 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 Approve Lease Agreement filed by Debtors-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and Debtors-in-Possession Francisco Silva and Oriana Silva are authorized to lease the property located at 300 East Barnhart Road, Ceres, California, to Jeff Whalen Dairy Farms, LLC, on the terms set forth in the Dairy Lease, filed as Exhibit A, Dckt. 59.

11. 13-90323-E-12 FRANCISCO/ORIANA SILVA — MOTION TO USE CASH COLLATERAL
PLF-6 Peter L. Fear — 10-3-13 [64]

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 Debtors, Chapter 12 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 3, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Use Cash Collateral 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 to Use Cash Collateral is granted. No appearance required.

Debtors-in-Possession Francisco and Oriana Silva move for an order approving the use of cash collateral to fund its ongoing operations and to otherwise continue the farming operation and preserve the value of the estate's assets. Debtor-in-Possession states the use of the cash collateral is needed immediately to maintain the reorganization process. Debtor believes the use of these funds is necessary to preserve its operations as a going concern. Debtor-in-Possession states that they have incurred post=petition administrative claims for products and services necessary to continue the farming operation, including, to cultivate, plant, and fertilize the corn crop and to harvest and stack oat hay.

The cash collateral stems from the sale of crops in the ordinary course of business. Debtor-in-Possession states he has kept these funds in a bank account pending court authorization for their use, which is approximately $17,000.00. The affected secured creditor is Nebraska State Bank, which has a security interest in the equipment and all accounts of the Debtors-in-Possession.

Debtor-in-Possession has been unable to obtain financing with unsecured credit pursuant to Bankruptcy Code §364(a) or (b) allowed as an administrative expense under Bankruptcy Code §503(b)(1), or secured credit pursuant to Bankruptcy Code §364(c), or on more favorable terms from any other sources. As adequate protection for the decline and value of the

Secured Creditor's collateral resulting from such use, Debtor-in-Possession will provide the Secured Creditor with a replacement lien.

The court may authorize use of cash collateral so long as the creditor is adequately protected. 11 U.S.C. § 363(e). The Debtor-in-Possession has the burden of proof on the issue of adequate protection. 11 U.S.C. § 363(p)(1). Adequate protection includes providing periodic cash payments to cover the loss in value of the creditor's interest. 11 U.S.C. § 361(1). Additionally, a substantial equity cushion in property provides adequate protection. *See In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984).

The Debtor-in-Possession proposes the following use of cash collateral:

Provider	Purchase	Price
A.M. P.M. Farms, LLC	Corn Planting	$648.00
Caetano Ranches	Eureka 7607 Seed Corn	$2,925.00
Kay-Hart Inc.	Cultivate corn/stack oat hay	$4,530.00
T&R Farms, LLC	Spray Corn	$396.00
Greg Nunes	Swath Oats and Bale Oats	$3,140.00
	Total:	**$11,639.00**

Counsel for Creditor Nebraska State Bank filed a Declaration of Non-Opposition to the Motion. Dckt. 73.

The court authorizes the use of cash collateral as requested. No objection has been raised to the use and the payments are reasonable and necessary to maintain Debtor's operations. The court may authorize use of cash collateral so long as the creditor is adequately protected. 11 U.S.C. § 363(e). Here, the use of the cash collateral is warranted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Use Cash Collateral filed by Debtors-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the motion to use cash collateral for the payment of the expenses is granted and the cash collateral may be used to pay the following expenses:

Provider	Purchase	Price
A.M. P.M. Farms, LLC	Corn Planting	$648.00
Caetano Ranches	Eureka 7607 Seed Corn	$2,925.00

Kay-Hart Inc.	Cultivate corn/stack oat hay	$4,530.00
T&R Farms, LLC	Spray Corn	$396.00
Greg Nunes	Swath Oats and Bale Oats	$3,140.00
	Total:	**$11,639.00**

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

12. 13-91729-E-7 BSH-1 THOMAS/CECILIA MCCAULEY Brian S. Haddix

MOTION TO AVOID LIEN OF DISCOVER FINANCIAL SERVICES, LLC
9-30-13 [9]

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on respondent creditors on September 30, 2013. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Avoid a 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).

The court's tentative decision is to deny the Motion to Avoid a Judicial Lien. 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 Motion to Avoid a Judicial Lien is denied for incorrect service. In the Proof of Service, the Debtors only showed that they served the Creditor. Since service upon the U.S. Trustee and Chapter 7 Trustee is required, the Motion to Avoid a Judicial Lien is denied for incorrect service.

If during the scheduled hearing, the Debtors can provide sufficient evidence that all parties of interest are correctly serviced, the court may alternatively make the following ruling:

A judgment was entered against the Debtor in favor of Discover Bank for the sum of $8,327.68. The abstract of judgment was entered against Debtors in Stanislaus County on January 27, 2012. That lien attached to the Debtor's residential real property commonly known as 13321 Sky Line Blvd, Waterford, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $124,000.00 as of the date of the petition. The unavoidable consensual liens total $321,679.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $1 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. 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 Discover Bank, Stanislaus County Superior Court Case No.666454, Document No. Xxxx, recorded on xxxx, 2011, with the Stanislaus County Recorder, against the real property commonly known as 13321 Sky Line Blvd, Waterford, California, is avoided 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.

13. 13-90231-E-7 JOSE/MARIA PEREZ
SLF-2 Thomas O. Gillis

MOTION TO EMPLOY PMZ REAL ESTATE AS REALTOR(S)
9-24-13 [28]

DISCHARGED 6-3-13

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 Debtors, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 24, 2013. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

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

Chapter 7 Trustee, Eric J. Nims, seeks to employ Bob Brazeal of PMZ Real Estate, in Modesto, California to assist the Trustee in the marketing and sale of residential real properties located at 1605 Winston Circle, Oakdale, California and 1615 Mark Court, Oakdale, California. The Trustee believes employing Bob Brazeal is in the best interests of creditors and should be approved pursuant to Bankruptcy Code Section 327.

Brazeal testifies that he is a real estate broker licensed by the State of California and has substantial experience in the valuation, marketing and sale of real property in Modesto. He states he will determine the fair market value of the property, list and market the property for sale. Brazeal states he will be entitled to a commission of six percent of the sales price, but will not be entitled to any fee absent a subsequent court order allowing the Trustee to pay his fee. Brazeal testifies he does not represent or hold any interest adverse to the Debtor or to the estate and that he has no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys and Realtors, 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. The court approves the fees computed as a commission equal to six percent 6% of the gross sales priced of the property, subject to further review pursuant to 11 U.S.C. § 328(a). 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.

Taking into account all of the relevant factors in connection with the employment and compensation of the realtor, considering the declaration demonstrating that Bob Brazeal does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Bob Brazeal as realtor for the Chapter 7 Trustee.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion 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 granted and the Chapter 7 Trustee is authorized to employ PMZ Real Estate and Bob Brazeal as realtor for the Chapter 7 Trustee to sell the real properties commonly known as 1605 Winston Circle, Oakdale, California and 1615 Mark Court, Oakdale, California.
>
> **IT IS FURTHER ORDERED** that compensation computed as a commission equal to six percent (6%) of the sales priced is approved, subject to the provisions of 11 U.S.C. § 328(a). No compensation is permitted except upon court order following an application pursuant to 11 U.S.C. §§ 330-331, which may be made as part of the motion to approve the sale of the property.
>
> **IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by the realtor in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

14. 13-91135-E-7 SLF-2 | **RONALD/STEPHANIE HANNINK** | **Scott A. Tibbedeaux** | **MOTION TO EMPLOY FIRST CAPITOL AUCTION, INC. AS AUCTIONEER 10-3-13 [27]**

DISCHARGED 9-30-13

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 Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on October 3, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

Chapter 7 Trustee, Gary R. Farrar, seeks to employ First Capitol Auction, Inc., 50 Solano Avenue, Vallejo California as the Trustee's auctioneer. The Trustee states that the Debtors disclosed an interest in the following four vehicles:

1. 2005 flat bed cargo trailer - valued at $300.00, no exemption claimed.
2. 2006 Yamaha Quad - valued at $2,500, no exemption claimed.
3. 2006 Yamaha Quad - valued at $1,800, no exemption claimed.
4. 2006 Harley Davidson, Black, valued at $8,000.00 and $1,554.98 claimed as exempt.

The Trustee states the Debtors did not schedule any liens or encumbrances against the vehicles and is unaware of any liens or encumbrances on them. The Trustee believes employing First Capital to sell the vehicles and obtain the equity for the estate is in the best interests of creditors.

The Declaration of Eric V. Smith, President of First Capitol Auction, Inc., testifies that he has been an auctioneer since 1987. Smith testifies he does not represent or hold any interest adverse to the Debtor or to the estate and that he has no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys and Realtors, 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. The court approves the fees computed as a commission equal to six percent 6% of the gross sales priced of the property, subject to further review pursuant to 11 U.S.C. § 328(a). 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.

Taking into account all of the relevant factors in connection with the employment and compensation of the realtor, considering the declaration demonstrating that Smith does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ First Capitol Auction, Inc. as auctioneer for the Chapter 7 Trustee.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion 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 granted and the Chapter 7 Trustee is authorized to employ First Capitol Auction, Inc. as auctioneer for the Chapter 7 Trustee.

IT IS FURTHER ORDERED that compensation computed as a commission equal to five percent (5%) of the sales price sold at auction, plus reasonable expenses, is approved, subject to the provisions of 11 U.S.C. § 328(a). No compensation is permitted except upon court order following an application pursuant to 11 U.S.C. §§ 330-331, which may be made as part of the motion to approve the sale of the property.

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by the realtor in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

15. 13-91135-E-7 RONALD/STEPHANIE HANNINK MOTION TO SELL
SLF-3 Scott A. Tibbedeaux 10-3-13 [32]

DISCHARGED 9-30-13

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 Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 3, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(2). 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 court's tentative decision is to grant the Motion to Sell Property. 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 Bankruptcy Code permits the Trustee to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b). Here, The Trustee seeks to sell at public action the following vehicles that the Debtors disclosed an interest in (the "Vehicles"):

1. 2005 flat bed cargo trailer - valued at $300.00, no exemption claimed.

2. 2006 Yamaha Quad - valued at $2,500, no exemption claimed.

3. 2006 Yamaha Quad - valued at $1,800, no exemption claimed.

4. 2006 Harley Davidson, Black, valued at $8,000.00 and $1,554.98 claimed as exempt.

The Trustee states the Debtors did not schedule any liens or encumbrances against the vehicles and is unaware of any liens or encumbrances on them. The Trustee seeks to sell these vehicles at an online/live auction through the website of First Capitol Auction, Inc., 50 Solano Avenue, Vallejo California (www.1stcapitolauction.com). The Trustee believes the proposed sale of the personal property is in the best interests of the creditors and that there is equity in the Vehicles and a sale of the

Vehicles at public auction is the best method of liquidating them for the benefit of the estate.

The Trustee believes that by using an auction process, the Vehicles will be exposed to a large number of prospective purchasers and, for that reason, will likely be sold for the best possible price. The Trustee intends to accept the highest reasonable bids. If, in the exercise of the Trustee's business judgment, no reasonable bids are received, the Vehicles may be held for subsequent auction or private sale without additional notice.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate. The Motion to Sell Property 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 sell 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 Trustee’s proposed sale of the vehicles, described as,
>
> 1. 2005 flat bed cargo trailer - valued at $300.00,
> 2. 2006 Yamaha Quad - valued at $2,500,
> 3. 2006 Yamaha Quad - valued at $1,800, and
> 4. 2006 Harley Davidson, Black - valued at $8,000.00,
>
> at public auction, by First Capitol Auction, Inc., 50 Solano Avenue, Vallejo, California, is granted.

16. 12-90836-E-7 PATRICIA DAY
HSM-2 Pablo A. Tagre

CONTINUED OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
8-23-13 [33]

CONT. FROM 9-26-13

DISCHARGED 7-2-12

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, parties requesting special notice, and Office of the United States Trustee on August 23, 2013. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Objection to Debtor's Claim 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).

The court's tentative decision is to sustain the Objection to Debtor's Claim of Exemptions. 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:

PRIOR HEARING

Chapter 7 Trustee objects to Debtor's amended Claim of Exemptions filed on July 26, 2013 by the Debtor. Trustee states this case was closed on July 6, 2012, and then reopened on May 7, 2013, based upon the discovery of a real property asset in Canada not previously disclosed. This is the same property that the Debtor is now claiming as exempt. The Debtor claimed as exempt her interest in real property located at Lot 14; Block 1; Plan 8421296 in Pine Grove Estates, Athabasca County, Alberta, Canada ("Property"), valuing the property at $420,000.000 and claiming $175,000.00 exempt pursuant to Cal. Code Civ. P. § 704.730. The Debtor states she resides in the property, she is over 55 and her income is less than $15,000.00.

Trustee argues that the homestead exemption should be denied due to the Debtor's bad faith filing conduct and prejudice caused to the Trustee, the Estate and the creditors.

Debtor failed to respond to the Trustee's Objection. However, at the status conference held on September 5, 2013, debtor's counsel advised the court that he is withdrawing from the case and Debtor asserted that she was looking for new counsel. The court continued the status conference to October 31, 2013 and ordered that an answer be filed not later than October 7, 2013.

The Trustee filed a statement stating that he would not oppose a 30 day continuance if the court so orders.

CONTINUANCE

Based on the fact that Debtor was without counsel and was seeking a new attorney, the court continued the hearing to October 30, 2013, with Debtor providing a response on or before October 7, 2013. The court notified the parties that if Debtor failed to file a written response by October 7, 2013, the court may enter the default of Debtor and resolve the matter without oral argument.

Debtor failed to respond to the motion by October 7, 2013, as ordered by the court. The default of the Debtor is hereby entered by the court. Therefore, the court addresses the merits of the motion.

On the Debtor's Original Schedule C, filed March 26, 2012, signed under penalty of perjury, the subject real property was not disclosed and the Debtor's residence was listed as 1600 Brixton Lane, Modesto, California. Nor was the subject real property disclosed during the bankruptcy which was open for three months. In her Declaration filed July 26, 2013, the Debtor stated that when she was put on title in 2006, it was to aid her father in paying bills related to the property and that she didn't consider the property hers, an assertion the trustee denies. The Declaration also states that she now understands that she is on title, disclosing the property and has listed it as her residence and is claiming a homestead exemption.

The court agrees with the Trustee that it is difficult to understand how at the time of filing the petition, her claim of title to the subject property was not known, but now is her homestead for purposes of the exemption.

Furthermore, to qualify for the $175,000.00 exemption, as Debtor does, she must have owned the home for at least 1,215 days before filing; otherwise the exemption is limited to $146,450.00. 11 U.S.C. § 522(p)(1).

The Trustee argues that the Debtor has conducted her bankruptcy in bad faith and failed to disclose the house in Canada in her original bankruptcy filing. Trustee states this bad faith conduct warrants the denial of the claimed exemption.

Federal Rule of Bankruptcy Procedure 1009(a), in which "[a] voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed." The court may disallow the amendment only upon "a showing of bad faith or prejudice to third parties." *Greene v. Savage (In re Greene)*, 583 F.3d 614, 625 (9th Cir. 2009); *Arnold v. Gill (In re Arnold)*, 252 B.R. 778, 784 (9th Cir. BAP 2000). On the issue of "prejudice" to third parties, there is an

additional requirement: merely showing “prejudice" does not automatically trigger disallowance of an amendment. The court must balance the prejudice to the debtor of disallowing the exemption against the prejudice to third parties in allowing the exemption. *In re Arnold*, 252 B.R. at 785. The usual ground for a finding of "bad faith" is the debtor's attempt to hide assets. *Id.*

Here, the record shows that Debtor did conceal the subject real property from the Trustee, even though she inherited it prior to the filing of the bankruptcy petition. Debtor admitted that she was put on title to aid her father in paying bills. Debtor failed to disclose the subject real property asset on her schedules when initially filing the bankruptcy case and only when the Trustee discovered her interest in the property did Debtor disclose, and attempt to exempt, the real property. Furthermore, it does not appear that Debtor qualifies for the homestead exemption, as the court is not convinced that the real property is Debtor’s residence. Debtor declared under penalty of perjury that she resided in California, not Canada and the homestead claim based on Canadian residency does not apply.

Based on the foregoing, the court finds requisite bad faith and the Debtor is denied the $175,000.00 exemption claimed in the real property located at Lot 14; Block 1; Plan 8421296 in Pine Grove Estates, Athabasca County, Alberta, Canada ("Property") pursuant to Cal. Code Civ. P. § 704.730.

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 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is sustained and Debtor is denied the $175,000.00 exemption claimed in the real property located at Lot 14; Block 1; Plan 8421296 in Pine Grove Estates, Athabasca County, Alberta, Canada ("Property") pursuant to Cal. Code Civ. P. § 704.730.

17. 13-91336-E-7 THOMAS/TONYA OLSON MOTION TO SELL
SLF-3 Scott D. Mitchell 10-3-13 [32]

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 Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on October 3, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(2). 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 court's tentative decision is to grant the Motion to Sell Property. 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 Bankruptcy Code permits the Trustee to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b). Here, the Trustee moves the sell the real property located at 2500 Pridmore Avenue, Modesto, California. Debtors claimed an exemption in $100,000.00 under California Code of Civil Procedure Section 704.730. Trustee employed PMZ Real Estate to market and sell the property, which determined the property was valued at $179,950.00. However, Debtors agreed to $55,000.00 to purchase the estate's interest in the subject real property. Trustee proposes that the sale be subject to overbidding at the time of the hearing.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate. The Motion to Permit Debtor to Sell Property is granted, subject to the court considering any additional offers from other potential purchasers at the time set for the hearing for the sale of the property.

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 sell 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 Eric J. Nims, the Chapter 7 Trustee(“Trustee”), is authorized to sell pursuant to 11 U.S.C. § 363(b)to Thomas Edward Olson and Tonya Marie Olson or nominee (“Buyers”), the residential real property commonly known as 2500 Pridmore Avenue, Modesto, California (“Real Property”), on the following terms:

1. The Real Property shall be sold to Buyer for $55,000.00, on the terms and conditions set forth in the Purchase Agreement, filed as Exhibit B in support of the Motion. Dckt. 36.

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

4. The Trustee be and hereby is authorized to pay a real estate broker's commission in an amount no more than six percent (6%) of the actual purchase price upon consummation of the sale.

IT IS ORDERED that the provisions of Federal Rule of Bankruptcy Procedure 6004(h) are waived.

18. 13-91439-E-7 MIGUEL SANTANA
BSH-1 Brian S. Haddix

MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA), N.A.
9-19-13 [17]

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on respondent creditors on September 19, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Avoid a 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).

The court's tentative decision is to grant the Motion to Avoid a Judicial Lien. 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 Motion to Avoid a Judicial Lien is tentatively denied for incorrect service. The Chapter 7 Trustee and Office of the US Trustee are required to be served. The proof of service failed to serve the Chapter 7 Trustee and Office of the US Trustee.

If Debtor provides sufficient service on the proper parties at the hearing or the Trustee waives service, the court will issue the following ruling:

Debtor testifies that a judgment was entered against the Debtor in favor of Capital One Bank (USA), N.A. for the sum of $3,959. The abstract of judgment was recorded with Stanislaus County on August 20, 2010. That lien attached to the Debtor's residential real property commonly known as 512 Crater Avenue, Modesto, California. FN.1.

FN.1. Debtor did not provide sufficient evidence of the judicial lien. A search of the LEXIS NEXIS database showed the judicial lien to Capital One Bank in the amount of $3,959.00, California Superior Court, Stanislaus County, Case No. 650074. Debtor should provide all required information regarding the lien in the future.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $105,000.00 as of the date of the petition. The unavoidable consensual liens total $144,575.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $1.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. 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 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 Capital One Bank (USA), N.A., Stanislaus County Superior Court Case No. 650074, Document No. 2011-0023320, recorded on August 20, 2010, with the Stanislaus County Recorder, against the real property commonly known as 512 Crater Avenue, Modesto, California, is avoided 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.

19. 12-93041-E-7 RAMON/ADELIA GOMEZ
JAD-1 Jessica A. Dorn

MOTION TO REOPEN CHAPTER 7 BANKRUPTCY CASE
9-17-13 [19]

CASE CLOSED 3-22-13

DISCHARGED 3-18-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on September 17, 2013. By the court's calculation, 44 days' notice was provided. 14 days' notice is required.

Final Ruling: The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's decision is to grant the motion to reopen the case. No appearance at the October 31, 2013 hearing is required.

Debtor filed this petition for relief on November 30, 2012, and the Meeting of Creditors was concluded on January 10, 2013. Debtors received their discharge on March 18, 2013. Debtors listed Capitol One Bank, and Bleir & Cox, attorneys for creditor Capitol One Bank on Schedule F of Debtors' Petition. Debtors were not familiar with the procedure to avoid their recorded liens.

Debtors now wish to avoid the lien recorded. Debtors request that the court reopen their case to allow them to avoid the lien held by Capitol One Bank.

The motion is granted and the case is reopened.

The court shall issue a minute order consistent with this ruling.

20. 12-93041-E-7 RAMON/ADELIA GOMEZ
JAD-2 Jessica A. Dorn

MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA) N.A.
9-17-13 [23]

CASE CLOSED 3-22-13

DISCHARGED 3-18-13

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 Debtors, Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on September 17, 2013. By the court's calculation, 44 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Avoid a 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 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 to Avoid a Judicial Lien is denied. No appearance required.

A judgment was entered against the Debtor in favor of Capital One Bank (USA) N.A. for the sum of $3,896.46. The abstract of judgment was recorded with Contra Costa County on September 12, 2011. That lien attached to the Debtor's residential real property commonly known as 1511 Folsom Avenue, San Pablo, California.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $125,000.00 as of the date of the petition. The unavoidable consensual liens total $115,500.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $1,662.59 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property.

However, after application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is equity to support the judicial lien. Therefore, the fixing of this judicial lien does not impair the Debtor's exemption of the real property and its fixing cannot be avoided.

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 Debtors 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 Avoid Judicial Lien is denied without prejudice.

21. 12-93041-E-7 JAD-3 | **RAMON/ADELIA GOMEZ** | **Jessica A. Dorn** | **MOTION TO AVOID LIEN OF CITIBANK (SOUTH DAKOTA), N.A.** | **9-17-13 [28]**

CASE CLOSED 3-22-13

DISCHARGED 3-18-13

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 Debtors, Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on September 17, 2013. By the court's calculation, 44 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Avoid a 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 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 to Avoid a Judicial Lien is denied. No appearance required.

A judgment was entered against the Debtor in favor of Citibank (South Dakota) N.A. for the sum of $5,801.13. The abstract of judgment was recorded with Contra Costa County on September 12, 2011. That lien attached to the Debtor's residential real property commonly known as 1511 Folsom Avenue, San Pablo, California.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $125,000.00 as of the date of the petition. The unavoidable consensual liens total $115,500.00 on that same date according

to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $1,662.59 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. However, after application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is 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 cannot be avoided.

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 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 Motion to Avoid Judicial Lien is denied without prejudice.

22. 12-92645-E-7 JOHN/JAN PIEL MOTION TO SELL
SSA-5 Cheryl L. Sommers 9-25-13 [121]

DISCHARGED 3-12-13

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 Debtors, Debtors' Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on September 25, 2013. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(2). 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 court's tentative decision is to grant the Motion to Sell Property. 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 Bankruptcy Code permits the Trustee to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b).

Here, the Trustee proposes to sell Debtors' interest in the subject property commonly known as follows:

> LOT 800 of Blue Lake Springs, Subdivision Unit 7, Tract No. 132, as set forth on the Official Map thereof, filed for record November 1964 in Book 2 of Subdivision Maps, Calaveras County Records, [A.P.N. 24-034-012].

The subject property is a lot with no structures on it. Debtors hold a one-half joint tenancy interest in the subject property with James Lykins, who is also the proposed buyer of the bankruptcy estate's interest in Debtors' lot.

Trustee received an offer to sell the estate's interest in the subject property to James Lykins for the principal sum of $4,500 in cash. The offer is "as is" and "without warranty." Normal and customary escrow costs applies between parties.

The buyer has tendered a deposit into escrow of $4,500. The buyer has also executed an Agreement to Purchase Excess Equity of Bankruptcy

Estate (Exhibit "1"; Dckt. No. 125) and Trustee's Addendum (Exhibit "A"; Dckt. No. 125). In consideration of the same, and subject to the court's approval and overbids, Trustee shall convey to buyer a Trustee's Deed for his interest in the subject property.

The buyer will be bearing customary escrow fees. The cost of an ALTA or CLTA homeowner's policy of Title Insurance issued by First American Title, currently assessed property and supplemental taxes, shall be paid by the seller prior to the close of escrow, and for the periods after close of escrow any taxes shall be paid by the buyer. The seller will bear normal and customary escrow and recording costs.

Trustee requests that any overbid be determined by the court. Trustee requests that any initial overbid be in increments of $250.00. As such, the next highest bid would be $4,750.00 and thereafter, in further increments as determine by the Bankruptcy Court.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate. The Motion to Permit Trustee to Sell Property is granted, subject to the court considering any additional offers from other potential purchasers at the time set for the hearing for the sale of the property.

Waiver of 14-Day Stay

The Federal Rule of Bankruptcy Procedure as drafted by the Rules Committee and Supreme Court specify that an order approving the sale of property is subject to a 14-day stay of enforcement. Fed. R. Bank. P. 6004(h). The Rule further provides that the court may "order otherwise," which allows the court to reduce or waive the stay when appropriate.

In this Motion, no basis has been provided to the court for waiving the 14-day stay, other than a citation to Fed. R. Bank. P. 6004(h). Such an argument could be made for any sale, with that exception swallowing the Rule. *See In re Dial-A-Mattress Operating Corp.*, 2009 Bankr. LEXIS 1801 at *23 (Bankr. E.D. N.Y. 2009) ("The debtors have failed to establish any exigent circumstances which would support a waiver of the 10 day stay. The Court denies that portion of the Motion which seeks waiver of the 10 day stay required by Bankruptcy Rule 6004 and 6006."); *In re L.A. Dodgers LLC,* 468 B.R. 652 (Bankr. Del 2011) ("The Court will waive the stay because, as is clear from this opinion, Debtors are operating within a small time frame. They must complete the marketing and sale of their telecast rights by April 30,2012, by which date Debtors must also consummate the sale of the Team. It is therefore critical that the Exclusive Negotiating Period continue to run during the period of time that a stay would be in place."); and *In re Boscov's, Inc.* 2008 Bankr LEXIS 3125 at *6 (Bankr. Del 2008), ("A court may reduce or waive the ten day stay period when there is a sufficient business need to close the transaction. *In re PSINet Inc.*, 268 B.R. 358, 379 (Bankr. S.D. N.Y.2001)(holding that debtor must demonstrate a business exigency demonstrating need for earlier closing date).").

No basis has been provided the court for a waiver of the Rule 6004(h) stay, but merely a request made that it be waive for unstated reasons. The request for waiver is denied.

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 sell 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 Michael D. McGranahan, the Chapter 7 Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b)to James Lykins, the real property lot legally described as:
>
> LOT 800 of Blue Lake Springs, Subdivision Unit 7, Tract No. 132, as set forth on the Official Map thereof, filed for record November 1964 in Book 2 of Subdivision Maps, Calaveras County Records, [A.P.N. 24-034-012]
>
> pursuant to the following terms:
>
> 1. The subject property shall be sold to Buyer for $4,500.00 in cash, on the terms and conditions set forth in the Agreement to Purchase Excess Equity of Bankruptcy Estate, filed as Exhibit 1 in support of the Motion. Dckt. 125.
>
> 2. The seller will be bearing normal and customary escrow and recording costs.
>
> 3. The Trustee will be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.
>
> 5. Overbid, if any, will be made in initial increments of $250 and as thereafter determined by this court.

23. 11-94146-E-11 DOMINIC/MARIA DEPALMA — CONTINUED MOTION TO DISMISS CASE
DJP-1 Naresh Channaveerappa — 9-12-13 [366]

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 Debtors', creditors holding the 20 largest unsecured claims], parties requesting special notice, and Office of the United States Trustee on September 12, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Dismiss Case 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 to Dismiss case is continued to 10:30 a.m. on November 21, 2013 pursuant to order of the court. No appearance required.

Creditor Farmers & Merchant Bank of Central California moves the court for an order dismissing the Chapter 11 case.

However, the parties filed a Stipulation to Continue Farmers & Merchant Bank of Central California's Motion for Order Dismissing Chapter 11 Case on September 26, 2013. Dckt. 377. The court approved the continuance of the motion to October 31, 2013, in the order dated September 28, 2013. Dckt. 378.

CONTINUANCE

At the October 10, 2013 hearing, the parties agreed and the court ordered that the hearing be continued to November 21, 2013. Dckt. 383.

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 Case filed by Creditor 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 Motion is continued to 10:30 a.m. on November 21, 2013.

24. 08-90052-E-7 JDP-3 | **JENNY HOLQUIN** | **James D. Pitner** | **MOTION TO AVOID LIEN OF CALIFORNIA STATE AUTOMOBILE ASSOCIATION/MICHAEL COSENTINO 10-3-13 [33]**

DISCHARGED 4-15-08

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, respondent creditors, and Office of the United States Trustee on October 3, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Avoid a 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 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 to Avoid a Judicial Lien is granted, with the lien avoided for all of the claim except $2,158.00. Creditors' lien is secured in the amount of $2,158.00, and avoided as to the remaining $30,641.83 of the judicial lien. No appearance required.

A judgment was entered against the Debtor in favor of California State Automobile Association and Assignee Michael Cosentino, for the sum of $32,799.83. The judgment was renewed on February 2, 1996, and then again on August 23, 2004. The abstract of judgment was issued in Creditors' favor on June 25, 2007, and on or about July 20, 2007, creditor recorded its abstract judgment with the Stanislaus County Clerk's Office. That lien attached to the Debtor's residential real property commonly known as 2328 Chrysler Drive, Modesto, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $142,000.00 as of the date of the petition. The

unavoidable consensual liens total $64,842.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730(a)(2) in the amount of $75,000.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is only $2,158.00 of equity in the subject property 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 to the extent of $30,641.83, 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 Michael Cosentino, obtained in Santa Clara County Superior Court Case No. DC96 323966, Document No. DOC-2007-0094863-00 recorded on July 20, 2007, with the Stanislaus County Recorder, against the real property commonly known as 2328 Chrysler Drive, Modesto, California, is avoided to the extent of $30,641.83 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.

25. 12-91564-E-11 ADJ-5 POCH TAN AND SAMEAN CHUM Anthony D. Johnston

MOTION FOR COMPENSATION FOR KEMPER CPA GROUP, LLP, ACCOUNTANT(S), FEES: $21,319.00, EXPENSES: $0.00 10-10-13 [167]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, creditors holding the 20 largest unsecured claims, all creditors, parties requesting special notice, and Office of the United States Trustee on October 10, 2013. By the court's calculation, 21 days' notice was provided. 21 days' notice is required.

Tentative Ruling: The Motion for Compensation has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion for Compensation. 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:

FEES REQUESTED

Mark P. Haney and other employees of the Kemper CPA Group, LLP ("Accountants") seek the total sum of $21,319.00 for a total of 139.7 hours of accounting services rendered in this case. The period for which the fees are requested is for the period May 31, 2012 through September 16, 2013. The order of the court approving employment of counsel was entered on July 5, 2012.

Description of Services for Which Fees Are Requested

Bookkeeping (Accounting and Preparation of U.S. Trustee Operations Reports): Accountants spent 35.3 hours in this category. Accountants' staff members reviewed bankruptcy schedules filed with the Court, set up excel spreadsheets, and set up Quickbooks for debtor in possession accounting and preparation of U.S. Trustee Operations Reports. Accountants prepared the monthly U.S. Trustee Operations Reports and provided general bookkeeping services for the Debtors.

The preparation of the U.S. Trustee Operations Reports included Application of Debtors in Possession for Allowance of Compensation for Certified Public Accountants reviewing and compiling of client documentation, bank statements, and various discussions with the Debtors.

Compiled Financial Statements (Accounting): Accountants spent 31.2 hours in this category. Accountants prepared accounting for the estate for the period between January 1, 2012 through May 31, 2012; and compiled financial statements for the period ending in May 31, 2012 for bankruptcy filing.

Business Consulting (Accounting): Accountants spent 70.5 hours in this category. This primarily represents the work completed by certified public accountants Mark Haney and Richard Gordon in preparing monthly bookkeeping, in connection with preparing monthly operating reports, schedules, supporting documentation, and various consultations and discussions with Debtors and their counsel.

Tax Preparation: Accountants spent 2.7 hours in this category. Accounting services performed included analysis regarding whether a bankruptcy tax return filing would be required, and accountants' engagement in discussions with attorney and client regarding necessary documents and information.

DISCUSSION

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).

FEES ALLOWED

The hourly rates for the fees billed in this case are $235.00/hour for Mark P. Haney, C.P.A. (partner); $195.00 per hour for Richard Gordon, C.P.A. (manager); $125.00 per hour for Sara Ange, paraprofessional; $115.00 per hour for Kalwinder Dhami, staff accountant I; $130.00 per hour for Varinder Bains, staff accountant I; and $145.00 per hour for Jennifer Hawkins, staff accountant II.

Accountant states the reasonable value of services rendered was determined according to a billing rate of $115.00 to $145.00 per hour for services rendered by staff accountants or other staff members of Accountants which did not require the expertise of a certified public accountant, including preparation of U.S. Trustee operations reports, bookkeeping, compilation of documents and information, preparation of draft tax returns for the bankruptcy estate, and related services.

The court finds that the hourly rates reasonable and that accountants effectively used appropriate personnel and staff accountants and rates for the services provided. The total accountants' fees in the amount of $21,319.00 are approved 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 11 case.

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

Accountants' Fees	$21,319.00

For a total final allowance of $21,319.00 in Accountants' Fees in this case.

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 Compensation filed by Accountants having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Kemper CPA Group, LLP is allowed the following fees and expenses as a professional of the Estate:

Kemper CPA Group, LLP, Accountants for the Estate
Applicant's Fees Allowed in the amount of $21,319.00

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

26. 12-91564-E-11 ADJ-6 POCH TAN AND SAMEAN CHUM Anthony D. Johnston

MOTION FOR COMPENSATION BY THE LAW OFFICE OF JOHNSTON & JOHNSTON LAW CORP. FOR ANTHONY D. JOHNSTON, DEBTOR'S ATTORNEY(S), FEES: $15,025.00, EXPENSES: $931.59
10-10-13 [173]

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

Correct Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, respondent Claimant, and Claimant's Attorney on September 4, 2013. By the court's calculation, 57 days' notice was provided. 44 days' notice is required.

Tentative Ruling: The Motion for Compensation has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion for Compensation. 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:

FEES REQUESTED

Anthony Johnson, Counsel for the Debtors-in-Possession (now Plan Administrators), makes a Motion for Compensation in this case. The period for which the fees are requested is for the period May 31, 2012 through October 10, 2013. The order of the court approving employment of counsel was entered on July 5, 2012.

Description of Services for Which Fees Are Requested

Financing: Counsel spent 1.1. hours in this category. Counsel negotiated a loan modification with the lender holding a lien against the Debtors' real property located at 701 Sonora Avenue, Modesto, California, and obtained the lenders consent for use of cash collateral.

Business Operations: Counsel spent 2.6 hours in this category. KMAT, Inc., the insurance carrier for Valley Tours, the Debtors' bus charter business, terminated coverage based upon the Debtors' bankruptcy petition. Counsel corresponded and engaged in telephone calls with KMAT, Inc., which resulted in reinstatement of coverage. Counsel also prepared a lease agreement for Debtors and Sangharam Monestary.

Plan and Disclosure Statement: Counsel spent 23.9 hours in this category. Counsel reviewed all financial documents, including proofs of claim and monthly operating reports, in order to formulate a plan of reorganization and disclosure statement. Counsel met with the Debtors to prepare projections and to discuss a feasible plan of reorganization.

Counsel prepared the plan of reorganization and disclosure statement, including the amended filings. Counsel noticed and served the haring for approval of the amended disclosure statement and obtained approval of the amended disclosure statement. Counsel noticed and served the hearing on confirmation of the plan of reorganization, solicited acceptances of the plan of reorganization, obtained sufficient acceptances for confirmation, obtained confirmation of the plan of reorganization, and prepared the order confirming the plan.

Counsel also prepared a motion granted by the court, which extended the deadline for the Debtor to confirm a plan.

Fee/Employment Applications: Counsel spent 10.3 hours in this category. Counsel prepared application and supporting documents to obtain approval for Debtors to employ him, and prepared the application for allowance of compensation for Debtors' certified public accountants.

Relief from Stay: Counsel spent 0.3 hours in this category. Counsel reviewed stipulations for relief from stay for two different deeds of trust secured by Debtors' former primary residence.

Meeting of Creditors: Counsel spent 2.0 hours in this category. Counsel attended a meeting of creditors held in Sacramento.

Case Administration: Counsel spent 15.8 hours in this category. Counsel prepared all documents necessary for the Chapter 11 case, such as schedules of assets and liabilities, statement of financial affairs, list of creditors holding 20 largest unsecured claims, and list of equity security holders, advised creditors of the automatic stay, prepared and served the preliminary status report required by the Court, attended the initial debtor interview with the U.S. Trustee's accountant, attended the preliminary status conference and continued status conferences, and reviewed monthly operating reports.

Motions to Value Collateral: Counsel spent 2.9 hours in this category. Counsel prepared a motion to value a junior deed of trust secured by Debtors' real property (former primary residence), which was granted by the court.

Claims: Counsel spent 0.3 hours in this category. Counsel communicated with secured creditor Gonor Funding, Inc., regarding impairment of its secured claim in plan of reorganization.

DISCUSSION

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).

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 as legal 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 legal services undertaken 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 [legal fee] tab 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 is obligated to consider:

> (a) Is the burden of the probable cost of legal 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 Counsel's services rendered a successful confirmation of a Chapter 11 Plan of Reorganization. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are $250.00/hour for counsel for 60.1 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of $15,025.00 are approved and authorized to be paid from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of $931.59 for parking, copies, and postage. The total costs in the amount of $931.59 are approved and authorized to be paid from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

Counsel is allowed the following amounts as compensation as a professional in this case:

Attorneys' Fees	$15,025.00
Costs and Expenses	$ 931.59

For a total final allowance of $15,956.59 in Attorneys' Fees and Costs in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon

review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Anthony Johnson is allowed the following fees and expenses as a professional of the Estate:

Anthony Johnson, Counsel for the Estate
Applicant's Fees Allowed in the amount of $ 15,025.00
Applicants Expenses Allowed in the amount of $ 931.59.

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Plan Administrators are authorized to pay such fees from funds of the Estate as they are available.

27. 11-93765-E-7 SSA-4 — JACK BIDDLE — Jakrun Sodhi — OBJECTION TO CLAIM OF ELIZABETH PERKINS, CLAIM NUMBER 11 — 9-4-13 [33]

DISCHARGED 2-8-12

Local Rule 3007-1(c)(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, respondent creditor, and Office of the United States Trustee on September 4, 2013. By the court's calculation, 57 days' notice was provided. 44 days' notice is required.

Final Ruling: This Objection to a Proof of Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(c)(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.

The Objection to Proof of Claim number 11 of Elizabeth Perkins is sustained and the claim is disallowed in its entirety. No appearance required.

The Proof of Claim at issue, listed as claim number 11 on the court's official claims registry, asserts a secured $191,708.11 claim.

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).

Trustee objects to the Proof of Claim as a secured claim on multiple grounds.

First, the subject property listed, in part, as the basis for conferring secured status for the Claim is not property of the Debtor's estate under 11 U.S.C. § 541. A copy of Debtor's Schedules A and D that at the time Debtor filed his bankruptcy proceeding, he listed no real property owned by him. Rather, the property named in the claim was owned by Debtor's father, Jack Biddle Sr. in fee simple, prior to his death, and is part of the father's pending probate estate case, referenced as Estate of Jack Biddle, Sr., Stanislaus Superior Court Action No. 439610.

Secondly, although Claimant attached a Notice of Judgment Lien (with no recordation date) to the Proof of Claim, there are no property assets in Debtor's bankruptcy case for which the lien attaches under Cal. Code of Civil Procedure § 697.530. Cal. Code of Civil Procedure § 697.530(a) states that a judgment lien duly prepared and recorded with the Secretary of State creates a lien on the following personal property: accounts receivable, tangible chattel paper, equipment located within this state, farm products located within this state, inventory located within this state, and negotiable documents of title located within this state.

Debtor's Schedule B bankruptcy schedules and amendments reflect no personal property assets meeting the definition of items provided for by Cal. Civil Procedure § 697.530(a) et seq.

Based on the evidence before the court, the creditor's claim is disallowed in its entirety. The Objection to the Proof of Claim is sustained.

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 Claim of Elizabeth Perkins in this case by Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim number 11 of Elizabeth Perkins is sustained and the claim is disallowed in its entirety.

28. 10-94467-E-7 TINA BROWN MOTION TO ABANDON
MDM-3 Michael Germain 10-2-13 [88]

DISCHARGED 2-22-11

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

Correct Notice Provided. The Proof of Service filed on October 2, 2013, states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, other parties in interest, and Office of the United States Trustee. By the court's calculation, 29 days' notice was provided. 28 days' notice is required

Tentative Ruling: The Motion to Abandon Real and Personal Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and 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). Therefore, the defaults of the respondent and other parties in interest are entered.

The Motion to Abandon Real and Personal Property is granted and the Trustee is ordered to abandon the properties. 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:

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). Here, among the assets which constitute property of the estate is the community property in the possession of the non-debtor spouse, Tim Brown, commonly described as:

A. Lot in El Dorado Ranch, Mexico, Deed No. 6400-013-23 ("Property A")

B. Stock in Affordable Moving & Storage, Inc. ("Property B")

C. 2008 Harley Davidson Cross Bones motorcycle ("Property C")

Property A is a 10,000 sq. ft. lot near San Filipe, Mexico, with no electricity, water, or other improvements. Based on Trustee's investigations, consisting of internet searches and telephone calls to the El Dorado Ranch, the estimated value is less than $8,000; the lot appears to be unencumbered. The legal and logistical expenses (which would include

hiring a Mexican attorney) involved in liquidating the property would, in the Trustee's opinion, consume all equity in the lot.

Property B is a non-publically traded moving and storage company whose stock shares are owned solely by the non-debtor spouse, Tim Brown. The estate may hold a community property interest in the stock. Trustee claims that the value of the company can only be determined by an examination of the books and records, including an audited financial statement. Trustee has contacted the company accountant but has not been able to obtain any financial information. Trustee does not know the value assigned to the shares.

Trustee further states that if the financial statement were to show stockholder equity, a buyer would then need be found, and the buyer would have to assume both the assets and liabilities of the company. Given the intransigence and lack of cooperation of the stockholder, and taking into consideration the legal costs of obtaining the financial records, obtaining a judgment allowing a sale (assuming there is any value) and finding a buyer for a closely-held company would be difficult. Trustee opines that the stock has no value to the estate and should be abandoned.

Property C is a 2006 Harley Davidson Cross Bones motorcycle that was, according to the non-debtor spouse, damaged in an accident and was uninsured. The value of the motorcycle is $5,000, encumbered by $12,000 in debt. Trustee maintains that even if the motorcycle was undamaged, the motorcycle would still have no equity and should be abandoned.

Since the debt secured by the properties exceed the sales price, and the negative financial consequences to the Estate from retaining these three properties, the court determines that the properties are of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the properties

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 Abandon 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 to Compel Abandonment is granted and that the real and personal property identified as:
>
> 1. Lot in El Dorado Ranch, Mexico, Deed No. 6400-013-23
>
> 2. Stock in Affordable Moving & Storage, Inc.

3. 2008 Harley Davidson Cross Bones Motorcycle

listed on Debtor's Schedules B and C are abandoned to the Debtor by this order, with no further act of the Trustee required.

29. 13-90467-E-7 UST-1 | **FRANCISCO ALDANA AND MARIA ORTEGA** Thomas O. Gillis | **MOTION FOR REVIEW OF FEES 9-3-13 [27]**

DISCHARGED 9-16-13

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, and parties requesting special notice on September 3, 2013. By the court's calculation, 58 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion for Review of 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).

The court's tentative decision is to grant the Motion for Review of Fees. 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 Acting United States Trustee for the Eastern District of California, August B. Landis ("UST") moves the court for an order determining the reasonable value of the legal services provided by attorney Thomas O. Gillis, Esq. in contemplation of or in connection with this case and requiring all excessive payments to Gillis disgorged and returned to the Debtors or the Chapter 7 Trustee.

The UST contends that Gillis received $1,950 in contemplation of, or in connection with, this case. UST maintains that Gillis's fee exceeds the reasonable value of his services, and that disgorgement of some portion of the fee is warranted pursuant to 11 U.S.C. § 329(b).

DISCUSSION

This court has the authority, and responsibility, to consider attorneys' fees obtained or to be paid prior to or during a bankruptcy case. 11 U.S.C. § 329, 330, 331. Fees in excess of the reasonable value of such services may be ordered repaid. The application of 11 U.S.C. § 329 and Federal Rule of Bankruptcy Procedure 63 F.3d 877 (9th Cir. 1997), may seem harsh, but are necessary to not only protect vulnerable consumers and business owners, but to protect the integrity of the federal judicial process. The federal courts are not mere devices to be used to generate fees for attorneys irrespective of any bona fide rights to be adjudicated.

The UST states that Gillis (or his staff) filed incomplete and inaccurate schedules for Debtors, who operate a grocery distribution business. On their Schedule B, as filed by Gillis, Debtors incorrectly stated that they did not own any businesses or accounts receivable. On Schedule G, Debtors incorrectly stated that did not have any leases. And on Schedule J, Debtors neglected to attach detailed list of their business expenses. Schedule J, however, clearly states that Debtors own Ortega Groceries Sale & Distrib."

As part of this business, Debtors own accounts receivable and lease a 1,200 square foot warehouse space. Debtors confirmed these facts at their meeting of creditors, held on April 16, 2013. At a minimum, Debtors' disclosures indicated that Gillis should have asked more questions about Debtors' business. The fact that Debtor's original schedules were incorrect should have been readily apparent to Gillis.

The UST states that when these issues first came to light in April, 2013, the Chapter 7 Trustee followed up with Gillis. Gillis did not file an Amended Schedule B that listed the account receivable until four months later, on August 28, 2013, and to date, has still not filed an Amended Schedule J that includes a detailed list of Debtors' business expenses.

According to the Declaration of Michael McGranahan, Gillis and his staff have been slow to respond to the Chapter 7 Trustee's requests for documents. For instance, May 7, 2013, the Chapter 7 Trustee requested that the Debtors provide a written explanation for several large pre-petition bank withdrawals (the "Statement of Explanation"). Despite the Trustee's follow-up, Gillis did not provide this explanation until August 21, 2013. In May, the Trustee also requested that the Debtors provide their 2012 State Tax Return, which still has not been provided.

The UST maintains that Gillis' delays in relaying requested documents, and omissions in preparing Debtor's bankruptcy filings have wasted both the Debtors' time and the Chapter 7 Trustee's time. The Trustee had to continue the 341 Meeting on multiple occasions; both the Debtors and the Trustee had to attend three sessions of the 341 Meeting. *See* McGranahan Declaration, at ¶¶ 8, 17, 20. The Chapter 7 Trustee also had to obtain an order extending the deadline to object to Debtors' discharge. *See* Dckt. No. 23. The UST notes that Gillis waited until after the deadline was extended, to file an Amended Schedule B (containing the accounts receivable) and to provide the Statement of Explanation. UST urges the court to review Gillis's fees for not assisting Debtors in conducting the smooth and uneventful bankruptcy case that they should have expected.

Thomas O. Gillis's Reply

Gillis states that Trustee's contention that Debtors own a grocery distribution business is not a proper characterization. Gillis states that Debtor husband is an independent distributor of spices only, and that his only function is to sell market spices and condiments to various markets and restaurants. Counsel states that while it is true that Debtor husband does rent a space to store some inventory, that inventory consisted of spices that were used as samples to show prospective clients. As a result of Trustee's concerns raised at the initial 341(a) meeting of creditors, Counsel states, his office filed amendments to Schedules B, C, G, and J on April 29, 2013.

Counsel also prepared a declaration signed by both Debtors attesting to their debt of $1,963.00 to the IRS, as a result of their initial omission of the debt in specifying Debtors' use of their 2012 Tax refunds, after a subsequent meeting of creditors held on May 7, 2013.

Counsel attributes the delays in this case to issues with Debtors' availability. As set forth in the Declarations of Kathy and Sandra Alcaraz, Debtor husband is typically on the road for his job, which covers territory from Reno to Chico, California, thus limiting his availability to meet with Counsel's office. Debtor wife was unemployed at the time of the filing, and was receiving only $654.00 per month.

Debtors do not have significant time to come to Counsel's office to review and sign paperwork. Counsel further states that his staff attempted to contact Debtors' supplier, which was not “overly cooperative” and delayed obtaining business invoice records that Trustee had also requested. It was only after repeated requests did the business office turn over the requested invoices. Gillis asserts that his office staff diligently attempt to comply with Trustee's requests.

Finally, Counsel states that Debtors did comply with Trustees request to inspect the storage unit, which was almost completely empty except for several boxes of samples that Debtor husband takes on the road with him. FN.1.

FN.1. The court notes that in filing this reply, Counsel appears to ignore Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents. The motion, points and authorities, opposition, each declaration, and the exhibit document are to be filed as separate electronic files. As part of the “Exhibits” filed in response, counsel has chosen to bury declarations among the exhibits. Dckt. 36. Possibly this was done to create the illusion that letters being provided as exhibits constitute declaration like testimony under penalty of perjury. In light of this counsel facing serious issues concerning the misuse of his electronic filing privileges in the Mary Coelho Chapter 12 case, the failure to comply with the most basic of filing requirements could be construed as a statement that the rules of this court are not to be applied to counsel. Further, the letters presented as exhibits with the declarations are not properly authenticated as required by the Federal Rules of Evidence. F.R.E. 901. Again, the court could infer that counsel asserts that the Federal Rules of Evidence do not apply to his practice of law in the courts in this District.

Finally, the declaration for the Debtors filed as an exhibit purports to be under penalty of perjury. However, their testimony is qualified by the Debtors as follows – "We state the following facts on our own personal knowledge and know them to be true, except those facts stated on information and belief, of which facts we are informed and believe to be true." Declaration, Exhibit A, Dckt. 36. Based on this qualification, nothing in the declaration may be stated on personal knowledge, but the Debtors are only repeating what their attorney has told them because it helps them in their case.

The requirements for what constitutes an adequate declaration are set out in 28 U.S.C. § 1746, which provides,

> § 1746. Unsworn declarations under penalty of perjury
>
> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
>
> (1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).
>
> (Signature)".
>
> (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
>
> (Signature)".

This does not provide for any qualification on stating that the information is true and correct, or let the witness provide a declaration based on information and belief. Stating that the information is true and correct, only to the extent that I actually know or believe it to be true, is not substantially in compliance with this section.

Reply of the UST in Support of Motion to Review

The UST reiterates that Counsel did not respond to multiple requests from the Chapter 7 Trustee for further information on Debtors' bankruptcy

filings. Most notably, in May 2013, the Trustee requested a written explanation for large, pre-petition withdrawals from Debtors' bank account, and Counsel did not provide a written explanation until August. The UST points out that although Counsel attributes these deficiencies to Debtors' unavailability, the supporting declarations for Counsel's Opposition to the Motion for Review of Fees confirm that Debtors actually met and/or spoke with Counsel's employees on numerous occasions (although not with Counsel himself).

The UST states that although Counsel blames the delay on securing "business invoice records" from Debtors' supplier, the UST maintains that Trustee did not request these records, and Counsel did not apprise the Trustee of the purported difficulties, save a brief mention at the 341 Meeting conducted on June 4, 2013. The UST states that the delays and omissions of Counsel have wasted the Debtors' and the Chapter 7 Trustee's time. The Trustee had to continue the 341 Meeting on multiple occasions, and thus both Debtors and the Trustee had to attend three sessions of the 341 Meeting. The Chapter 7 Trustee had to obtain an order extending the deadline to object to the Debtors' discharge.

Counsel filed the following inaccurate schedules at the outset of the case:

- Schedule B incorrectly stated that the Debtors did not own any businesses. See Schedule B, at items 13-14 (Dckt. No. 1).

- Schedule B incorrectly stated that the Debtors did not own any accounts receivable. See Schedule B, at item 16 (Dckt. No. 1). This false statement was repeated on Amended Schedule B that was filed on April 29, 2013.

- Schedule G did not list the Debtors’ warehouse lease. See Dckt. No. 1.

- Schedule J did not include a detailed list of the Debtors’ business expenses. See Schedule J, at line 16 (Dckt. No. 1).

The UST states that these errors should have been immediately apparent to Counsel, as Schedule I lists Debtors ownership of "Ortega Groceries Sale & Distrib.," suggesting that Counsel was aware of Debtors' business and should have asked more questions about it. Counsel's Opposition, however, provides little indication that Counsel met with Debtors prior to the petition date. When the errors in the schedules came to light at the creditors' meeting on April 16, 2013, Trustee specifically requested that Debtors make amendments. Counsel did not add Debtors' accounts receivable to Schedule B until August 28, 2013 (Dckt. No 24). Counsel has still not attached a detailed list of Debtors' business expenses to an Amended Schedule J.

Counsel's Opposition states that the delay has been in large part, due to Debtor's busy schedules. The supporting schedules from Counsel's legal assistants, however, indicate that Counsel's employees had spoken to Debtor by telephone on June 17, 2013 and July 10, 2013.

Indeed, the Declaration of Sandra Alcaraz, one of Gillis's legal assistants, shows that Ms. Alcaraz personally met with Debtor husband on March 5, 2012, May 13, 2012, October 23, 2012, January 15, 2013, April 10, 2013, April 17, 2013, and April 20, 2013 to discuss required documentation to be submitted to the court, and to update Debtors' bankruptcy record and filings. *See* Declaration of Sandra Alcaraz (Exhibit E to the Opposition) (Dckt. No. 36), at ¶¶ 3, 5-6. Kathy Alcaraz testifies that she spoke with Debtor by telephone on June 17, 2013 and July 10, 2013. See Declaration of Kathy Alcaraz (Exhibit D to the Opposition) (Dckt. No. 36), at ¶¶ 5-6. Debtors also appeared at the continued sessions of the meeting of creditors on May 7, 2013 and June 4, 2013.

Discussion

The primary duty of debtor's counsel is to make sure that bankruptcy schedules are accurate and complete, and attorney must use all of his or her training and experience to make sure that asset or debt is not inadvertently omitted. *In re Tran*, 427 B.R. 805 (Bankr. N.D. Cal. 2010) aff'd sub nom. *In re Nguyen*, 447 B.R. 268 (B.A.P. 9th Cir. 2011).

Upon review of the evidence supplied by the UST and Counsel, the court is perplexed by Counsel's argument that he was unable to correct the errors in Debtors' initial schedules because of Debtors' unavailability. Counsel's own declarations, attached to his Opposition to the Motion for Review of Attorney's Fees, show that Counsel's legal assistants were able to schedule and meet with Debtors on multiple occasions *after* the Chapter Trustee requested that Debtors make the appropriate amendments. Trustee inquired into the errors at the creditors' meeting held on April 16, 2013. Counsel's office met with Debtors in person and communicated with Debtors telephonically for at least four times after the meeting. Debtors also appeared at the continued meetings of creditors on May 7, 2013 and June 4, 2013.

According to the Chapter 7 Trustee, Counsel's office never informed the Trustee about any difficulties in fulfilling his requests, including the request for the statement of explanation regarding the withdrawals, and requests that Debtors amend their schedules.

The court is not convinced that Gillis satisfactorily carried out his duty to make sure that Debtors' schedules are accurate and complete, and to conduct due diligence using his experience and training to make sure that certain assets or debts were not omitted. The court determines that the Gillis's fees were excessive, and the excessive payments will be disgorged and returned to Debtors or the Chapter 7 Trustee.

Thus, Thomas Gillis shall pay to the Chapter 7 Trustee, the sum of $950.00, which monies shall be held by the Trustee pending further order of the court. Debtors may file a motion asserting any right to receive such monies, with such motion filed on or before November 21, 2013. If no such motion is filed by the Debtors, the Trustee may file an ex parte motion, serving the Debtors and Debtors' counsel, for an order authorizing the Trustee to disburse the $950.00 for payment of administrative expenses and claims as permitted in this Chapter 7 case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Review of Attorney Fees filed by the United State 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 pursuant to the Motion, Thomas Gillis is ordered to disgorge and pay to the Chapter 7 Trustee on or before November 21, 2013, $950.00, which represents a portion of the $1,950 in fees he received from the Debtors to represent them in the bankruptcy cases filed in this District. Thomas Gillis is authorized to retain $1,000.00 of the $1,950 he was paid by the Debtor to represent them in the bankruptcy cases, including continuing to serve as their counsel of record in the present Chapter 7 case. The Chapter 7 Trustee shall hold the $950.00 until further order of the court.
>
> **IT IS FURTHER ORDERED** that on or before November 21, 2013, the Debtors may, if they believe proper grounds exist, file and serve a motion asserting any right to receive all or any portion of the $950.00 held by the Chapter 7 Trustee. If no motion is filed by the Debtors on or before November 21, 2013, asserting a right to the $950.00, the Chapter 7 Trustee may upload a Supplemental Order, bearing this Docket Control Number, authorizing the Trustee to disburse the $950.00.

30. 13-91572-E-7 RLS-1 | **MABELLE GORR AND MARLON CASTULO** | **MOTION TO AVOID LIEN OF CACH, LLC**
Richard L. Schneider | **9-27-13 [11]**

Final Ruling: The Debtors having filed a Withdrawal of the Motion to Avoid Lien of Cach, LLC, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041 **the Motion to Avoid Lien of Cach, LLC was dismissed without prejudice, and the matter is removed from the calendar.**

31. 08-90273-E-7 CWS-3 | **KEVIN/SHEILA JOHNSON** | **MOTION FOR COMPENSATION BY THE LAW OFFICE OF NEUMILLER &**
Pro Se

BEARDSLEE FOR MICHAEL R. TENER, TRUSTEE'S ATTORNEY(S), FEES: $42,053.00, EXPENSES: $1,243.80
10-8-13 [75]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors (*pro se*), Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on October 8, 2013. By the court's calculation, 23 days' notice was provided. 21 days' notice is required.

Tentative Ruling: The First and Final Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the First and Final Application for Fees. 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:

FEES REQUESTED

Neumiller & Beardslee, A Professional Corporation, ("Movant"), Counsel for the Chapter 7 Trustee, Gary Farrar, makes a Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period April 7, 2008 through October, 2013. The order of the court approving employment of counsel was entered on May 13, 2008.

Description of Services for Which Fees Are Requested

Preliminary Case Review: Counsel spent .4 hours in this category for total fees of $116.00. Counsel describes the tasks performed as reviewing the case file.

Employment and Fee Application: Counsel spent 10.20 hours in this category for total fees of $1,950.00. Counsel describes the tasks performed as preparing application to employ and compensate Movant.

Communications: Counsel spent 4.6 hours in this category for total fees of $1,211.00. Counsel describes the tasks performed as communicating with the Trustee, Debtors and third parties regarding the case.

General Case Review, Strategy, and Research: Counsel spent 25.10 hours in this category for total fees of $5,970.50. Counsel describes the tasks performed as reviewing schedules and other records in the case to strategy the case and conduct legal research.

Administrative Matters: Counsel spent 12.90 hours in this category for total fees of $1,439.50. Counsel describes the tasks performed as organizing and categorizing records for review in the Firm's litigation support software.

Motion to Extend Time to Object to Discharge: Counsel spent .70 hours in this category for total fees of $203.00. Counsel describes the tasks performed as preparing and litigating Motion to Extend Time to object Debtor's discharge.

Aircraft Issues: Counsel spent 18.60 hours in this category for total fees of $4,133.00. Counsel describes the tasks performed as evaluation of liens and options for recovery for damage to and theft form an aircraft and attempt at liquidation.

Adversary Proceeding for Denial of Discharge: Counsel spent 7.10 hours in this category for total fees of $2,059.00. Counsel describes the tasks performed as litigating an adversary proceeding concerning the Trustee's objection to the Debtor's discharge.

Adversary Proceeding for Turnover of Estate Property: Counsel spent 10.20 hours in this category for total fees of $2,769.00. Counsel describes the tasks performed as litigating an adversary proceeding concerning turnover of the aircraft or the value.

Adversary Proceeding to Void Security Interest: Counsel spent 4.30 hours in this category for total fees of $994.00. Counsel describes the tasks performed as litigating an adversary proceeding to avoid security interest in the aircraft.

Adversary Proceeding: Conduct of Discovery and Miscellaneous Litigation: Counsel spent 22.00 hours in this category for total fees of $4,348.00. Counsel describes the tasks performed as conducting discovery in the adversary proceedings.

Adversary Proceeding: Motion to Compel Discovery Responses: Counsel spent 55.20 hours in this category for total fees of $10,740.00. Counsel describes the tasks performed as litigating motions to compel discovery responses in more than one adversary proceeding.

Adversary Proceedings: Default and Judgments: Counsel spent 25.00 hours in this category for total fees of $5,415.00. Counsel describes the tasks performed as requesting default and default judgments in more than one adversary proceeding.

Case Reopening: Counsel spent 3.20 hours in this category for total fees of $768.00. Counsel describes the tasks performed as reopening the bankruptcy case to administer new assets.

DISCUSSION

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).

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 as legal 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 legal services undertaken 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 [legal fee] tab 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 is obligated to consider:

> (a) Is the burden of the probable cost of legal 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 Counsel's services rendered a successful administration of the estate including litigating adversary proceeding against Debtors and another individual, Warren Mecum. The litigation resulted in the denial of the Debtors discharge and a $60,000 judgment against the Debtors and a third party. The Firm also voided a purported security interest competing with the Estate's interest in the Debtors' principal asset, a private aircraft estimated to be worth approximately $60,000. Trustee states that unfortunately Kevin Johnson vandalized and stole components from the aircraft, destroying most of the value of that asset. As of October 4, 2013, the estate had received $10,575.47 and disbursed $152.55.

FEES ALLOWED

The hourly rates for the fees billed in this case as follow.

Type of Professional	Year Admitted to Practice	Rate/Hour	Hours Billed
Attorney	1990	$300.00/hr	4.20
Attorney	1990	$290.00/hr	45.10
Attorney	2007	$250.00/hr	3.20
Attorney	2007	$240.00/hr	3.40
Attorney	2007	$230.00/hr	3.30
Attorney	2007	$220.00/hr	18.80
Attorney	2007	$200.00/hr	57.40
Attorney	2007	$180.00/hr	31.30

Law Clerk		$135.00/hr	14.80
Paralegal		$110.00/hr	12.40
Paralegal		$120.00/hr	.10
Paralegal		$1.0.00/hr	5.50

The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of $42,053.00 are approved 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.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of $1,243.80 for copies ($148.55), mileage ($18.91), filing fees and other fees ($820.10), federal express ($119.96), and postage ($136.28). The total costs in the amount of $1,243.80 are approved 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.

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

Attorneys' Fees	$ 42,053.00
Costs and Expenses	$ 1,243.80

For a total final allowance of $43,296.80 in Attorneys' Fees and Costs in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Neumiller & Beardslee, A Professional Corporation, is allowed the following fees and expenses as a professional of the Estate:
>
> Neumiller & Beardslee, Counsel for the Chapter 7 Trustee
> Applicant's Fees Allowed in the amount of $ 42,053.00
> Applicants Expenses Allowed in the amount of $ 1,243.80,
>
> **IT IS FURTHER ORDERED** that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

32. 10-94874-E-7 SSA-2 STEVEN/JOANNE JETT Bryan L.Ngo

MOTION TO EMPLOY ELIZABETH MIDDLETON BURKE AS SPECIAL COUNSEL
10-2-13 [30]

DISCHARGED 3-28-11

TRUSTEE REQUESTED TO PROVIDE INFORMATION AS TO WHETHER SETTLEMENT OF CLAIM HAS BEEN COMPLETED AND COUNSEL TO BE PAID OR WHETHER FURTHER LEGAL SERVICES ARE TO BE PROVIDED

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 Debtors, Debtors' Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on October 2, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to grant the Motion to Employ. 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:

Chapter 7 Trustee, Michael D. McGranahan, seeks to employ counsel Richardson, Patrick, Westbrook & Brickman LLC, and The Goldwater Law Firm, *Nunc Pro Tunc*, pursuant to Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of counsel to assist the Trustee in the medical/pharmaceutical case involving a personal injury/product claim. The case was initially closed as a "no asset" case on April 1, 2011. Dckt No. 16. However, the Trustee learned that Debtors failed to include in their schedules a prospective pharmaceutical claim and settlement award of approximately $39,124.76, arising out of a personal injury/product suit which Debtor Steven Jett had initiated in 2009. Debtor executed a Contingency Fee Agreement with the firms Richardson, Patrick, Westbrook & Brickman LLC, and The Goldwater Law Firm on or about August 4, 2009. Exhibit

1, Dckt. 35. It was special counsel that informed the Trustee of the pending suit.

The terms of the Contingency Fee Agreement to be approved are summarized as follows:

A. If not settlement is obtained, the bankruptcy estate and Trustee will owe no fees or expenses to special counsel appointed;

B. If any recovery is obtained, the contingency fee counsel will be awarded 40% of any gross settlement recovery; however,

C. All litigation costs and expenses incurred by contingency counsel shall be reimbursed to that counsel and deducted from the residual amount of recovery, after legal fees are calculated. Contingency Fee Agreement at 1, Paragraphs 2 and 5.

D. It will be the responsibility of Contingency Fee Counsel to provide Trustee, the gross proceeds of settlement arising out of the present pharma-medical claim, with the understanding that Trustee, through the assistance of Contingency Fee Counsel, and their agents and employees, will distribute and pay the residual costs and liens (if applicable), that are attributable to the settlement.

The Trustee argues that counsel's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate regarding present personal injury/medication recall suit.

Elizabeth Middleton Burke, a partner of Richardson, Patrick, Westbrook & Brickman LLC, working with The Goldwater Law Firm, testifies that they are representing a number of clients in the medical pharmaceutical recall case involving a nationally known drug and manufacturer. Ms. Burke testifies that she cannot disclose the name of the drug company, unless it is under seal. However, Ms. Burke testifies that she contacted the Chapter 7 Trustee regarding the pending suit and has been in contact with the Trustee's counsel to resolve the matter. Ms. Burke testifies she, her firm, or proposed joint special counsel do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

DISCUSSION

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate, and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the

conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

***Nunc Pro Tunc* Application**

Factors for determining whether *nunc pro tunc* employment should be approved include:

> 1. The debtor, trustee or committee expressly contracted with the professional person to perform the services which were thereafter rendered;
>
> 2. The party for whom the work was performed approves the entry of the *nunc pro tunc* order;
>
> 3. The applicant has provided notice of the application to creditors and parties in interest and has provided an opportunity for filing objections;
>
> 4. No creditor or party in interest offers reasonable objection to the entry of the *nunc pro tunc* order;
>
> 5. The professional satisfied all the criteria for employment pursuant to 11 U.S.C.A. § 327 and Rule 215 (now Rule 2014) of the Federal Rules of Bankruptcy Procedure at or before the time services were actually commenced and remained qualified during the period for which services were provided;
>
> 6. The work was performed properly, efficiently, and to a high standard of quality;
>
> 7. No actual or potential prejudice will inure to the estate or other parties in interest;
>
> 8. The applicant's failure to seek pre-employment approval is satisfactorily explained; and
>
> 9. The applicant exhibits no pattern of inattention or negligence in soliciting judicial approval for the employment of professionals.

These factors, have been cited with approval by the Ninth Circuit Court of Appeals and the Ninth Circuit Bankruptcy Appellate Panel. See Atkins v. Wain, 69 F.3d 970, 974 (9th Cir. 1995); *Credit Alliance Corp. v. Boies (In re Crook)*, 79 Bankr. 475, 478 (Bankr. 9th Cir. 1987); *In re Crest Mirror & Door Co.*, 57 B.R. 830, 832 (B.A.P. 9th Cir. 1986); *In re Kroeger Properties & Dev., Inc.*57 B.R. 821, 823 (B.A.P. 9th Cir. 1986).

Here, the Debtor expressly contracted with Counsel for the services in the pharma/medical case. Neither the Debtor or other parties in interest have filed an opposition to this motion. Counsel appears to have satisfied the criteria set forth in 11 U.S.C. § 327 and the work performed appears satisfactory. The court cannot discern that any prejudice to the estate

from approval of Counsel and the Trustee has properly explained the reasoning for failure to seek approval, as the Trustee learned that Debtors failed to include in their schedules a prospective pharmaceutical claim and settlement award of approximately $39,124.76, arising out of a personal injury/product suit which Debtor Steven Jett had initiated in 2009.

Taking into account all of the relevant factors in connection with the employment and compensation of counsel, considering the declaration demonstrating that counsel does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Richardson, Patrick, Westbrook & Brickman LLC, and The Goldwater Law Firm as counsel for the Chapter 7 estate on the terms and conditions set forth in the 40% of the net recovery, with reasonable expenses paid from recovery before computing the fee, Contingency Fee Employment Agreement filed as Exhibit 1, Dckt. 35. The approval of the contingency fee is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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 granted and the Chapter 7 Trustee is authorized to employ Richardson, Patrick, Westbrook & Brickman LLC, and The Goldwater Law Firm as counsel for the Chapter 7 Trustee on the terms and conditions as set forth in the Contingency Fee Employment Agreement filed as Exhibit 1, Dckt. 35.
>
> **IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.
>
> **IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.
>
> **IT IS FURTHER ORDERED** that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

33. 13-91575-E-7 TIMOTHY/EQUILLA CARAZO MOTION TO COMPEL ABANDONMENT
MLP-1 Martha Passalaqua 10-15-13 [13]

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 Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 15, 2013. By the court's calculation, 16 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Abandon Real Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The Motion to Abandon Real Property is granted and the Trustee is ordered to abandon the property. No appearance required.

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).

Here, Debtor operates a sole proprietorship, a landscape maintenance business known as "Tim Carazo Landscaping." All assets related to the operation of the business were disclosed in the filed Schedule B. *See* Dckt. No. 1. The business assets were listed as follows:

Asset	Value at Time of Filing

Business Checking Account	$256.09
Accounts Receivable	$600.00
Customer List	$4,175.00 2005
Dodge Ram 1500 Quad Cab	$6,725.00
Computer & Printer	$150.00
Lawn Maintenance Equipment (Mower, etc.)	$625.00
Lawn Maintenance Inventory	$300.00
Total Value of Business Assets	$12,831.09

Debtor claimed the entirety of his business assets as exempt, at the full and total value of $12,831.09 on his Schedule C. There is $0.00 net available equity, after calculating the difference between the fair market value of the business assets (12,831.09, as outlined above) and Debtor's claimed exemption of $12,831.09. Debtor states that there is no business asset that can be profitably liquidated by Trustee over and above the exemptions in Schedule C, and that the business itself has no net sale value to benefit the bankruptcy estate. Debtor further asserts that, based on the lack of any unexempt equity in any of the business assets, there is no benefit to the estate to either operate or shut down the business.

Since there is no available equity in the subject business assets, and there are negative financial consequences to the Estate in retaining the property, the court determines that the business assets are of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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 Abandon Property filed by the Debtors 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 personal property identified as:
>
> 1. Business Checking Account
> 2. Accounts Receivable
> 3. Customer List
> 4. 2005 Dodge Ram 1500 Quad Cab
> 5. Computer & Printer
> 6. Lawn Maintenance Equip (Mower, etc.)

7. Lawn Maintenance Inventory

on Schedule B by the Debtor is are abandoned to the Debtors by this order, with no further act of the Trustee required.

34. 12-92479-E-12 NFG-1 — DAVID/ESPERANZA AGUILAR — Nelson F. Gomez — CONTINUED MOTION TO VALUE COLLATERAL OF ONEWEST BANK, FSB — 7-11-13 [38]

CONT. FROM 9-26-13, 8-22-13

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 12 Trustee, respondent creditor, and Office of the United States Trustee on July 11, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Value Collateral 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 court's tentative decision is to set the Motion to Value for an evidentiary hearing. 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:

PRIOR HEARING

Debtor seeks to value the collateral securing Debtor's indebtedness to OneWest Bank, FSB on Debtor's first mortgage and deed of trust on the business real property commonly known as 5001 W. Monte Vista Avenue, Denair, California. The motion is accompanied by the Debtor's declaration. The Debtor seeks to value the property at a fair market value of $81,260.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Debtor also offers the Declaration of Jose L. Valencia, a licensed real estate broker, who opines that the value of the property is $81,260.00.

CREDITOR'S OPPOSITION

Creditor Deutsche Bank National Trust Company, as Trustee of Indymac Loan Trust Mortgage Backed Certificates Series 2004-11 Under the Pooling and Servicing Agreement Dated June 1, 2004, as serviced by OneWest Bank, FSB opposes the Debtor's Motion to Value. Creditor filed Proof of Claim No. 1 in the amount of $179,923.80, including an arrearage.

Creditor believes that the value of the property is $150,000.00. Creditor offers the Declaration of David Tafolla Aguilar, a licensed real estate agent with 14 years' experience, who opines that the value of the property is $150,000.00.

Creditor requested a continuance to procure an appraisal or other expert evaluation of the property. The hearing on the Motion to Value was continued to allow the parties to obtain appraisals on the subject real property.

CONTINUANCE

The parties filed a Stipulation to continue the hearing to October 31, 2013. The court issued an order granting the continuance on September 17, 2013. Dckt. 52.

No additional documents have been filed by either party to date. AS there are disputed material factual issues, the matter will be set for an evidentiary hearing.

The court shall issue an Evidentiary Confirmation Hearing Order setting the following dates and deadlines:

(1) Testimony and exhibits shall be presented to the court pursuant to Local Rule 9017-1. Presentation of witnesses at the hearing is required.

(2) Debtors shall lodge with the court and serve their direct testimony statements and exhibits on or before ----------.

(3) Deutsche Bank National Trust Company, as Trustee of Indymac Loan Trust Mortgage Backed Certificates Series 2004-11 Under the Pooling and Servicing Agreement Dated June 1, 2004 shall lodge with the court and serve their direct testimony statement on or before ----------.

(4) Evidentiary objections and confirmation hearing briefs shall be filed and served on or before ----------.

(5) Oppositions to evidentiary objections shall be filed and served on or before ----------.

(6) The Evidentiary Confirmation Hearing shall be conducted at ----------.

35. 13-90079-E-7 ROLLAND/ROBERTA YOUNG MOTION TO COMPEL ABANDONMENT
BPC-1 Tamie L. Cummins 10-3-13 [28]

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, all creditors, parties requesting special notice, and Office of the United States Trustee on October 3, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Abandon Real Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and 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 to Abandon Real Property is granted and the Trustee is ordered to abandon the property. No appearance required.

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).

Here, the Debtors request the Court to enter an order compelling the Chapter 7 Trustee to abandon the Bankruptcy Estate's interest in the Debtor's personal property described as:

1. Certificate of Deposit account number ending with 1062 with Ally Bank in the approximate balance of $25,340.00;

2. Individual Retirement Account ending in 9469 with Fidelity Management Services, LLC in the approximate balance of $189,305.89;

3. Individual Retirement Account ending in 5419 with Fidelity Management Services, LLC in the approximate balance of $68,659.70;

4. Pension Plan ending in 5836 with Taylor-Morrison Homes in the approximate balance of $27,669.57;

5. Household furniture - desk & chair, office cabinet, large sofa, coffee table, end table, recliner, two chairs, arm chair, straight chair, kids table and chair set, round dining table, china cabinet, six dining chairs, kitchen table, six chairs, four bar stools, tall dresser, iron headboard & mattress, night stand, bench wooden headboard & mattress, cedar chest, reading chair, night stand, storage cabinet, entry hall-tree, headboard & mattress, rocker, love seat, ottoman, two dressers, hall-tree storage cabinet piano stool, floor lamp, night stand, 17 pieces of wall art, and upright piano. The value of the household furniture is approximately $2,140;

6. Appliances - washer, dryer, sewing machine, iron, alarm clock, coffee maker, toaster, hand mixer, and hair dryer. The value of the appliances is approximately $750;

7. Kitchenware – china set, crystal set, silver-plate for eight, glass candlesticks, dishes, cooking pots and pans, baking dishes, bowls, silverware, cooking utensils. The value of the kitchenware is approximately $300;

8. Books, discs and DVD's valued at approximately $50;

9. One pair of skis and poles valued at approximately $100;

10. Electronics - stereo and three televisions valued at approximately $215; and

11. A laptop, printer, router, and faxing machine valued at approximately $200.

Schedule C shows that the equity in the Debtors' property is exempted pursuant to C.C.P. §§ 703.140(b)(5), 703.140(b)(3) and 703.140(b)(10)(E). Debtors state that since the property is protected and exempted, there is nothing for the Trustee to administer to unsecured creditors. Debtors further state that, since Wells Fargo obtained relief from the stay to foreclose Debtors' primary residence, Debtors will be moving into a space significantly smaller in size than the family residence, and will not have enough space to adequately store all of their household furniture and furnishings.

Moreover, Debtors need access to their certificate of deposit held at Ally Bank in order to finance their move; Debtors are retired, and rely on the retirement accounts to maintain their monthly obligations, and need access to these funds for that purpose.

Since the Debtors have exempted the above listed properties, the court determines that the property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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 Abandon Property filed by the Debtors 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 personal identified as:
>
> 1. Certificate of Deposit account number ending with 1062 with Ally Bank in the approximate balance of $25,340.00;
>
> 2. Individual Retirement Account ending in 9469 with Fidelity Management Services, LLC in the approximate balance of $189,305.89;
>
> 3. Individual Retirement Account ending in 5419 with Fidelity Management Services, LLC in the approximate balance of $68,659.70;
>
> 4. Pension Plan ending in 5836 with Taylor-Morrison Homes in the approximate balance of $27,669.57;
>
> 5. Household furniture - desk & chair, office cabinet, large sofa, coffee table, end table, recliner, two chairs, arm chair, straight chair, kids table and chair set, round dining table, china cabinet, six dining chairs, kitchen table, six chairs, four bar stools, tall dresser, iron headboard & mattress, night stand, bench wooden headboard & mattress, cedar chest, reading chair, night stand, storage cabinet, entry hall-tree, headboard & mattress, rocker, love seat, ottoman, two dressers, hall-tree storage cabinet piano stool, floor lamp, night stand, 17 pieces of wall art, and upright piano. The value of the household furniture is approximately $2,140;
>
> 6. Appliances - washer, dryer, sewing machine, iron, alarm clock, coffee maker, toaster, hand mixer, and hair dryer. The value of the appliances is approximately $750;
>
> 7. Kitchenware – china set, crystal set, silver-plate for eight, glass candlesticks, dishes, cooking pots and pans, baking dishes, bowls, silverware, cooking utensils. The value of the kitchenware is approximately $300;
>
> 8. Books, discs and DVD's valued at approximately $50;
>
> 9. One pair of skis and poles valued at approximately $100;

10. Electronics - stereo and three televisions valued at approximately $215; and

11. A laptop, printer, router, and faxing machine valued at approximately $200.

on Schedule B by the Debtors are abandoned to Rolland Young and Roberta Young, the Debtors, by this order, with no further act of the Trustee required.

36. 13-90382-E-7 MICHAEL CARSON — MOTION TO STRIKE
13-9016 RDR-2 — 9-12-13 [37]
TAIPE V. CARSON

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 Plaintiff's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on September 12, 2013. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Strike 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 court's tentative decision is to deny the Motion to Strike. 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:

Defendant Michael Robert Carson requests this court enter an order striking portions of Plaintiff's First Amended Complaint (even though the prayers seeks an order dismissing the complaint against Michael Robert Carson with prejudice and without leave to amend).

In Adversary Proceedings Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 govern law and motion practice. Rule 7(b) states,

(b) Motions and Other Papers.
(1) In General. A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) state with particularity the grounds for seeking the order; and

(C) state the relief sought.

(2) Form. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

For the present motion, the sum total of attempting to plead with particularity pursuant to Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007, is that Defendant moves to strike portions of the Plaintiff's First Amended Complaint

"on the grounds the pleading contains an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter:

1. Page 8, paragraph 4, lines 2-3 which states: "….including attorney fees and costs incurred in litigating this adversary proceedings, subject to proof."

Defendant then directs the court to the Memorandum or Points and Authorities, Request for Judicial Notice and al other pleadings and papers filed in ths matter. Rather than pleading with particularity in the Motion, the Plaintiff instructs the court to read multiple other pleadings filed to assemble for Plaintiff what are the actual grounds upon which he relies — distilling those grounds from the declarations, exhibits, arguments, citations, and quotations in those other pleadings.

The court declines to do so. The Motion is denied without prejudice.

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

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

The Motion to Strike filed by Defendant 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.

37. 13-90382-E-7 MICHAEL CARSON
13-9016 RDR-2
TAIPE V. CARSON

MOTION TO DISMISS ADVERSARY PROCEEDING
9-13-13 [40]

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 Plaintiff's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on September 13, 2013. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here the moving party reused a Docket Control Number. This is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

Tentative Ruling: The Motion to Dismiss Adversary Proceeding 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 court's tentative decision is to deny the Motion Dismiss Adversary Proceeding. 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:

Defendant Michael Robert Carson requests this court for dismissal of the Plaintiff's First Amended Complaint without prejudice and without leave to amend.

In Adversary Proceedings Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 govern law and motion practice. Rule 7(b) states,

> (b) Motions and Other Papers.
> (1) In General. A request for a court order must be made by motion. The motion must:
>
> (A) be in writing unless made during a hearing or trial;

> (B) state with particularity the grounds for seeking the order; and
>
> (C) state the relief sought.
>
> (2) Form. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

For the present motion, the sum total of attempting to plead with particularity pursuant to Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007, is that Defendant moves to strike portions of the Plaintiff's First Amended Complaint

> "on the grounds: (1) that there are no facts set forth in the complaint to support a claim for relief against him (2) that the plaintiff has failed to and cannot state any causes of action against him."

Defendant then directs the court to the Memorandum or Points and Authorities, Request for Judicial Notice and all other pleadings and papers filed in ths matter. Rather than pleading with particularity in the Motion, the Plaintiff instructs the court to read multiple other pleadings filed to assemble for Plaintiff what are the actual grounds upon which he relies — distilling those grounds from the declarations, exhibits, arguments, citations, and quotations in those other pleadings.

The court declines to do so. The Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss Adversary Proceeding filed by Defendant 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.

38. 13-91382-E-7 JENNIFER FLORES
PLG-2 Rabin J. Pournazarian

MOTION TO COMPEL TURNOVER EXEMPT MONIES LEVIED BY CACH, LLC
10-2-13 [23]

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, all creditors, the Contra Costa County Sheriff's Office, and Office of the United States Trustee on October 2, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Turnover Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and 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.

The court's tentative decision is to grant the Motion to Compel Turnover of Property. 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:

Debtors seek an order from the court compelling the Sheriff's office to turnover exempt monies levied by CACH, LLC. Prior to filing her Chapter 7 petition, respondent CACH, LLC obtained a judgment against Debtor and levied her bank account. CACH, LLC levied a total of $4,372.50 from Debtor's Wells Fargo accounts on June 10, 2013. Debtor attaches a copy of the state court judgment issued in CACH, LLC v. Flores, Stanislaus County Superior Court case no. 878632, as Exhibit 1 on Dckt. No. 27.

At the time of her bankruptcy filing, Debtor had separated from her spouse, and found it difficult to obtain a spousal waiver from him. She was not eligible to file a Chapter 7 bankruptcy until July 13, 2013, due to the filing of her previous bankruptcy. Because of the amount of time that had passed until Debtor could file again, she believed that the Sheriff had already disbursed the levied funds to CACH, LLC. Since Debtor had few assets, and it was difficult to obtain a spousal waiver, her attorney suggested that Debtor use the 704 exemptions.

After filing her Chapter 7 voluntary petition on July 25, 2013, however, Debtor realized that the Contra Costa County Sheriff was still

holding on to the levied funds and had not yet disbursed said funds to CACH, LLC. Debtor's counsel spoke to the Sheriff on or about August 1, 2013, and confirmed that the funds were still being held with the Sheriff.

Debtor was subsequently able to obtain a spousal waiver from her separated spouse, and proceeded to file Amended Schedules "B" and "C" on August 14, 2013 to exempt the funds that were still being held by the Sheriff. The funds are identified in Debtor's Amended Schedule B as "Checking & Savings account with Wells Fargo, no monies in account," with a value of $4,372.50, and exempted in her Amended Schedule C. pursuant to C.C.P. Section 703.140(b)(5). True and correct copies of the amended schedules are attached to the instant motion as Exhibit "2."

Debtor attended her 341(a) meeting of creditors on August 22, 2013, and the Chapter 7 Trustee requested that Debtor make further amendments, most notably to add her mother on Schedule D as a secured creditor. Debtor filed further Amended Schedules B, C, and D on September 9, 2013, with the listings of the levied funds on her Schedules remaining the same as they had appeared on her August 14, 2013 Amended Schedules. Debtor is now requesting an order directing the Sheriff's Department to turn over the $4,372.50 back to the Debtor.

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). As Debtor states in her motion, the Bankruptcy Appellate Panel in Hernandez concluded that because the Debtor in that case had an exempt property interest in the levied funds, the judgment creditor's levy did not operate to extinguish those interests, and that the court had the authority to enter an order requiring the judgment creditor to surrender the funds to Debtor under § 105(a).

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 Motion to Compel Turnover of Property filed by the Trustee having been presented to the court, and
>
> **IT IS ORDERED** that the Motion is granted and the Contra Costa Sheriff’s Office is authorized and ordered to immediately turnover to Jennifer Flores $4,372.50 of the monies levied upon by the Sheriff pursuant to the Judgment issued in *Cash, LLC v. Jennifer Flores*, Stanislaus County Superior Court Case No. 878632, by CACH, LLC.

39. 11-92487-E-7 MICHAEL/SHELLEY CUMMINGS MOTION TO EMPLOY STEVEN J. WILLIAMSON AS ATTORNEY(S)
WFH-1 Steven S. Altman 10-9-13 [31]

DISCHARGED 10-24-11

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 9, 2013. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

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 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative

The court's tentative decision is to deny the Motion to Employ. 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:

Chapter 7 Trustee, Michael D. McGranahan, seeks to employ counsel Wilke, Fleury, Hoffelt, Gould & Birney, LLP, pursuant to Bankruptcy Code Sections 327, 328(a) and 330. This case was initially closed after the discharge of the Debtors and the Trustee's no asset report. Dckts. 18, 16. However, the Trustee recently learned that Debtors failed to include in their schedules a lawsuit the Debtors were pursuing in Stanislaus County Superior Court. The State Court Action arose due to actions that took place prior to the filing of the Debtors' petition. The US Trustee filed a Motion to Reopen Case based on the foregoing information, and the Motion to Reopen was supported by a declaration from the Trustee. Dckts. 22-24. On June 11, 2013, the Trustee was reappointed. Dckt. 26.

The Trustee seeks the authorization to employ counsel to enable the Trustee to properly perform his duties with respect to the following matters:

a. To assist in employing special counsel to pursue the State Court Action on behalf of the bankruptcy estate;

b. To prepare and prosecute a Rule 9019 motion for approval of compromise should the parties to the State Court Action enter into a settlement; and

c. To assist the Trustee in any other issues that arise during the administration of the estate.

The Trustee further contends that Wilke, Fleury, Hoffelt, Gould & Birney, LLP is well qualified to render the services described above because the attorneys of that firm, and in particular Daniel L. Egan, Megan A. Lewis and Steven J. Williamson, are experienced and practice in the areas of bankruptcy, debtor/creditor matters, and general business litigation. Trustee believes this employment would be in the best interests of the estate.

Steven J. Williamson, an associate of Wilke, Fleury, Hoffelt, Gould & Birney, LLP testifies that they have represented clients in matters adverse to the following creditors: American Express; Bank of America; Citibank Staples; Discover Financial Services, LLC; FIA Card Services ;GEMB JC Penny; GEMB Mervyns; GEMB Sleep Train; GMAC Mortgage, LLC; Hyundai Motor Finance Company; Erin Laney; OneWest Bank; and Pacific Gas and Electric company. Wilke, Fleury, Hoffelt, Gould & Birney, LLP has also acted as a neutral arbitrator or independent investigator in cases involving the following creditor or counsel: Bank of America; Citibank; and OneWest Bank.

However, Mr. Williamson testifies that he or his firm do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

DISCUSSION

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee’s duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate, and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Trustees may select their own attorneys, accountants and other professional persons, subject to the approval of the court within its sound discretion. *Official Joint Comm. of Unsecured Creditors v. Bashas', Inc. (In re Bashas', Inc.)*, 2010 Bankr. LEXIS 3519 (B.A.P. 9th Cir. 2010); 3 COLLIER ON BANKRUPTCY ¶ 327.04[1] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.) The court’s discretion and consideration of good reason for disapproval are not limited to determinations of disinterestedness and the court may include

other considerations, such as experience and rates of compensation in determining whether to approve the employment of a professional. 3 COLLIER ON BANKRUPTCY ¶ 327.04[1]. Some courts have required that a bankruptcy court exercise its discretionary powers over the approval of professionals in a manner that takes into account the particular facts and circumstances surrounding each case and the proposed retention in making a decision for employment. *Id.; see In re Harold & Williams Dev. Co.,* 977 F.2d 906, 910 (4th Cir. 1992)(finding the "the discretion of the bankruptcy court must be exercised in a way that it believes best serves the objectives of the bankruptcy system. Among the ultimate considerations for the bankruptcy courts in making these decisions must be the protection of the interests of the bankruptcy estate and its creditors, and the efficient, expeditious, and economical resolution of the bankruptcy proceeding.")

As counsel is aware, from other proceedings in which counsel and other attorneys at counsel's law firm have represented this and other trustee, grave concerns have developed for this court as to future representation by said law firm of trustees, debtors in possession, and creditors committees. These situations have include the Chapter 7 Trustee supporting the payment of compensation to professionals who do not meet the requirements of 11 U.S.C. § 327; trustee's providing incomplete information in declarations, trustee's testifying only as to the "best of their knowledge" or "it is my belief," rather than providing knowledgeable testimony; and counsel not recognizing conflicts wherein prior attorney for the estate having a conflict when such prior attorney attempted to sue the trustee. FN.1.

FN.1. These matters include, but are not limited to, the following cases.

***Applegate Johnson, Inc.*, Case No. 13-91315.** Counsel filed a motion for the Chapter 7 Trustee to approve a § 506(c) surcharge stipulation. No written stipulation was filed. DCN: WFH-6, Dckt. 132, filed on September 12, 2013. The Motion states with particularity (Fed. R. Bank. P. 9013) that Westamerica Bank asserts a lien on the personal property to be sold at auction, that the Trustee has reached an agreement with the Bank as to the amount of a § 506(c) surcharge amount, and the surcharge will be 20% of the net sales proceeds (after subtracting the auction expenses and Counsel's fees relating to the sale). Nothing is stated as to why or what makes 20% a reasonable amount or what cost and expenses the estate has incurred.

Though thin, the court was prepared to grant the motion based on the estate recovering 20% of the net sales proceeds and considering the equipment being sold (pursuant to a separate motion). At the hearing the Trustee backtracked on the "stipulation" in light of another creditor filing an administrative expense claim for post-petition insurance premiums for the equipment being sold. This post-petition debt was known to the Trustee prior to the hearing, and prior to entering into the "stipulation" with the Bank, as the creditor financing the insurance premiums having filed for relief from the automatic stay because of the failure of either the Trustee or Bank providing for paying for the insurance. (August 7, 2013 Motion for Relief From Stay, DCN:SK2, Dckt. 57.) It was then represented by counsel for the Bank (in a "he said-she said" statement) that a written cash collateral stipulation had been sent to counsel for the Trustee, but the Trustee failed to return the written stipulation.

Counsel also filed a motion to sell the equipment and vehicles (for which the surcharge "stipulation" was presented to the court) in which Westamerica Bank asserted its lien. Motion filed September 12, 2013, DCN: WFH-4, Dckt. 125. The motion to sell free and clear of liens expressly states that all proceeds in which Westamerica Bank asserted a lien, which would not be disbursed except upon further order fo the court. (On the same calendar the Trustee has a separate motion for an order authorizing the disbursement of the monies. Motion to Disbursed Collateral, DCN: WFH-5, Dckt. 120, to which an objection had been filed by another creditor.) At the hearing on the Motion, Counsel and the Trustee improperly attempted the court to alter the relief requested and have the sale authorizing the sale also authorize the disbursement of the monies to Westamerica Bank.

Counsel also filed a motion for the Chapter 7 Trustee seeking an order authorizing the disbursement of monies in a bank account which were stated to represent proceeds from accounts receivable collected by the Trustee. Motion to Disburse Collateral, DCN: WFH-5, Dckt. 120. This Motion drew the objection of the creditor asserting the administrative expense for the post-petition insurance premiums for the policies insuring the estate's and Bank of the West's interests in the personal property being auctioned. Then at the hearing, the Trustee qualified this request, stating that some of the monies in the account may not be proceeds of the accounts receivable, but may be insurance proceeds and he needed to investigate this asset further.

In re DePalma, Case No. 11-94146. In this Chapter 11 case, Counsel represents the Chapter 11 Trustee. The Chapter 11 Trustee was appointed in the DePalma case due to the elderly Debtors' inability to fulfill the fiduciary obligations as debtors in possession. Many of the breaches related to the Debtors dealing with their son, Gino Depalma and his occupancy and use of property of the estate. Further, there are significant accounts receivable from Gino Depalma to the estate which were not being enforced and allow to grow by the Debtors in Possession. At the Status Conference the Chapter 11 Trustee confirmed that these accounts receivable remain unpaid and offered no explanation to the court as to what the Chapter 11 Trustee was doing to recover these accounts receivable or why Gino Depalma was allowed to continue in the fee use and occupancy of property of the estate (other than the general comment that since there was an undocumented, informal "arrangement" with Gino Depalma to run and manage the agricultural properties of the estate). Civil Minutes, 11-94146 Dckt. 382. No documentation for any use or rental of the properties were apparently requested by the Trustee, prepared by Counsel, or Counsel reviewing with the Trustee his fiduciary duties to the estate and the appearance of impropriety when a trustee merely allows family members to use property of the bankruptcy estate.

In re Fagundes and Son, Inc, Case No. 10-93791. On May 5, 2013, accountants Priest Amistadi Creedon filed a motion for approval of fees for having served as the accountant for the Chapter 7 Trustee. Counsel represented the Chapter 7 Trustee in that case. Earlier in the case the Chapter 7 Trustee fired Priest Amistadi Creedon upon learning that they received a post-petition retainer and were doing work for principals of the Debtor and the Debtor. Priest Amistadi Creedon has presented the court with a declaration from one of their partners confirming that they had no such

post-petition conflicts and qualified to be employed pursuant to 11 U.S.C. § 327. Though not qualifying to be employed, and therefore not entitled to be paid any amount, they filed a request for the court to approve fees. Motion for Compensation, 10-93791 Dckt. 200. Notwithstanding Priest Amistadi Creedon not meeting the basic requirements for employment and compensation, Counsel prepared for the Chapter 7 Trustee and filed a statement affirmatively not opposing the fee application.

As stated by the court at the hearing and in the Civil Minutes (10-93791 Dckt. 206), the Trustee and Counsel appeared to be tone deaf to the ethical violations by the accountants and the accountants not being entitled to fees as a matter of federal bankruptcy law. Rather, Counsel and the Trustee created the appearance that since the accountants had agreed to "split" some of the fees with the Trustee (on behalf of the estate), then the Trustee was willing to go along with the accountants being paid. The court stated these concerns in the Civil Minutes, FN.1., as follows,

> "The court is perplexed by the Trustee having supported, by affirmatively not opposing, payment of more than $4,000.00 in fees to Accountants who could not qualify to be employed as a professional pursuant to 11 U.S.C. § 362(a). While the court is confident that this Trustee, who is very experienced and highly respected, would not trade on his fiduciary obligations, the position asserted by the Trustee could give the appearance of "back-scratching" with Accountants. It could appear that the Trustee believed that the Estate could be entitled to $12,000 of monies that Accountants received for the undisclosed services to the Debtor and insider of the Debtor relating to this bankruptcy case. The Trustee then made a deal with Accountants to pay $8,000.00 to the estate, which could be used to pay Trustee's and counsel for the Trustee's fees, and the Trustee would then agree to pay $4,000 of those monies back to Accountants (who did not qualify under 11 U.S.C. § 327 to receive such fees) by affirmatively not opposing this fee request.
>
> The court does not believe that such a "deal" was made, and does believe that this highly respected Trustee would not even contemplate such a transaction. However, trustee's, attorneys, judges, and debtors in possession must not only not engage in such improper conduct, but avoid the appearance of such conduct. Attorneys, trustees, and judges who practiced in the 1980's can recall trustees and attorneys who not merely created the appearance of impropriety, but engaged in organized activities to inappropriately transfer monies from bankruptcy estates to such fiduciaries of bankruptcy estates. In some cases the conduct resulted not only in such trustees and professionals being denied fees and removed from their fiduciary positions, but criminal prosecution, conviction, and incarceration."

Freeman v. Flemmer, Adversary No. 13-2027. In this Adversary Proceeding the Chapter 11 Trustee was sued by a non-debtor for issues relating to a

settlement in an earlier adversary proceeding filed by the Estate (the debtor in possession as predecessor fiduciary of the estate to the Chapter 11 Trustee) against Mr. Freeman. The attorney representing the Estate in the adversary proceeding was W. Austin Cooper. Upon the appointment Counsel represented the Chapter 11 Trustee as general bankruptcy counsel and special litigation counsel was engaged for the Estate v. Freeman adversary proceeding. In the *Freeman v. Flemmer*, W. Austin Cooper filed the complaint and attempted to represent Mr. Freeman suing the Estate over the settlement in the action in which W. Austin Cooper represented the Estate against Mr. Freeman. Counsel did not object to W. Austin Cooper suing the estate and seemed to be unaware of any ethical violations of an attorney in suing a former client over matters relating to the prior representation.

In this case, the court has reviewed the motion prepared by counsel to employ "The Law Office of Joseph Lovretovich" as special counsel for the Trustee. That motion suffers from some fundamental defects. First, the attorney being employed is JML, Law, a Professional Law Corporation, not the Law Office of Joseph Lovretovich as counsel states in the Motion. Exhibit A to that Motion, Dckt. 38, clearly states that the professional corporation is being engaged, not the Law Office of Joseph Lovretovich. The Motion does not state the terms of the employment. The Employment Agreement not only provides for the engagement of JML Law, A Professional Law Corporation, but also includes the following provisions: (1) pre-authorization of a $750 hourly rate, (2) pre-authorizes Attorney to file sue and negotiate a settlement, (3) penalizes the Trustee if he does not accept the settlement proposed by Attorney, (4) violates federal law by purporting to circumvent the provisions of 11 U.S.C. § 330 requiring the bankruptcy court to determine and approve fees of professionals of the estate. Taken on its face, there is little for the Trustee to do in administering this asset, other than cash whatever check attorney hands to the Trustee.

While this court believes that the attorneys in the well respected law firm are smart, intelligent, fundamentally ethical persons, the court cannot continue to allow such basic lapses to occur. The court believed that in clearly and bluntly addressing the shortcomings in other cases with counsel and other members of his law firm, these failings would be corrected. That clearly has not occurred. Rather, Counsel appears to operate under a "business as usual" and the "rules don't apply to us" business model in representing fiduciaries of bankruptcy estates. That is not a proper business model and the court has afforded Counsel multiple opportunities to correct these shortcomings, if they were arising from mere inadvertence, inadequate supervision by senior attorneys, or lack of knowledge. Possibly, when counsel and his law firm can show this court that whatever organizational changes and ongoing educational programs are provided, this court can again approve the employment of counsel to represent professionals in bankruptcy cases.

Based on the repeated shortcomings in providing representation by the attorneys in this law firm, multiple warnings, and with great sadness in light of the status that this law firm has had in the Northern California community for many years, the court denies the Motion to employ bankruptcy counsel.

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 denied.

40. 11-92487-E-7 MICHAEL/SHELLEY CUMMINGS
WFH-2 Steven S. Atlman

MOTION TO EMPLOY ELLEN E. COHEN AS SPECIAL COUNSEL
10-17-13 [35]

DISCHARGED 10-24-11

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 17, 2013. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The Court's decision is to tentatively grant the Motion to Employ. 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:

Chapter 7 Trustee, Michael D. McGranahan, seeks to employ counsel The Law Offices of Joseph M. Lovretovich pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. However, a review of the employment agreement discloses that the actual law firm to be engaged is JML Law, a Professional Law Corporation ("JML Law Corp."). Trustee seeks the employment of counsel to assist in issues regarding debtors' State Court Action. The case was initially closed by discharging the Debtors on July 12, 2011. Dckt. 1. However, the Trustee recently learned that Debtors failed to include in their schedules a lawsuit the Debtors were pursuing in Stanislaus County Superior Court. The State Court Action arose due to actions that took place prior to the filing of the Debtors' petition. The US Trustee filed a Motion to Reopen Case based on the foregoing information, and the Motion to Reopen was supported by a declaration from the Trustee. Dckts. 22-24. On June 11, 2013, the Trustee was reappointed. Dckt. 26.

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.

Trustee is charged with the duty of liquidating Debtors' assets, including ongoing litigation such as the State Court Action to collect monies for the bankruptcy estate. The Trustee argues that counsel's appointment and retention is necessary to handle the State Court Action.

The Trustee further contends that JML Law Corp. is well qualified to render the services described above because JML Law Corp. has represented the Debtors in the State Court Action since it was filed, has conducted discovery and there is a mediation set to take place this month. Loveretovich has knowledge, expertise, and experience in prosecuting wrongful termination actions, and is familiar with the State Court Action as that firm filed the complaint and has prosecuted the State Court Action since its inception.

The Trustee's Motion states that "to the best of JML Law Corp.'s knowledge, other than a discussed and disclosed in the declaration of Ellen E. Cohen, filed in support of this Application, Loveretovich has no disqualifying connection with the Trustee, Debtors, the creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee, or any other person employed in the office of the United States Trustee." Motion, Dckt. 35. On its face, this Motion does not affirmatively state that there is no disqualifying connection, but merely that one person, and then only as to "the best of her knowledge," an attorney with JML Law Corp. testifies that neither she nor her firm do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

The Motion states that compensation is to be paid on a 40% contingency fee basis, but does not state upon which the 40% is to be computed. Additionally, as with the best of Ms. Cohen's "best of knowledge" declaration, the court is instructed to read the fee agreement to divine for itself what the true terms of the contingent fee agreement is to be. The Trustee makes no effort to state such terms with particularity in the Motion.

Further, other than saying that JML Law Corp. has represented the Debtors in the state court action and a mediation is upcoming, no statements are made concerning what has transpired in the litigation, the work done, and why this court approving, at this time, a 40% contingent fee agreement is reasonable.

Additionally, the Motion provides no summary of what the state court litigation entails and the nature of the claims. Reference is made to JML Law Corp. having knowledge and experienced in prosecuting termination actions, but doesn't state that property of the estate includes a wrongful termination claim against PG&E. The court and creditors are forced to dig through the motion and parse one or two words, from which this key information must be inferred.

In her declaration, Ellen Cohen qualifies her declaration saying that she is testifying under penalty of perjury, but "only to the best of my knowledge." This could mean that she had conducted a diligent investigation of her law firm records and attorneys, conducted a conflicts check, and based upon the identified research, provides her testimony. Conversely, she could be saying, "I don't think we have any conflicts, I haven't done anything to check, so 'to the best of my (lack of) knowledge,' I will testify that there is no conflict. Counsel further states that JML Law Corp. will accept the employment, and for the court and creditors to go read Exhibit A to figure out what terms the parties in interest think that Ms. Cohen believes, to be the terms of employment. In this declaration Ms. Cohen says that the litigation is for Michael Cummings claim for wrongful termination.

The court has reviewed the Employment Agreement (Exhibit A, Dckt. A) provide by the Trustee. The basic terms of the Retainer Agreement are stated as follows:

A. Agreement is between the Chapter 7 Trustee and JML Law, a Professional Corporation ["Attorneys"]. (The Motion states that the attorneys to be employed are the "Law Office of Joseph M. Lovretovich" not JML Law, a Professional Corporation).

B. The Trustee "empowers Attorneys to negotiate for a settlement, or to file suit, as they [the "Attorney"] deem advisable..."

C. The Trustee agrees to pay the Attorneys for the services,

1. "Forty percent (40%) if recovery is made **up to sixty (60) days before trial.**"

2. "Forty-five percent (45%) if recovery is made within sixty (60) days of trial."

3. The Trustee agrees to pay the initial filing fee and service fee on a complaint and all costs out of any potential recovery.

4. Costs and expenses shall be reimbursed after the contingency fee is computed from the gross settlement amount.

5. The Trustee's share of the recovery shall be the balance remaining after reimbursement of such costs and payment of the contingency fee.

6. If the Client "[Trustee, but presumably the Debtor] chooses to return to his or her job as part of the settlement of claims, the value for purposes of the contingency fee agreement is one years salary."

7. The Trustee agrees not to terminate the Attorneys without the written consent of the Attorney, and if so agreed, Attorney shall be entitled to fees on an hourly basis, computed at a rate of $750.00 an hour.

8. If the Trustee rejects an offer of compromise proposed by a neutral mediator and recommended by Attorney, then Client agrees to pay all outstanding costs and to advance future costs.

9. The Trustee agrees to the arbitration of not only any possible malpractice claims against Attorney, but for arbitration to determine the fees to be allowed for Attorney [which appears to purport to transferring the statutory obligation of this court to determine fees of professionals to arbitration].

The court cannot, and will not, grant blanket approval of the employment on the terms and conditions as stated in the Fee Agreement. Some terms, such as the court abdicating its statutory duty to determine the compensation of professionals in this case is in violation of federal law. Further, the Agreement appears to transfer the authority to administer this asset and determine whether a proposed settlement is proper from the Trustee to Attorney. The court also will not pre-determine that Attorney's hour rate is $750.00 in the event that the fees are not to be computed on a contingent fee basis.

The substance of the fee agreement, a 40% contingent fee is not shocking, but slightly higher than such contingent fee agreements among major plaintiff litigation firms in Northern California. Additionally, the contingent fee is being computed on the gross recovery, not after the costs and expenses are deducted, as is commonly done. Presumably, the Trustee has intelligently and knowingly negotiated these terms and believes them appropriate.

The court approves the employment of counsel on the 40% contingent fee basis. Such approval of the fee computation methodology is made pursuant to 11 U.S.C. § 328, with the final amount of fees subject to final approval by this court pursuant to 11 U.S.C. § 330 and § 328. Attorney is granted its attorney's lien on the proceeds. The court does not approve, at this time, any other terms of the Agreement.

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 granted and the Chapter 7 Trustee is authorized to employ JML Law, a Professional Law Corporation, ("Attorney") as counsel for the Chapter 7 Trustee pursuant to the Retainer Agreement set out in the Exhibit under Docket No. 38.

IT IS FURTHER ORDERED that the court approves a 40% contingent fee, computed on the gross recovery for the claim which is the subject of the Fee Agreement, and confirms that Attorney has an attorneys' lien on such recovery. No compensation is permitted Attorney except upon court order of this court pursuant to application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

41. 13-90888-E-7 MICHAEL/ANN BADIOU
13-9027 ACG-1
SENTRY SELECT INSURANCE COMPANY ET AL V. BADIOU

MOTION TO DISMISS COUNTER CLAIM UPON WHICH RELIEF CAN BE GRANTED AND/OR MOTION FOR MORE DEFINITE STATEMENT
9-19-13 [8]

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 Defendant (*pro se*), Chapter 7 Trustee and Office of the United States Trustee on September 19, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Defendant-Debtor Michael W. Badiou filed opposition and supplemental counterclaim pleading. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court's tentative decision is to grant the Motion to Dismiss. 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:

Plaintiff American Chevrolet-Geo, Inc. ("Movant") seeks to dismiss Michael W. Bodiou's ("Defendant-Debtor") counterclaim on the basis that the counterclaim fails to state a claim upon which relief may be granted and the counterclaim fails to stat with particularity the circumstances behind the alleged fraud. Fed. R. Civ. P. 12(b)(6) *incorporated by* Fed. R. Bankr. P. 7012; Fed. R. Civ. P. 8(a)(2) *incorporated by* Fed. R. Bankr. P. 7008; Fed. R. Civ. P. 9(b) *incorporated by* Fed. R. Bankr. P. 7012(b). In the alternative, Movant asks Defendant-Debtor for a more definite statement of pleading under Federal Rule of Civil Procedure 12(e). Fed. R. Bankr. P. 7012(b).

PLAINTIFF'S MOTION

Movant filed an adversary complaint against Defendant-Debtor for concealing his actions regarding sale of 34 vehicles. Defendant-Debtor sold another 29 vehicles, however, Defendant-Debtor did not pay Movant. Therefore, Movant claimed that Defendant-Debtor owed at least $608,965.82 to Movant for the 63 vehicles. Movant submitted an insurance claim for 34 vehicles and was reimbursed $349,899.75. Movant claims that $349,899.75 and $5,000 deductible are subrogated to its insurance carrier.

Defendant-Debtor responded to the complaint with an answer and a counterclaim for fraud. In the Answer to the Complaint to determine non-dischargability of debt, Defendant-Debtor asserted a counterclaim for fraud.

Dckt. 6. Defendant-Debtor provided following information to support his claim. Plaintiff abused its position of trust and confidence, took advantage of Defendant-Debtor's lack of business expertise and used its influence with local law enforcement and the California Department of Motor Vehicle to investigate Defendant-Debtor. Plaintiff had insurance policy on Defendant-Debtor that it could collect from.

Movant moved to dismiss Defendant-Debtor's counterclaim for fraud because Defendant-Debtor does not allege sufficient facts nor address the elements of a fraud claim. Instead, Defendant-Debtor provides conclusory statements. For example, Defendant-Debtor claims his business was used to cover Movant's financial loses, however, the Defendant-Debtor does not provides facts to demonstrate how Movant did this act. Defendant-Debtor does not provide any facts about Movant making any false or misleading statements, Defendant-Debtor relying on such statements, or location of such representation. Therefore, Defendant-Debtor fails to state a claim upon which relief may be granted.

In the alternative, Movant argues that Defendant-Debtor's counterclaim is unintelligible and incomprehensible. Movant does not understand the accusations to file an responsive pleading. Therefore, the counterclaim should be dismissed or Defendant-Debtor should be required to file a more definite statement regarding the basis of his claim.

DEFENDANT-DEBTORS' OPPOSITION/SUPPLEMENTAL COUNTERCLAIM

Defendant-Debtor filed an opposition to the motion to dismiss by filing a supplemental counterclaim for intentional infliction of emotional distress and negligent infliction of emotional distress pursuant to Federal Rule of Civil Procedure 15(d).

Defendant-Debtor presents the following facts. Defendant-Debtor has had a long, trust-based relationship with Movant. Movant approached Defendant-Debtor with a business proposal to help with Movant's used-car department. Movant convinced Defendant-Debtor that their business relationship does not need to be based on a written contract. Defendant-Debtor continued to operate the business at loss because he received assurances from Movant that the economy will improve and business will become profitable. At the beginning of 2013, when business had become profitable again, Movant terminated its relationship with Defendant-Debtor. Movant spread false and misleading information about Defendant-Debtor, his character and business practices. This caused Defendant-Debtor and his family extreme distress.

Defendant-Debtor asked the court to deny Movant's motion and allow supplemental claim to be filed.

LEGAL STANDARDS

Failure to State a claim 12(b)(6)

A complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-66 (2007). ("[A] plaintiff's obligation to provide 'grounds' of his 'entitle[ment]' to relief requires more than labels and

conclusions, and a formulaic recitation of the elements of a cause of action will not do."). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.*, citing to 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235-36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"). However, all allegations of fact by the party opposing the motion are accepted as true and are construed in the light most favorable to that party. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988). Federal Rule of Civil Procedure 8, made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7008, requires that complaints contain a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. Fed. R. Civ. P. 8(a). Under the Supreme Court's most recent formulation of Civil Rule 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal, 129* S.Ct 1937, 1954 (2009).

When hearing a Rule 12(b)(6) motion to dismiss a district court may 'dispose of the motion by dismissal rather than judgment.'" *Technology Licensing Corp. v. Technicolor USA, Inc.*, 2010 WL 4070208 (E.D. Cal. Oct. 18, 2010) (quoting *Sprint Telephony PCS, L.P. v. County of San Diego*, 311 F. Supp. 2d 898, 902 03 (S.D. Cal.2004)).

In ruling on a 12(b)(6) motion to dismiss, the Court may consider "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court need not accept unreasonable inferences or conclusory deductions of fact cast in the form of factual allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court required to "accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

Fraud

The circumstances constituting allegations of fraud, claims of fraud, or a mistake must be pled with particularity. Fed. R. Civ. P. 9(b); *Borsellino v. Goldman Sachs Group, Inc.*, 477 F3d 502, 507 (7th Cir. 2007); *Desaigoudar v. Meyercord*, 223 F3d 1020, 1022-1023 (9th Cir. 2000).

The court requires who, what, when, and where of the alleged fraud before providing access to the discovery process. *Williams v. WMX Technologies, Inc.,* 112 F3d 175, 178 (5th Cir. 1997). Claimant can provide time, place and content of fraud, identify the actual source of the fraud (e.g, oral or written statement, speakers identity), and manner in which representation was false or misleading. *In re GlenFed, Inc. Secur. Litig.*, 42 F.3d 1541(9th Cir. 1994); *Exergen Corp. v. WalMart Stores, Inc.,* 575 F3d 1312, 1329 (Fed. Cir. 2009). This ensures that claimant conducts a precomplaint investigation in sufficient depth to assure that fraud charge is responsible and supported, rather than defamatory and extortionate. *Ackerman v. Northwestern Mut. Life Ins. Co.,* 172 F3d 467, 469 (7th Cir. 1999). Allegations that are vague and conclusory are insufficient to satisfy the "particularity" required by Federal Rule of Civil Procedure 9(b).

A fraud claim must meet both "particularity" and "plausibility" requirements. *Bell Atlantic Corp. v. Twombly*, 550 US 544, 569 (2007). If fraud claim fails to meet the Federal Rule of Civil Procedure 9(b) "particularity" standard, it will be disregarded and the remaining allegations will be evaluated to see if a valid claim has been stated. *Vess v. Ciba-Geigy Corp. USA,* 317 F3d 1097, 1105 (9th Cir. 2003). In the alternative, court may dismiss the claim without prejudice and require counsel to rewrite the deficient complaint. *Lone Star Ladies Invest. Club v. Schlotzsky's Inc.,* 238 F3d 363, 368 (5th Cir. 2001).

Supplement to a Pleading

There is no right to supplement "as a matter of course" as there is with certain amended pleadings. For example, prior to trial, each party has a right to amend a pleading once "as a matter of course" within 21 days after the pleading was served if no response is due, or if responsive pleading is required, then within 21 days after service of responsive pleading or motion under Rule 12(b), (e), (f), whichever is earlier. Fed. R. Civ. P. 15 (a)(1)(B).

In contrast, Supplemental pleadings can only be filed with leave of the court such as a motion or reasonable notice, and upon such terms as are just. Fed. R. Civ. P. 15(d). Court can "permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time." *Id.*

DISCUSSION

Failure to State a Fraud Claim

Defendant-Debtor does not provide "a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested." Fed. R. Civ. P. 8(a). Instead, Defendant-Debtor lists various facts in his counterclaim such as Movant had a insurance policy that it could use to collect against Defendant-Debtor or there was as business arrangement with respect to trade-in vehicles. Defendant-Debtor also provides legal conclusions without sufficient factual allegations such as Movant abused its position of trust and confidence, or took advantage of Defendant-Debtor's lack of business expertise. However, these facts or legal conclusions do not amount to a claim(s) which entitles Defendant-Debtor to a relief.

Defendant-Debtor does not meet the particularity and the plausibility requirements for fraud. *Bell Atlantic Corp. v. Twombly*, 550 US 544, 569 (2007). For example, Defendant-Debtor asserts that Movant "abused its position of trust and confidence as well as [D]efendant['s] lack of business expertise to fraudulently entice [Defendant-Debtor] to accept the business arrangement wherein ... [Movant] would benefit by disposing trade-in vehicles which were overvalued by its employees to [D]efendant and thus benefitting his balance sheet while at the same time telling [D]efendant not to worry about the 'paper balance owed.'" However, Defendant-Debtor does not provide particularities of these various transactions. For example, who,

when, and where abused its position of trust and confidence, when and by whom was Defendant-Debtor enticed to enter into business with Movant, what was the nature of business arrangement or pricing of the cars. Defendant-Debtor does not provide time, place, content or source of the fraud. It is not clear if Movant made oral or written statement or if these statements were made by one or more persons.

As the Defendant-Debtor's counterclaim for fraud fails to set forth enough factual matter to establish plausible and particular grounds for the relief, the court grants Movant's Motion to Dismiss.

Opposition/Supplemental Counter-claim

In response to the Motion to Dismiss, Defendant-Debtor filed a supplemental counterclaim for intentional infliction of emotional distress and negligent infliction of emotional distress pursuant to Federal Rule of Civil Procedure 15(d). However, under Federal Rule of Civil Procedure 15(d), Defendant-Debtor is required to ask for court's leave to file supplemental pleading. There is no evidence that Defendant-Debtor filed a motion or provided the court with a reasonable with respect to the supplemental counterclaim. Therefore, court cannot decide on the merits of the supplemental pleading.

Additionally, supplemental pleading is used as to "any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d). It is not clear that factual allegations stated in the supplemental pleading took place after the Defendant-Debtor filed an Answer to the Complaint on August 29, 2013 (Dckt. 6).

The Defendant-Debtor is appearing in *pro se*. While the court allows pro se parties more leeway with respect to pleadings and some of the "formalities" of court, basic pleading requirements must be complied with for there to be any rhyme or reason to the judicial process. Parties in federal court cannot engage in an ever changing ebb and flow of pleadings, amending them at will to address what a party believes as a deficiency or something to that party's advantage. The "First Supplemental Pleading was not authorized and does not comply with the provision for supplemental pleadings in Federal Rule of Civil Procedure 15(d). That pleading is dismissed as part of the Counter-Claim.

The court grants leave to the Defendant-Debtor to file a counter-claim, which shall be titled "Second Amended Counter-Claim" to state any and all proper claims which may be asserted as a counter-claim. Effectively, there has only been one counter-claim filed, and this gives the Defendant-Debtor really one amendment. It makes little sense to the court not to allow for a counter-claim, if one can be properly stated, rather than forcing there to be a separate state court or federal court proceeding between these parties. The "Second Amended Counter-Claim" shall be filed on or before November 14, 2013.

The court grants the Motion to Dismiss as to the counterclaim for fraud.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss filed by Plaintiff American Chevrolet-Geo, Inc. having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Dismiss is granted as to the counter-claim (Counter-Claim included in Answer, Dckt. 6, and First Supplemental Counter-Claim, Dckt. 17) of Defendant-Debtor Michael W. Badiou against Plaintiff American Chevrolet-Geo, Inc.
>
> **IT IS FURTHER ORDERED** that Defendant-Debtor Michael W. Badiou is given leave to file a Second Amended Counter-Claim, if any, on or before November 14, 2013.

42. 12-91391-E-7 ADJ-4 — BRIAN/MERIDITH HOLLOWAY — Patrick B. Greenwell — MOTION FOR COMPENSATION FOR ANTHONY D. JOHNSTON, TRUSTEE'S ATTORNEY(S), FEES: $1,400.00, EXPENSES: $0.00 — 10-1-13 [95]

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 Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 1, 2013. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

Final Ruling: The Final Application for 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 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 Final Application for Fees is granted. No appearance required.

FEES REQUESTED

Anthony D. Johnston, Counsel for the Chapter 7 Trustee, makes a Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period July 13, 2012 through August 29, 2013. The order of the court approving employment of counsel was entered on July 26, 2012.

Description of Services for Which Fees Are Requested

Fee and Employment Application: Counsel spent 3.5 hours in this category. Counsel prepared the necessary application and supporting documents to obtain approval for the Trustee to employ him for the case and prepared this application for allowance of compensation.

Asset Analysis and Recovery: Counsel spent 3.3 hours in this category. Counsel reviewed Debtor's schedules to identify issues with claimed exemptions in firearms and corporate assets; filed objections to exemptions; prepared objection to claim of exemption; appeared at hearings for both exemptions; communicated with Debtor's attorney regarding turnover of other estate assets (Chevrolet Prism, horse trailers, bus) and discussed

value of corporation and goodwill of the same; assisted the Trustee in turn-over of the estate assets and negotiated retention by Debtors of the assets in exchange for the Debtors rendering the Tahoe non-exempt. Counsel is not seeking compensation for the work related to the objections to exemptions (which represents 2.2 hours of work).

DISCUSSION

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).

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 as legal 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 legal services undertaken 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 [legal fee] tab 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 is obligated to consider:

> (a) Is the burden of the probable cost of legal 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 Counsel's services rendered a successful turnover of estate assets. The estate has $2,820.00 to be administered as of the filing of the application. Counsel states he spent 6.8 hours in this case, which would represent $1,700.00, but has agreed to reduce his request to $1,400.00. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are $250.00/hour for counsel for 6.8 hours. Counsel states he spent 6.8 hours in this case, which would represent $1,700.00, but has agreed to reduce his request to $1,400.00. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of $1,400.00 are approved 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.

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

Attorneys' Fees	$1,400.00

For a total final allowance of $1,400.00 in Attorneys' Fees in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Johnston & Johnston Law Corp. is allowed the following fees and expenses as a professional of the Estate:

Johnston & Johnston Law Corp. Counsel for the Estate Applicant's Fees Allowed in the amount of $ 1,400.00.

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.