UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

November 30, 2023 at 10:30 a.m.

1.	**23-21407-E-11** **SBL-1**	**BELLA VIEW CAPITAL, LLC** **Peter Macaluso**	**MOTION TO APPROVE STIPULATION FOR RELIEF FROM THE AUTOMATIC STAY**
	1 thru 2		**10-25-23 [155]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, 20 largest creditors, parties requesting special notice, and Office of the United States Trustee on October 30, 2023. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered.

The Motion for Relief from the Automatic Stay ~~is granted as to the real property commonly known as 831 Colusa Avenue, Oroville, California 95965.~~

Secured creditor Persevere Lending, Inc. ("Movant") seeks relief from the automatic stay with respect to Bella View Capital, LLC's ("Debtor") real property commonly known as 831 Colusa Avenue,

Oroville, California 95965 ("Property"). Debtor borrowed $267,500.00 from John and Nancy Young and David and Corinne Gallagher on January 3, 1995, with their loan being secured by a deed of trust on the Property. Motion, Dckt. 155; Exhibit 2, Dckt. 159. Movant is the agent for the lenders John and Nancy Young and David and Corinne Gallagher. Movant has provided the Declaration of Susan B. Luce to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property. Declaration, Dckt. 157.

Movant submits a Stipulation to the court entered between itself and Debtor, showing Debtor's consent to grant relief from the stay as to the Property. Exhibit 1, Dckt. 158. Movant asks the court grant relief from stay in accordance with the Stipulation.

Terms of the Stipulation

1. Upon approval of this Stipulation by the Court, the automatic stay set forth in 11 U.S.C. § 362 shall be terminated as to Debtor, its Bankruptcy estate;

2. Upon approval of this Stipulation by the Court, Lenders, their Assigns and/or their Agent may take all steps necessary to enforce their remedies to foreclose upon and take possession of the Property in accordance with applicable non-bankruptcy law.

3. Upon approval of this Stipulation by the Court, the 14-day stay provided by Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived.

Exhibit 1, Dckt. 158. Movant and Debtor have agreed that the Property is not necessary to an effective reorganization. *Id.*

DISCUSSION

This case having been converted to one under Chapter 7, the party in interest who now has authority to enter into a stipulation consenting to relief from stay is the Chapter 7 Trustee, Nikki Farris. At the hearing, **xxxxxxxxxx**

~~Consistent with the Stipulation, the court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.~~

No other or additional relief is granted by the court.

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

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

The Motion for Relief from the Automatic Stay filed by Persevere Lending, Inc. ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

~~**IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed that is recorded against the real property commonly known as 831 Colusa Avenue, Oroville, California 95965 ("Property"), to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale to obtain possession of the Property.~~

2. **23-21407-E-11 UST-1** | **BELLA VIEW CAPITAL, LLC** **Peter Macaluso** | **MOTION TO RECONVERT CASE FROM CHAPTER 11 TO CHAPTER 7 (FILING FEE NOT PAID OR NOT REQUIRED), MOTION TO DISMISS CASE 11-1-23 [169]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, and parties requesting special notice on November 1, 2023. By the court's calculation, 29 days' notice was provided. 14 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor has not filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Motion is xxxxx.

The United States Trustee, Tracy Hope Davis ("US Trustee"), filed this Motion seeking conversion or dismissal of the Chapter 11 case pursuant to 11 U.S.C. § 1112(b). The case having been converted to a case under Chapter 7 by this court's order on November 13, 2023, the court need only discuss grounds for dismissal. Dckt. 188.

The Memorandum of Points and Authorities submitted in support states the following with particularity (FED. R. BANKR. P. 9013):

1. The case was filed on April 28, 2023, as a Chapter 7 case.

2. On May 4, 2023, the Debtor in Possession filed a motion to convert the Chapter 7 case to a Chapter 11 case. On May 15, 2023, the court entered an order granting conversion.

3. Debtor in Possession's schedules and statement of financial affairs reflect that Debtor in Possession sole valuable assets consist of four items of real property located at the following addresses:

   A. 5425 Bacon Road, in Oakland, CA 94619 (the "Oakland Property");

   B. 7796 Laramore Way in Sacramento, CA 95832 (the "Laramore Property");

   C. 831 Colusa Avenue, in Oroville, CA 95965 (the "Oroville Property"); and

   D. 1396 Summit Road, in Berkeley, CA (the "Berkeley Property").

4. On July 21, 2023, Center Street filed a second motion for relief from the automatic stay with respect to the Berkeley Property.

5. On August 16, 2023, secured creditor Scott Capital Management Fund 1, LLC filed a motion for relief from the automatic stay with respect to the Laramore Property.

6. On September 22, 2023, the Court entered orders granting relief from stay as to the Laramore Property and as to the Berkeley Property.

7. A continued hearing on Center Street's motion for relief as to the Oakland Property is currently set for hearing on November 21, 2023.

8. On September 26, 2023, the Debtor filed a motion to sell the Berkeley Property and the Oakland Property.

9. On October 19, 2023, Center Street filed opposition to the Debtor's sale motion. Specifically, Center Street points out that the proposed sales are insufficient to pay its claims in full and the sales would leave no excess proceeds for the bankruptcy estate.

10. In addition to the foregoing, as of the date of this motion, the Debtor is delinquent in the filing of monthly operating reports for August and

September 2023, and the Debtor has filed non-compliant reports for the months of June and July, 2023.

11. Cause exists to dismiss the case in order to avoid further loss or diminution to the Estate.

Memo, Dckt. 172.

The US Trustee filed the Declaration of Carla K. Cordero, the bankruptcy auditor for the US Trustee, to provide testimony attesting to the facts asserted in the Motion and supporting Memo. Declaration, Dckt.171. In her Declaration, Ms. Cordero asserts Debtor in Possession has not timely filed its required monthly operating reports. *Id.* at ¶¶ 4 & 6. Ms. Cordero also testifies that Debtor in Possession failed to attach the required bank statements with monthly operating reports. *Id.* at ¶ 5.

DISCUSSION

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

Regarding dismissal in Chapter 11 cases, the Bankruptcy Code provides:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1). Examples of "cause" for purposes of 11 U.S.C. § 1112(b)(1) are listed in 11 U.S.C. § 1112(b)(4) and include:

> (A)substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;
>
> . . .
>
> (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter[.]

11 U.S.C. §§ 1112(b)(4)(A) & (F). Once the court has found that cause exists to dismiss the case, the court must then "identify whether there are unusual circumstances that establish that dismissal or conversion is not in the best interests of creditors and the estate." *In re Sullivan*, 522 B.R. 604, 612 (B.A.P. 9th Cir. 2014); 11 U.S.C. § 1112(b)(2) ("The court may not convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter if the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors. . .").

Dismissal of a Chapter 7 case is governed by 11 U.S.C. § 707. That section of the Code provides,

> The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—
>
> (1)unreasonable delay by the debtor that is prejudicial to creditors;
>
> (2)nonpayment of any fees or charges required under chapter 123 of title 28; and
>
> (3)failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521(a), but only on a motion by the United States trustee.

11 U.S.C. § 707(a). The examples of cause listed are not exhaustive. 6 COLLIER ON BANKRUPTCY ¶ 707.03[1].

Here, the US Trustee asserts that cause exists under 11 U.S.C. § 1112(b)(4)(A) to dismiss the case. The US Trustee argues that there is a substantial or continuing loss to or diminution of the estate because this court has granted relief from stay as to two of the four pieces of real estate. *See* Dckts. 135 and 137. Further, Debtor has continued to default in making post-petition payments to creditors. Defaults in post-petition payments, combined with this court granting relief from stay as to two of the four items of real property in the bankruptcy estate, show a substantial or continuing loss to or diminution of the estate. *See* 7 COLLIER ON BANKRUPTCY ¶ 1112.04[6][a][I] ("If the estate has sustained a substantial loss following the commencement of the case, or the debtor is operating with a sustained negative cash flow or diminution in asset value after the commencement of the case, these facts are sufficient to justify a finding of 'substantial or continuing loss to … the estate.'"). The court further finds that there is no reasonable likelihood of rehabilitation as the court recently reconverted this case to one under Chapter 7. *Id.* at ¶ 1112.04[6][a][ii]; Order, Dckt. 188. Therefore, cause exists to dismiss this case pursuant to 11 U.S.C. § 1112(b)(4)(A).

Regarding 11 U.S.C. § 1112(b)(4)(F), the US Trustee argues that Debtor in Possession has failed to file required monthly operating reports for August and September of 2023. With respect to the monthly operating reports Debtor in Possession did file for June and July, Debtor in Possession did not attach required bank statements and registers, so the US Trustee was unable to confirm Debtor in Possession's operating reports. Failure to file require operating reports constitutes cause for dismissal under 11 U.S.C. § 1112(b)(1). Therefore, cause further exists to dismiss this case pursuant to 11 U.S.C. § 1112(b)(4)(F).

The case now being in Chapter 7 with a Chapter 7 Trustee appointed on November 15, 2023, the Chapter 7 Trustee needs to weigh in whether this case warrants dismissal under 11 U.S.C. § 707.

At the hearing, **xxxxxxxxxx**

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

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

The Motion To Dismiss filed by the United States Trustee, Tracy Hope Davis ("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 is **xxxxx**.

3.	**18-27974-E-7** **BHS-3**	**JEROD KENOYER** **Nikki Farris**	**MOTION TO COMPROMISE CONTROVERSY / APPROVE SETTLEMENT AGREEMENT WITH FIRE VICTIMS TRUST AND/OR MOTION TO ABANDON, MOTION TO PAY** **10-13-23 [67]**
	3 thru 4		

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 13, 2023. By the court's calculation, 48 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Approval of Compromise has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Approval of Compromise is granted.

The Motion to Abandon is granted.

The Motion for Authorization to Pay the Federal Income Tax is granted.

Kimberly J. Husted, the Chapter 7 Trustee ("Movant," "Trustee"), requests that the court approve a compromise and settle competing claims and defenses arising from the November 2018 wildfire that occurred in Butte County. Debtor Jerod Kenoyer ("Debtor") was awarded a settlement in the amount of $367,691.10 for property damage and/or personal injuries arising from the fire. The first disbursement of the settlement award is 60% of the total award, amounting to $220,614.66. Trustee moves this court to allow Trustee to abandon the Estate's interest in any amount beyond this 60% disbursement, arguing there are sufficient funds in the initial disbursement to pay all claims in full.

Trustee submits her own Declaration in support, providing testimony to authenticate the settlement award and accompanying facts. Declaration, Dckt. 69.

Trustee has resolved Debtor's claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit B in support of the Motion, Dckt. 72):

		Amounts		
Claimant Award Amount		$ 367,691.10		
Gross Pro Rata Disbursement No. 1 Amount		$ 220,614.66	60%	of Determination Notice
Preliminary Payment (Included in Attorney Fees)		$ -		
Gross Pro Rata Distribution less Preliminary Payment		**$ 220,614.66**		
Attorney Fees		**$ 55,153.67**	25%	Attorney fees
Singleton Schreiber, LLP Net Attorney Fees	$ 41,365.25			
Referring Attorney Fee: Rooney Law Firm	$ 13,788.42		25%	Referring Attorney Fee
	$ 55,153.67			
NET BALANCE TO CLIENT		**$ 165,460.99**		

DISCUSSION

JOINDER OF MOTIONS

As recognized by Movant in the Motion, Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018 for allowing the joinder of claims does not apply to contested matter practice. Fed. R. Bankr. P. 9014(c). However, the court may make Rules 18 and 7018 applicable for specific contested matters. *Id.* This Local Bankruptcy Rule establishes pre-authorized joinder for specified claims to relieve movants of having to request the relief in advance. See, L.B.R. 9014-1(d)(5). While the present Motion is not within the pre-authorized joining of claims, such may be requested as provided in Fed. R. Bankr. P. 9014(c).

Here, Movant has requested such authorization to join multiple claims, but is requesting it after the fact, akin to the philosophy of "it is better to seek forgiveness than permission." The better procedure is to request such authorization by ex parte motion filed with the motion seeking the relief and lodge a proposed

order with the court. If the court grants the ex parte motion, then counsel can serve the substantive motion and pleadings. If not, then a movant can "go back to the drawing board."

The requested relief is proper to join the various claims in this once motion and the court makes applicable after the fact Rules 18 and 7018 applicable in this Contested Matter.

MOTION TO APPROVE COMPROMISE

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 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 Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (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); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Movant argues that the four factors have been met in her Memorandum of Points and Authorities in support. Dckt. 70.

Probability of Success

This settlement award results from PG&E's Chapter 11 bankruptcy case. The award is not likely to be amended in subsequent litigation.

Difficulties in Collection

There are not any expected difficulties in collection because this award is part of an aggregate settlement of similar claims resulting from the November 2018 Butte County wildfire.

Expense, Inconvenience, and Delay of Continued Litigation

Any attempts to amend the settlement award would result in extremely lengthy and complicated litigation.

Paramount Interest of Creditors

Creditors will be paid in full.

Consideration of Additional Offers

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

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 to Approve Compromise is granted.

MOTION TO ABANDON

After notice and hearing, the court may order a 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(a). 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).

In this case, any amount over the 60% initial disbursement is of inconsequential value to the Estate because all claims will be paid in full by the initial 60% disbursement. The Motion to Abandon is granted.

MOTION FOR AUTHORIZATION TO PAY FEDERAL INCOME TAX

Trustee further requests in this Motion that the court authorize her to pay the administrative federal income tax in the amount of approximately $23,250.00. As an administrative expense, Trustee is authorized to make this distribution from the proceeds of the settlement award pursuant to 11 U.S.C. § 503(b)(1)(B). The Motion for Authorization to Pay the Federal Income Tax is granted, and Trustee is authorized to pay the federal income tax with funds from the initial 60% disbursement of the settlement award.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Kimberly J. Husted, the Chapter 7 Trustee ("Movant," "Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise 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 B in support of the Motion (Dckt. 72).

IT IS FURTHER ORDERED that the Motion to Compel Abandonment is granted, and the amount of the settlement award in excess of the initial 60% disbursement of the settlement award is abandoned to Jerod Kenoyer by this order, with no further act of the Chapter 7 Trustee required.

IT IS FURTHER ORDERED that the Motion for Authorization to Pay the Federal Income Tax is granted, and Trustee is authorized to pay the federal income tax with funds from the initial 60% disbursement of the settlement award.

4. **18-27974-E-7** **JEROD KENOYER**
BHS-4 **Nikki Farris**

MOTION FOR COMPENSATION BY THE LAW OFFICE OF SINGLETON SCHREIBER LLP FOR GERALD SINGLETON, SPECIAL COUNSEL(S), MOTION FOR COMPENSATION BY THE LAW OFFICE OF ROONEY LAW FIRM FOR MICHAEL ROONEY, SPECIAL COUNSEL(S)
10-13-23 [74]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 13, 2023. By the court's calculation, 48 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

Kimberly J. Husted, the Chapter 7 Trustee ("Applicant"), on behalf of her special litigation counsel, Singleton Schreiber LLP and Rooney Law Firm ("Special Counsel"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for Special Counsel's work related to recovering the settlement award for debtor Jerod Kenoyer's ("Debtor") injuries he sustained resulting from the November 2018 Butte County wildfire. Fees were originally agreed to be in the amount of 33.3% of the settlement award; however, Special Counsel has voluntarily agreed to take a 25% contingency fee. Declaration, Dckt. 77. The court reminds counsel that a Motion for Allowance of Professional Fees is permitted to be brought in one proceeding with a Motion to Approve Compromise pursuant to Local Bankruptcy Rule 9014(d)(5)(B)(v). Since this Motion was brought separately, the court will accordingly issue a separate ruling.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

In re Puget Sound Plywood, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

FEES AND COSTS & EXPENSES REQUESTED

Fees

Special Counsel provides testimony in its supporting Declaration of the services it performed, which include: monitoring the PG&E bankruptcy proceeding, discussing losses and damages with clients, submitting proofs of claims in the PG&E bankruptcy case, providing status updates to clients, and traveling to personally meet with clients. Declaration, Dckt. 77 ¶ 5. The court finds the services were reasonable and beneficial to Applicant and the Estate.

Contingency Fee: Litigation

Applicant computes the fees for the services provided as a percentage of the monies recovered for the Estate. Special Counsel represented Applicant in litigation for which Applicant agreed to a contingent fee of 33.3% of the gross settlement award. In approving the employment of Special Counsel, the court approved the contingent fee, subject to further review pursuant to 11 U.S.C. § 328(a). Order, Dckt. 48. However, Special Counsel has voluntarily reduced its contingency fee to 25% of the initial disbursement in this Motion for Compensation. This 25% ($55,153.67) is to be split between both law firms, with Special Counsel Singleton Schreiber LLP receiving 75% ($41,365.25) and Rooney Law Firm receiving 25% ($13,788.42). $220,614.66 of net monies (exclusive of these requested fees) was recovered for the Estate from the initial disbursement of 60% of the total settlement award.

FEES AND COSTS & EXPENSES ALLOWED

Fees

Percentage Fees

The court finds that the fees computed on a percentage basis recovery for the Estate are reasonable and a fair method of computing the fees of Special Counsel in this case. Such percentage fees are commonly charged for such services provided in non-bankruptcy transactions of this type. The court allows Final Fees of $55,153.67 pursuant to 11 U.S.C. § 330 for these services provided to Applicant by Special Counsel. The Chapter 7 Trustee is authorized to pay from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

Special Counsel is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

> Fees: $55,153.67, with Special Counsel Singleton Schreiber LLP receiving 75% ($41,365.25) and Special Counsel Rooney Law Firm receiving 25% ($13,788.42)

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Kimberly J. Husted, the Chapter 7 Trustee ("Applicant"), on behalf of her special litigation counsel, Singleton Schreiber LLP and Rooney Law Firm ("Special 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 Special Counsel Singleton Shreiber LLP and Special Counsel Rooney Law Firm are allowed the following fees and expenses as a professional of the Estate:
>
> Fees: $55,153.67, with Special Counsel Singleton Schreiber LLP receiving 75% ($41,365.25) and Special Counsel Rooney Law Firm receiving 25% ($13,788.42)
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. §§ 328 & 330 as Special Counsel for the Chapter7 Trustee.

5. 23-20380-E-12 GB-2 **TIMOTHY WILSON** **Mark Wolff** **MOTION TO DISMISS CASE** **10-25-23 [151]**

5 thru 7

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 12 Trustee, persons having filed a Request for Notice, all creditors and parties in interest, and Office of the United States Trustee on October 25, 2023. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Motion to Dismiss is xxxxxxx.

Creditor Umpqua Bank ("Creditor") moves to dismiss debtor Timothy Wilson's ("Debtor," "Debtor in Possession") case pursuant to 11 U.S.C. § 1208(c)(1) & (9). Motion, Dckt. 151. Creditor further seeks dismissal on the grounds that Debtor has filed and prosecuted this case in bad faith. Movant states the following grounds exist for dismissal:

1. This case was filed on February 7, 2023, and no Plan is in place.

2. Debtor is a serial filer. This is Debtor's sixth bankruptcy case since June 13, 2011. Except for approximately 16 months Debtor has been in bankruptcy continuously for 10 of the last 12 years, all the while never bringing current or repaying Creditor's claim. All of Debtor's prior cases have been dismissed for either a failure to prosecute, failure to confirm a Plan, and failure to make plan payments.

3. Debtor has offered three separate ways of how he plans to fund this case, including by seeking to sell real property and by operating a mining operation, none of which have been viable. This court has entertained these different suggestions with the Debtor changing his mind along the way, seeking continuance after continuance.

4. The court should dismiss the case and impose a two-year bar to refiling.

Id.

Creditor submits the Declaration of Douglas H. Kraft, co-counsel of record for Creditor, in support. Dec., Dckt. 154. Mr. Kraft authenticates and testifies to the facts alleged in the Motion.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on November 15, 2023. Dckt. 165. Debtor submits his own Declaration in support, testifying to the facts alleged in his Opposition. Dec., Dckt. 167. Debtor argues:

1. Debtor is in the process of preparing a new Chapter 12 Plan to be funded by mining operations on his real property.

2. Debtor has received a report from a Nova Explorations employee, Steve Cockrell, on November 14, 2023, attached as Exhibit A, Dckt. 166. The report states that there are traces of gold and silver on Debtor in Possession's property and those elements can be mined for substantial profit.

3. Debtor has some concentrated head ore already stockpiled waiting for refinement. Debtor estimates this ore to value $14,684,976.00 when refined based on current gold and silver prices.

4. Debtor will break this concentrated head ore down then ship it to a refinery, Elemental Refineries, which will pay 80% of the ore's value.

5. Debtor wants to use this money to pay the creditors in full.

6. Debtor is asking this court for more time to gather relevant documents related to filing a new Plan funded by the mining operation.

Dckts. 165, 167. In his Declaration, Debtor testifies that the new Plan will be filed by November 21, 2023,to account for the money derived from his mining operation. Dec., Dckt. 167 ¶ 19. A review of the docket on November 28, 2023 reveals that no new Plan has been filed.

CREDITOR'S RESPONSE TO DEBTOR'S OPPOSITION

On November 22, 2023, Creditor filed a Response to Debtor's Opposition. Dckt. 173. In its Response, Creditor states:

1. Debtor's claim that he will pay all creditors in full is outlandish. Debtor has never paid his creditors in full in his previous six cases, and this time is no different.

2. Debtor is not qualified to offer his own testimony concerning details of the mining operation. An expert must testify because it is an area requiring specialized skill or knowledge. Furthermore, Debtor's testimony leaves too

many variables unaddressed, such as when will Debtor actually sell the ore, and what happens if the refinery decides not to accept the ore?

3. The report in Debtor's Exhibits is not admissible because it has not been authenticated by the expert, Steve Cockrell.

4. Debtor cannot be trusted. He was planning this mining operation the whole time, even while telling the court he would fund the Plan by selling real property.

Dckt. 173.

On the same day, Creditor also filed evidentiary objections to Debtor's exhibits and testimony. Dckt. 174. Creditor argues:

1. Debtor is not qualified to offer opinion testimony on specialized knowledge. Therefore, Debtor's Declaration is not credible.

2. The report attached to Debtor's Opposition, purportedly from Steve Cockrell, is not properly authenticated, and therefore is inadmissable.

Dckt. 174.

CREDITOR JANA PROPERTIES, LP AND JACK FARAONE'S JOINDER

On October 26, 2023, creditor JANA Properties, LP and Jack Faraone ("JANA"), filed a joinder motion in this case, siding with Creditor and arguing the case should be dismissed with a two-year bar to refiling. Dckt. 163. JANA asserts it has not been paid on its secured claim in the previous six filings in this case, and there are no viable reorganization prospects in this case.

CHAPTER 12 TRUSTEE'S JOINDER

On November 13, 2023, the Chapter 12 Trustee, David Burchard ("Trustee"), filed a joinder motion in this case, siding with Creditor and arguing the case should be dismissed with a two-year bar to refiling. Dckt. 163.

DISCUSSION

Evidentiary Issues

The Federal Rules of Evidence do not allow "a lay opinion [to be] based on scientific, technical, or other specialized knowledge." *Lee v. City of Stockton*, *California*, F. App'x. 297, 299 (9th Cir. 2003). Fed. R. Ev. 701(c) ("If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is. . . not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."). Federal Rule of Evidence 702 states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Further, the federal Rules of Evidence outline what type of facts or data an expert may rely on when testifying. Federal Rule of Evidence 703 states:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

In this case, the issue is whether Debtor's testimony is based on scientific, technical, or specialized knowledge that would either prevent him from testifying as a layperson, or require the Debtor to be qualified as an expert. Specialized knowledge, though not precisely defined, typically involves sophisticated issues or knowledge concerning particular techniques of a trade. *See U.S. v. Figueroa-Lopez*, 125 F. 3d 1241, 1245 (9th Cir. 1997) (holding that a witness should have been qualified as an expert when the bulk of his testimony was based on his perceptions, education, training, and experiences as a law enforcement officer).

The court finds that Debtor's Declaration does involve scientific, technical, or specialized knowledge that would require him to either be qualified as an expert or prevent the admissibility of his Declaration as improper testimony. Debtor is testifying to precious mineral and ore refinery processes and projected yields, including expected profits. Dec., Dckt. 167 ¶¶ 12, 13-16. These particular areas of the trade involve sophisticated issues and projections that only an experienced expert could testify to. Debtor does not submit to the court any evidence that he should be qualified as an expert on gold and precious mineral mining, meaning this testimony may not be considered as evidence. Furthermore, Creditor raises the issue that a license would be required to conduct such an operation. Opposition, Dckt. 169, p. 3. Debtor does not address this issue.

At the hearing, **xxxxxxxxxx**

Motion to Dismiss

Dismissal of a Chapter 12 case is governed by 11 U.S.C. § 1208(c). That section of the Code provides:

> On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including—
>
> > (1)unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors;
> >
> > (2)nonpayment of any fees and charges required under chapter 123 of title 28;
> >
> > (3)failure to file a plan timely under section 1221 of this title;
> >
> > (4)failure to commence making timely payments required by a confirmed plan;
> >
> > (5)denial of confirmation of a plan under section 1225 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;
> >
> > (6)material default by the debtor with respect to a term of a confirmed plan;
> >
> > (7)revocation of the order of confirmation under section 1230 of this title, and denial of confirmation of a modified plan under section 1229 of this title;
> >
> > (8)termination of a confirmed plan by reason of the occurrence of a condition specified in the plan;
> >
> > (9)continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation; and
> >
> > (10)failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

This list is not exhaustive. 8 COLLIER ON BANKRUPTCY ¶ 1208.03. Bankruptcy courts have held that dismissal is also proper for bad faith. *See In re Walton*, 116 B.R. 536 (Bankr. N.D. Ohio 1990) (dismissal for bad faith filing when case was debtor's third bankruptcy filing and first two had been dismissed); *In re Beswick*, 98 B.R. 900 (Bankr. N.D. Ill. 1989) (debtors' second chapter 12 case dismissed as an attempt to circumvent the appellate process); *In re Galloway Farms, Inc.*, 82 B.R. 486 (Bankr. S.D. Iowa 1987) (dismissal for bad faith filing when case was debtor's third bankruptcy filing and first two had been dismissed); *In re Welsh*, 78 B.R. 984 (Bankr. W.D. Mo. 1987) (dismissal for bad faith when debtor withheld information from the court).

In this case, a review of Debtor in Possession's filings shows he has only filed one previous case in the last year. Case no. 2022-22415. That case was dismissed, in part, because Debtor attempted to navigate the Chapter 12 process *pro se.* Debtor in Possession has retained counsel in this current case,

addressing that defect in the previous case. However, that does not address the more than a decade of Debtor in Possession having bankruptcy relief but not performing the bankruptcy plan.

Before that, there were two Chapter 12 cases filed by Debtor:

1. 15-25059; Filed June 24, 2015, and dismissed on November 24, 2015.

2. 15-29451; Filed December 10, 2015, and dismissed on September 24, 2021.

In both of the 2015 filed cases Debtor was represented by the same counsel as in this Bankruptcy Case.

In Case 15-29542, Debtor confirmed a Chapter 12 Plan. 15-29542; Order, Dckt. 124. The Plan was modified in 2020 and then again in 2021. By Motion filed August 6, 2021, the Chapter 12 Trustee filed a Motion to Dismiss that Bankruptcy Case, asserting a ($50,000) default in Plan payments for the months of March, April (partial payment), May (partial payment), June (partial payment), July, August, September, and October 2021. *Id.*; Dckt. 219. Debtor did not oppose the Motion to Dismiss, and Case 15-29542 was dismissed.

Going earlier, Debtor filed his first Chapter 12 case on November 17, 2011, Case 11-47119, which was dismissed on March 27, 2015. Debtor was represented by the same counsel in Case 11-47119 that represents him in this case.

In substance, Debtor has been living under Chapter 12 Plans since November 17, 2011–which is now more than a decade without performing the confirmed Chapter 12 Plans.

It has been questioned whether Debtor qualifies for Chapter 12 Relief. See, Civil Minutes; Dckt. 54. As it developed, the Debtor's path in this case was to proceed with the prompt sale of his real property and protect any exemption he had in it. At the July 19, 2023 Status Conference, Debtor's counsel reported the independent fiduciary who had been engaged to consider the marketability of the property (and the court thought for the marketing and sale of the property). Civ. Minutes; Dckt. 119. As stated in the Civil Minutes for the July 19, 2023 Status Conference:

> At the Status Conference, counsel for the Debtor in Possession has retained Mr. Spacone and has provided his report of value. The low $2,050,000 and high of $2,350,000. The Debtor in Possession finds these values to be sufficient to proceed with a plan for liquidation of the real property.
>
> At the hearing, counsel for the Debtor in Possession has retained Mr. Spacone and has provided his report of value. The low $2,050,000 and high of $2,350,000. The Debtor in Possession finds these values to be sufficient to proceed with a plan for liquidation of the real property. Counsel for Jana expressed concerns.
>
> Counsel for Umpqua Bank stated that some concerns exist as to the proposed Plan. As to feasibility, it is concerned that the Debtor, as plan administrator, can actually sell the Real Property. Counsel for Jana Properties expressed similar concerns.

> The productive discussions continued, with the creditors pressing the point of the need for employment of a professional to take on the responsibilities for the marketing and sale of the Real Properties (in light of Debtor's multiple unsuccessful bankruptcy filings). Some questions were raised about the Debtor's dramatic increase in income, which was stated by counsel being due to the sale of minerals on the Properties.
>
> In the course of the discussions, counsel for Debtor in Possession appeared to acknowledge the need for an independent fiduciary for the Bankruptcy Estate taking over the marketing and sale of the Real Properties - which independent fiduciary would protect the economic interests of not only creditors, but the Debtor, in proceeding with a timely, commercially reasonable, fair market value sale of the Real Properties.

Id.

At the September 21, 2023 Status Conference, the tenor of this case took a turn for the worse, the court stating:

> The Trustee's September 14, 2023 Docket Entry Report states that the 341 Meeting of Creditors has been concluded.
>
> At the Continued Status Conference, counsel for the Debtor in Possession reported that they have been working on a Plan, but the Debtor in Possession did not agree with the final version that creditors supported.
>
> The Chapter 12 Trustee believes that this case is one that should be dismissed.
>
> The Creditors supported the Trustee's statement that this case should be dismissed.
>
> The court addressed with Counsel for the Debtor in Possession the issues being raised by the Chapter 12 Trustee and counsel, the statements that motions to dismiss to be filed will request a bar on filing another case by the Debtor in light of the five prior cases that have been filed and dismissed since November 2011, and that at prior hearings the representations from the Debtor in Possession were along the lines of his proceeding with a commercially reasonable sale so he could protect his large California homestead exemption in the real property.

Civil Minutes; Dckt. 133.

On October 25, 2023, Umpqua Bank filed this Motion to Dismiss this Bankruptcy Case, and Creditor requests the court to impose a two year bar on Debtor filing another case (Debtor having continually been in bankruptcy, and having the protections thereof, since 2011). Mtn. Dismiss; Dckt. 151. The Motion includes the following statement of the proceedings in this case:

> When the Debtor filed this Case on February 7, 2023, he said that he intended to reorganize and had ability to reorganize by continuing his "farming" operations. When it became apparent that the Debtor cannot reorganize through his "farming" operations, he said that he wanted to sell his real property. The Court continued the hearing on plan confirmation twice and extended the deadline for plan confirmation three times. After the creditors and the trustee spent significant time and expense working with the Debtor and a marketing and sales consultant, to formulate a plan for selling the real property, the Debtor changed his mind again. Nearly nine (9) months into this Sixth Case, the Debtor says that he wants to mine his real property—a business operation he has never attempted or conducted before. How does he even have the funds to start a mining operation. Moreover, with his poor health, there are serious questions of the Debtor ability to start, manage, and maintain a mining operation during a 60-month plan.

Mtn. Dismiss, p. 2:17 - 3:2; Dckt. 151. Additionally:

> On May 8, however, the Debtor filed a liquidating plan, seeking to sell his real property by May 2024. Docket 47 at §7. Relying on this change of mind, the Court continued twice (once to June 28 and second time to July 19) the hearing on the Debtor's plan confirmation motion. Dockets 86, 87, 103. The Court also continued three times the deadline for obtaining plan confirmation (to July 21, August 31, and then to October 6). Dockets 87, 103, 123. Also relying on this, the creditors (including Umpqua) and the Chapter 12 trustee began working with the Debtor on an amended Chapter 12 plan that would provide for the appointment of Hank Spacone as Plan Administrator, with the authority to sell the Debtor's real property. On June 22, the Court approved Mr. Spacone's employment as a consultant to determine the value of the real property. Docket 122; Kraft Decl. ¶¶21-24.
>
> Notwithstanding the foregoing, the Debtor changed his mind once again. In mid September, the Debtor told Umpqua that he no longer wanted to liquidate the real property. Instead, he now wanted to start a mining operation on the real property. Kraft Decl. ¶25. As such, the Debtor is asking now for a fourth (4th) extension of the deadline to obtain plan confirmation. See Docket 135.

Id.; p. 7:19 - 8:8.

The Motion provides a general discussion of the Debtor's change of heart about selling the property. Also, a history of Debtor's prior filings, defaults, failures, and cases being dismissed.

In the more than a decade of being in bankruptcy, Debtor has demonstrated that while he has great visions for his financial future, the bankruptcy filings have been used to delay creditors without good faith prosecutions by Debtor. With the Debtor in Possession's last minute plan shifting to his new vision of a mining operation on the properties of the Bankruptcy Estate, Debtor manifests the same "vision" of being able to live in bankruptcy and speculate on financial outcomes at the cost and expense of creditors. This bankruptcy case is being prosecuted to hinder and delay creditors – including Creditor.

Before the court now are interesting reports and allegations that purportedly show millions of dollars of precious ores and minerals on Debtor's property. Exhibit A, Dckt. 166; Dec., Dckt. 167 ¶ 12-13.

However, Debtor attempts to submit these facts based on his testimony as a layperson where such facts require an expert's opinion. For example, Debtor informs the court that,

> Running the head ore through an X-Ray fluorescence (XFR) shows the valuable mineral content. The head ore at location H1 was run though the XFR twice and shows element 47 AG Sliver at a percentage of 1.14% and .97%. Further the head ore at location H1 shows element 79 Au Gold at a percentage of .51% and .50%. The current price for silver is at $23.25 Ozt and gold is at $1,967.90 Ozt. This equates to a value for the silver of $6,765.00 per ton of head ore and a value for the gold of $285,345.00 per ton of head ore.

Dec., Dckt. 167 ¶ 12. Debtor does not explain to the court how he, as a layperson, is qualified to offer this specialized knowledge concerning the details of a precious ore and mineral mining operation. Moreover, Debtor informed the court that he is receiving a more formal report soon from Mr. Cockrell of Nova Explorations and expects to have a Chapter 12 Plan filed with the court by November 21, 2023. However, no formal report or Chapter 12 Plan has been filed with the court. Debtor also informs the court that presumably expensive pieces of industrial mining equipment, such as a "ball mill," are being delivered to his Property. Dec., Dckt. 167 ¶ 15. The court is left in the dark as to how Debtor can afford such equipment.

Debtor's behavior in this case is consistent with his behavior in his previous five cases. It appears to the court that Debtor is yet again stringing the court and creditors along by proffering false or untenable solutions to his problems. Debtor's repeated failure to pay his creditors and prosecute a viable bankruptcy case amount to unreasonable delay, or gross mismanagement, by the Debtor that is prejudicial to creditors. 11 U.S.C. § 1208(c)(1). Furthermore, Debtor's inability to propose a viable Chapter 12 Plan and pay his creditors shows a continuous loss to the Estate without a reasonable likelihood of rehabilitation. 11 U.S.C. § 1208(c)(9).

Two-Year Bar to Refiling

The bankruptcy courts are established by an act of Congress and the All Writs Act, 28 U.S.C. § 1651(a), and 11 U.S.C. §105 provides the bankruptcy courts with the inherent power to enter pre-filing orders against vexatious litigants. *Molski v. Evergreen Dynasty Corp, et al*, 500 F.3d 1047 (9th Cir. 2007); *Gooding v Reid, Murdock & Co.*, 177 F 684, (7th Cir 1910), *Weissman v. Quail Lodge Inc.*, 179 F.3d 1194, 1197 (9th Cir. 1999), and *In re Bialac,* 15 B.R. 901, (9th Cir. B.A.P. 1981), aff'd 694 F2d 625 (9th Cir. 1982). A court must be able to regulate and provide for the proper filing and prosecuting of proceedings before it. 11 U.S.C. §105(a) expressly grants the court the power to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. Further, the court is authorized to *sua sponte* take any action or make any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process. This power exists, and it does not matter whether it is being exercised pursuant to 11 U.S.C. §105 or the inherent power of the court. *In re Volpert*, 110 F.3d 494, 500 (7th Cir. 2007); and *Peugeot v. U.S. Trustee* (*In re Crayton*), 192 B.R. 970, 976 (9th Cir. BAP 1996).

The Ninth Circuit Court of Appeals re-stated the grounds and methodology for pre-filing review requirements as an appropriate method for the federal courts in effectively managing serial filers or vexatious litigants. *Molski v. Evergreen Dynasty Corp, et al*, 500 F.3d 1047 (9th Cir. 2007), en banc hearing denied, 521 F.3d 1215 (9th Cir. 2008); and *In re Fillbach*, 223 F.3d 1089 (9th Cir. 2000). While

maintaining the free and open access to the courts, it is also necessary to have that access be properly utilized and not abused. The abusive filing of bankruptcy petitions, motions, and adversary proceedings for purposes other than as allowed by law diminishes the quality of and respect for the judicial system and laws of this country.

As addressed by the Ninth Circuit Court of Appeals in *Molski*, the ordering of a pre-filing review requirement is not to be entered with undue haste because such orders can tread on a litigant's due process right of access to the courts. As discussed in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982), the right to seek redress from the court is a protected right civil litigants. The issuing of a prefiling only is to be made only after a cautious review of the pertinent circumstances.

However, the Ninth Circuit Court of Appeals clearly draws the line that a person's right to present claims and assert rights before the federal courts is a not a license to abuse the judicial process and treat the courts merely as a tool to abuse others.

> Nevertheless, "[f]lagrant abuse of the judicial process cannot be tolerated because it enables one person to preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants." *De Long*, 912 F.2d at 1148; *see O'Loughlin v. Doe*, 920 F.2d 614, 618 (9th Cir. 1990).

Molski v. Evergreen Dynasty Corp, et al, supra, p. 1057. In the Ninth Circuit the trial courts apply a four factor analysis in determining if and what type of pre-filing or other order should properly be issued based on the conduct of the party at issue.

1. First, the litigant must be given notice and a chance to be heard before the order is entered.

2. Second, the district court must compile "an adequate record for review."

3. Third, the district court must make substantive findings about the frivolous or harassing nature of the plaintiff's litigation.

4. Finally, the vexatious litigant order "must be narrowly tailored to closely fit the specific vice encountered."

Id.

The Debtor's repetitive filing of bankruptcy cases, motions, and adversary proceedings demonstrates abusive conduct and misuse of the bankruptcy laws. Though the bankruptcy court is open to all and a person's financial, personal, or other missteps are not a bar to seeking the extraordinary relief available, debtors must seek the relief and prosecute the cases in good faith. In this case the Debtor has chosen to repeatedly file a series of Chapter 12 cases in which he has failed to file necessary documents or make necessary payments and has demonstrated that he is otherwise unable to prosecute a Chapter 12 case. The Debtor has failed to commence making meaningful payments to creditors for over a decade now. The Debtor has demonstrated, through the repeated Chapter 12 cases which have not been prosecuted, that this and the prior Chapter 12 cases do not have merit as a reorganization.

The court is cognizant of the significant impact the filing of a bankruptcy case has on the not only the Debtor, but creditors and other persons. Even if, due to the repeated filings and the provisions that Congress has placed in a subparagraph of an subsection of the Bankruptcy Code, the automatic stay does not go into effect, the mean presentation of a petition and the significant sanctions imposed on someone violating the stay can work to prevent creditors from legitimately enforcing their rights. In these cases the Debtor has filed a series of non-productive Chapter 12 cases, which appear to exist only for the purpose of deterring a creditor from proceeding with a foreclosure on real property. The Debtor has been afforded multiple opportunities to advance a Chapter 12 Plan to cure defaults on the obligation owing to the creditors and restructure the debt through the Chapter 12 Plan. While obtaining the benefit of the automatic stay, whether actual or improperly represented to exist, the Debtor has been unable or refused to properly prosecute a Chapter 12 Plan.

The court has weighed the options, ranging from just dismissing the current case, as it has done in the past, to imposing an outright bar on the Debtor filing a bankruptcy case. Clearly, some limits need to be placed on the Debtor to prevent the abuse and attempted abuse of the bankruptcy court, bankruptcy laws, state court judgments, and third-parties. The court will not ban the Debtor from ever filing bankruptcy, but will impose the much more moderate requirement that he first obtain the pre-filing authorization from the chief judge in the bankruptcy district before commencing another bankruptcy case during the two year period following the dismissal of this case.

A pre-filing review requirement is of little impact to a debtor seeking legitimate relief from the bankruptcy court. In this case, it will require the debtor to have the initial bankruptcy pleadings completed and on their face appear to be consistent with the requirements of the Bankruptcy Code and Chapter under which the Debtor seeks to file bankruptcy. It imposes no significant cost or delay, in that the petition, schedules, and other basic pleadings need to be prepared at the time of filing. The ability to file rests solely with the Debtor, requiring him to do and comply with only what the Bankruptcy Code requires.

It also has the effect of this Debtor being prepared to successfully prosecute a Chapter 12 case, rather than continue to flounder and squander his rights under the Bankruptcy Code. By his conduct, the Debtor has lost the ability to receive the automatic stay. To the extent that he has or had the ability to cure any defaults and restructure any debts allowed in the Chapter 12 case, those appear to have squandered as well.

The court finds from the totality of the circumstances that Debtor's conduct in this case and prior cases before this court represents a bad faith abuse of the bankruptcy code and its protections.

At the hearing, **xxxxxxxxxxxx**

The Motion ~~is granted, and the case is dismissed.~~

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

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

~~The Motion to Dismiss the Chapter 12 case filed by Umpqua Bank ("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 to Dismiss is granted, and the case is dismissed.~~

~~**IT IS FURTHER ORDERED** that the debtor Timothy Wilson ("Debtor," "Debtor in Possession"), pay all filing fees at the time a new case is commenced, and is prohibited from obtaining a fee waiver or authorization to pay filing fees in installments. The court authorizes and orders the Office of the Clerk to not file any bankruptcy petition filed by the Debtor, Timothy Wilson, which is not approved for filing by the Chief Judge for the Bankruptcy District in which, Timothy Wilson, attempts to file a bankruptcy case.~~

6. **23-20380-E-12 CAE-1** **TIMOTHY WILSON** **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 2-7-23 [1]**

At the hearing, **xxxxxxxxxxx**

7. 23-20380-E-12 WW-6 | **TIMOTHY WILSON** | **MOTION TO EXTEND TIME**
Mark Wolff | **10-6-23 [135]**

Final Ruling

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 12 Trustee, attorneys of record who have appeared in the bankruptcy case, and Office of the United States Trustee on October 6, 2023. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

The Motion to Extend Deadline to File a Complaint Objecting to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006).

The Motion to Extend Deadline to Obtain Confirmation of a Chapter 12 Plan is granted.

Timothy Wilson, Debtor in Possession, ("Movant") moves to extend the deadline to obtain confirmation of a Chapter 12 Plan. Movant argues that the extension is warranted because Movant is waiting on reports from Nova Exploration concerning a potential mining operation on Movant's property. Dec., Dckt. 137. According to Movant, the extension is warranted because these documents are essential to forming a viable Chapter 12 Plan. *Id.*

The deadline for filing and confirming a Chapter 12 Plan was previously extended by this court's Order to August 31, 2023. Dckt. 103. The court again extended that deadline to October 6, 2023. Dckt. 123. Movant now requests another extension, this time to November 29, 2023.

Creditor Umpqua Bank ("Creditor") opposes the Motion on the following grounds:

1. Movant has not filed a new Plan.

2. Movant's proposed mining operation is highly improbable because Movant requires a license for such an operation, contrary to Movant's assertion that he does not require a license.

3. This court did not approve the retention of Nova Explorations as a professional in this case.

4. Movant's proposed mining operation violates Creditor's Deed of Trust because it causes impermissible waste on Movant's property.

5. Movant's Plan is not feasible because he has no prior mining experience and his projections are speculative. Furthermore, Movant is in poor health and is likely unable to run a mining operation.

6. The proposed mining operation is just another delay tactic used by Movant.

Opposition, Dckt. 169. Creditor also lodges evidentiary objections, arguing that Movant is relying on hearsay evidence from County employees concerning the requirement of a license to run the mining operation. Evid. Objection, Dckt. 171 p. 2:6-8. Further, Creditor argues any such statements from the County should be excluded from the record because they are highly unreliable, confusing, and prejudicial. *Id.* at 9-10.

Creditor submits the Declaration of Douglas H. Kraft, co-counsel of record for Creditor, in support of its Opposition and Evidentiary Objection. Dec., Dckt. 170. Mr. Kraft testifies to and authenticates the facts alleged in the Opposition and Evidentiary Objection.

DISCUSSION

Federal Rule of Bankruptcy 9006 governs motions for extending time. According to that Rule,

> Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Fed. R. Bankr. 9006(b)(1). So long as the request is made before the expiration of time, the court may, in its discretion, grant an extension of time for cause shown. 10 COLLIER ON BANKRUPTCY ¶ 9006.06[2].

In this case, Movant made its request for extension just before time expired. Where the court has mentioned this case is in its 11th hour, the court now holds the case to be in its 11th hour and 59th minute. Movant has informed the court there are untold riches to be had if this extension can be granted. Therefore, the extension is granted one last time to November 30, 2023.

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

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

The Motion to Extend Deadline to File a Complaint Objecting to Discharge filed by Timothy Wilson, Debtor in Possession, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, and the deadline for Movant to confirm a Chapter 12 Plan is extended to November 30, 2023.

FINAL RULINGS

8.	**23-23620-E-11** **GEL-2**	**ROBERT P. OBREGON DDS INC.** **Gabriel Liberman**	**MOTION TO EMPLOY GABRIEL E. LIBERMAN AS ATTORNEY(S)** **11-1-23 [29]**

Final Ruling: No appearance at the November 30, 2023 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors, parties in interest, and Office of the United States Trustee on November 1, 2023. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Employ is granted.

Robert P. Obregon, DDS, Inc. ("Debtor in Possession") seeks to employ Gabriel E. Liberman ("Counsel") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor in Possession seeks the employment of Counsel to help Debtor in Possession execute its duties as a fiduciary and otherwise navigate through the Chapter 11 case.

Counsel has been paid a pre-petition retainer fee of $27,000.00. Pre-petition costs and fees have equaled $13,393.00, so Counsel is currently holding a retainer in the sum of $15,345.00 in the client-trust account. Counsel's paralegal's rate is $150.00 an hour while Counsel's rate is $350.00 per hour. Retainer Agreement, Exhibit A, Dckt. 32.

Gabriel Liberman testifies that he is a disinterested and qualified attorney to represent Debtor in Possession in this case. Declaration, Dckt. 31. Mr. Liberman further testifies that he and the firm do not

represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, 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, 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 Gabriel E. Liberman as Counsel for the Chapter 11 Estate on the terms and conditions set forth in the Retainer Agreement filed as Exhibit A, Dckt. 32. Approval of the commission 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 an order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by Robert P. Obregon, DDS, Inc. ("Debtor in Possession]") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted, and Debtor in Possession is authorized to employ Gabriel E. Liberman as Counsel for Debtor in Possession on the terms and conditions as set forth in the Retainer Agreement filed as Exhibit A, Dckt. 32.
>
> **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.	**23-22957-E-7** **BLG-1**	**CRYSTAL SOLAK** **Chad Johnson**	**MOTION TO REDEEM** **10-16-23 [17]**

Final Ruling: No appearance at the November 30, 2023 Hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 16, 2023. By the court's calculation, 44 days' notice was provided. 28 days' notice is required.

The Motion to Redeem has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Redeem is granted.

Crystal Dawn Solak ("Debtor") seeks to redeem 2002 Chevrolet Tahoe, vin ending in 5505 ("Property"), from the claim of Fast Auto Loans ("Creditor") pursuant to 11 U.S.C. § 722. Under that provision of the Bankruptcy Code, Debtor is permitted to redeem tangible personal property intended primarily for personal, family, or household use from a lien securing a dischargeable consumer debt, so long as the property is exempted under 11 U.S.C. § 522 or has been abandoned under 11 U.S.C. § 554. 11 U.S.C. § 722. The right to redeem extends to the whole of the Property, not just to Debtor's exempt interest in it. *See* H.R. Rep. No. 95-595, at 381 (1977). To redeem the Property, Debtor must pay the lien holder "the amount of the allowed secured claim of [the lien] holder that is secured by such lien in full at the time of redemption." 11 U.S.C. § 722. Payment must be made by a lump sum cash payment, not installment payments. *In re Carroll*, 11 B.R. 725 (B.A.P. 9th Cir. 1981). The court looks to 11 U.S.C. § 506 to determine the amount of the secured claim.

The Motion is accompanied by the declaration of Debtor. Declaration, Dckt. 19. Debtor seeks to value the Property at a replacement value of $100.00 as of the petition filing date. The vehicle has over 300,000 miles on it, oil pressure problems, fuel pump regulator problems, brake system issues, and issues with the electrical system, all requiring costly repairs. Dec., Dckt. 19 ¶ 5. As the owner, Debtor's opinion of value is

evidence of the Property'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).

The lien perfected on the Property secures Creditor's claim with a balance of approximately $2,300.00. Therefore, Creditor's claim secured by the lien is under-collateralized, and pursuant to 11 U.S.C. § 506(a), the court determines Creditor's secured claim to be in the amount of $100.00.

Debtor has claimed an exemption in the amount of $100.00 in the Property pursuant to California Code of Civil Procedure § 703.140(b)(2). Because Debtor claims an exemption in the Property, Debtor is permitted to redeem the Property by paying Creditor $100.00 at the time of redemption, which payment is in full satisfaction of the secured claim.

The Motion to Redeem pursuant to 11 U.S.C. § 722 and Federal Rule of Bankruptcy Procedure 6008 is granted.

The court shall issue an order in 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 Redeem filed by Crystal Dawn Solak ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor is authorized and allowed pursuant to 11 U.S.C. § 722 to redeem the 2002 Chevrolet Tahoe, vin ending in 5505 ("Property"), by paying Fast Auto Loans, the creditor holding the claim secured by the Property, the total amount of $100.00, in full at the time of redemption, which must be paid on or before January 2, 2023.

10. 18-20964-E-7 PA-6 | **BRADLEY GILBREATH** **Peter Macaluso** | **MOTION FOR COMPENSATION BY THE LAW OFFICE OF PINO & ASSOCIATES FOR ESTELA O. PINO, TRUSTEES ATTORNEY(S)** **10-23-23 [250]**

Final Ruling: No appearance at the November 30, 2023 Hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 7 Trustee, creditors that have filed claims, parties requesting special notice, and Office of the United States Trustee on October 23, 2023. By the court's calculation, 38 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Allowance of Professional Fees is granted.

Estela O. Pino with the Law Office of Pino and Associates ("Applicant"), the Attorney for Kimberly J. Husted, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period January 3, 2022, through November 2022. The order of the court approving employment of Applicant was entered on January 19, 2022. Dckt. 147. Applicant requests fees in the amount of $30,000.00 and costs in the amount of $1,329.97. Applicant's hours actually total $53,857.80, so Applicant is requesting fees at a reduced rate.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

In re Puget Sound Plywood, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's services for the Estate include assisting the Client in obtaining the turnover and sale of the real property located in Placer County, California, commonly known as 1342 Muscat Circle, Rosevilla, California 95747-7282 ("Property"). The proceeds from the sale of the Property total $461,000.000. Client testifies in her Declaration that with the sale of the Property, Client is able to pay off all administrative claims in the Estate as well as make a distribution to unsecured creditors. Declaration, Dckt. 254. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 29.20 hours in this category. Applicant represented Client during the bankruptcy process, keeping open communication with Client, and coordinated the turnover and sale of the Property.

Adversary Proceedings: Applicant spent 35.70 hours in this category. Applicant worked to prosecute the adversary proceeding to obtain the Property from Cynthia Gilbreath, the defendant in the proceeding. Applicant obtained a default judgment against the defendant, lodged the judgment with this court, and obtained the Property.

Matters Related to Sale of the Property: Applicant spent 82.90 hours in this category. Applicant worked with client and Reed Block Realtor, the real estate broker, to effectively market and sell the Property.

Matters Related to Motion for Relief from Stay: Applicant spent 6.60 hours in this category. Applicant worked with the mortgagee of the Property, U.S. Bank, to continue its Motion for Relief to allow Applicant time to sell the Property.

The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals	**Time**	**Total Fees Computed Based on Time and Hourly Rate**
Estela O. Pino; Raman K. Mahal	29.20	$10,155.00
	35.70	$12,015.00
	82.90	$29,370.00
	6.6	$2,317.50
Total Fees for Period of Application		$53,857.50

Applicant billed at $375.00 per hour for Ms. Pino, and an associate who worked on the case, Ms. Mahal, billed for $300.00 per our. However, Applicant is taking a substantial pay decrease and asks this court to approve a flat fee in the amount of $30,000.00.

Costs & Expenses

Applicant also seeks in the Application the allowance and recovery of costs and expenses in the amount of $1,329.97 pursuant to this Application. However, Applicants itemized lists of costs only shows costs in the amount of $1,256.72. Exhibit 9, Dckt. 253. It appears that there may have be a typographical error in the Application.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Postage		$204.65
Courthouse Parking		$5.00
Copies	$0.10	$785.50
Lexis		$260.67
Pacer		$0.90
Total Costs Requested in Application		$1,256.72

FEES AND COSTS & EXPENSES ALLOWED

Fees

Reduced Rate

Applicant seeks to be paid a single sum of $30,000.00 for its fees incurred for Client. First and Final Fees in the amount of $30,000.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

Applicant is not allowed fees in the amount of 1,329.97 because Applicant has not given the court evidence to authorize such a distribution. However, Applicant has provided the court with an itemized lists of costs in the amount of $1,265.72. Therefore, First and Final Costs in the amount of $1,265.72 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Applicant is allowed, and the Chapter7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$30,000.00
Costs and Expenses	$1,265.72

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

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

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

The Motion for Allowance of Fees and Expenses filed by Estela O. Pino with the Law Office of Pino and Associates ("Applicant"), Attorney for Kimberly J. Husted, the Chapter 7 Trustee ("Client"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Estela O. Pino with the Law Office of Pino and Associates is allowed the following fees and expenses as a professional of the Estate:

Fees in the amount of $30,000.00
Expenses in the amount of $1,265.72,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter7 Trustee.