

FILED & ENTERED

OCT 07 2019

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY gonzalez DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: Morad Javedanfar and Yaffa
Javedanfar, Debtors

Case No.: 2:13-bk-27702-ER

Adv. No.: 2:15-ap-01363-ER

JL AM Plus, LLC, successor-in-interest to
Timothy J. Yoo, Chapter 7 Trustee,

Plaintiff

v.

MBN Real Estate Investments, LLC,

Defendant

**MEMORANDUM OF DECISION
FINDING THAT JLAMP IS ENTITLED
TO ATTORNEYS' FEES AND COSTS IN
THE AMOUNT OF \$595,120.87**

TRIAL:

Date: February 13–15 and May 29–30,
2019

Time: 9:00 a.m.

Location: Ctrm. 1645
Roybal Federal Building
255 East Temple Street
Los Angeles, CA 90012

On August 27, 2019, the Court entered a *Memorandum of Decision Finding that JLAMP is
Entitled to Judgment in its Favor in the Amount of \$1,218,514.75, Plus Attorneys' Fees and*

1 *Costs, Pursuant to §§ 544, 548, and 550* [Doc. No. 333] (the “Memorandum of Decision”). The
2 Court found that Plaintiff JL AM Plus, LLC (“JLAMP”) was entitled to an award of attorneys’
3 fees and costs, pursuant to Cal. Civ. Code § 1717(a), as the prevailing party.¹ The Court directed
4 JLAMP to submit evidence of the attorneys’ fees and costs it had incurred, and provided
5 Defendant MBN Real Estate Investments, LLC (“MBN”) an opportunity to contest the
6 reasonableness of JLAMP’s fees and costs. Having reviewed the submissions of JLAMP and
7 MBN,² the Court finds that JLAMP is entitled to attorneys’ fees and costs in the amount of
8 \$595,120.87.

9 **I. JLAMP is Entitled to Attorneys’ Fees in the Amount of \$578,081.76**

10 *A. JLAMP is Not Entitled to Attorneys’ Fees in the Amount of \$149,000 Billed by the Kumagai*
11 *Law Group*

12 JLAMP was represented by the Kumagai Law Group, PC (“KLG”) between approximately
13 October 2016 and May 2017. From May 2017 through the conclusion of the litigation, JLAMP
14 has been represented by Arent Fox, LLP (“Arent Fox”).

15 JLAMP seeks attorneys’ fees in the amount of \$149,000 for work performed by KLG. No
16 attorney at KLG has submitted a declaration authenticating KLG’s billing records or otherwise
17 attesting to the work that KLG performed. The only testimony submitted regarding KLG’s work

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23 ¹ Memorandum of Decision at 32–33.

² The Court reviewed the following papers in adjudicating this matter:

- 24 1) JL AM Plus, LLC’s Application for Attorneys’ Fees Pursuant to the Court’s Memorandum of Decision
[Doc. No. 335] (the “Fee Application”)
a) Declaration of John S. Purcell in Support of JL AM Plus, LLC’s Application for Attorneys’ Fees
Pursuant to the Court’s Memorandum of Decision [Doc. No. 336]; and
25 2) Opposition by Defendant MBN Real Estate Investments, LLC to Motion for Attorneys’ Fees [Doc. No.
337] (the “MBN Opposition”).

1 is from John Purcell, an attorney at Arent Fox. Mr. Purcell testifies as follows:

2 I am generally familiar with the work the Kumagai Law Group provided to JLAMP as a
3 result of my representation of JLAMP in this case.... I have been provided the invoices of
4 Kumagai Law Group for its work performed for JLAMP in this case.

5 Purcell Decl. at ¶¶ 8 and 10.

6 MBN asserts that KLG's billing records should be excluded as inadmissible hearsay.

7 The Court agrees with MBN that KLG's billing records are inadmissible hearsay. Evidence
8 Rule 801(c)³ defines hearsay as a statement that "the declarant does not make while testifying at
9 the current trial or hearing" and that "a party offers in evidence to prove the truth of the matter
10 asserted in the statement." Hearsay is not admissible unless an exception applies. Evidence Rules
11 802 and 803.

12 KLG's billing records are offered by JLAMP to establish that KLG's attorneys performed
13 legal services for JLAMP in accordance with the time entries set forth in the records. As such,
14 the billing records are offered to prove the truth of the time entries contained therein, and
15 constitute hearsay.

16 Evidence Rule 803(6)(A) provides that records of a regularly conducted activity are not
17 excluded by the rule against hearsay. However, JLAMP has failed to establish that it is eligible
18 for the exception set forth in Evidence Rule 803(6)(A). To obtain admission of records of
19 regularly conducted activities, JLAMP must show the following:

20 (A) the record was made at or near the time by—or from information transmitted by—
21 someone with knowledge;

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24 ³ Unless otherwise indicated, all "Civil Rule" references are to the Federal Rules of Civil Procedure, Rules 1–86; all
25 "Bankruptcy Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037; all "Evidence
Rule" references are to the Federal Rules of Evidence, Rules 101–1103; all "LBR" references are to the Local
Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California, Rules 1001-1–9075-
1; and all statutory references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532.

1 (B) the record was kept in the course of a regularly conducted activity of a business,
2 organization, occupation, or calling, whether or not for profit;

3 (C) making the record was a regular practice of that activity;

4 (D) all these conditions are shown by the testimony of the custodian or another qualified
5 witness, or by a certification that complies with Rule 902(11) or (12) or with a statute
6 permitting certification; and

7 (E) the opponent does not show that the source of information or the method or
8 circumstances of preparation indicate a lack of trustworthiness.

9 Evidence Rule 803(6)(A).

10 Mr. Purcell's testimony that he is "generally familiar with the work the Kumagai Law Group
11 provided to JLAMP as a result of my representation of JLAMP in this case" fails to establish any
12 of the elements set forth in Evidence Rule 803(6)(A). More fundamentally, Mr. Purcell has not
13 shown that he is qualified to testify regarding KLG's record keeping practices. The fact that Mr.
14 Purcell represented JLAMP in no way shows that Mr. Purcell has personal knowledge of KLG's
15 record keeping practices.

16 Even if the Court were to disregard the inadmissibility of KLG's billing records, JLAMP has
17 failed to introduce sufficient evidence showing that it is entitled to fees in connection with the
18 work allegedly performed by KLG. JLAMP's lead trial counsel, Mr. Purcell, has not offered
19 testimony adequately establishing that KLG's work materially contributed to the judgment in
20 favor of JLAMP. To the contrary, the Court's review of KLG's billing records indicates that
21 much of KLG's work had nothing to do with the judgment in JLAMP's favor. A significant
22 portion of the billing entries pertain to KLG's unsuccessful defense of a motion for summary
23 judgment brought by Morad Ben Neman ("Mr. Neman"). JLAMP was not the prevailing party
24 with respect to that motion; instead, the motion resulted in the entry of final judgment in Mr.
25 Neman's favor.

1 *B. JLAMP is Entitled to Attorneys' Fees in the Amount of \$578,081.76 Billed by Arent Fox*

2 The Court “must calculate awards for attorneys’ fees using the ‘lodestar’ method, and the
3 amount of that fee must be determined on the facts of each case. The ‘lodestar’ is calculated by
4 multiplying the number of hours the prevailing party reasonably expended on the litigation by a
5 reasonable hourly rate.” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008)
6 (internal citations and quotations omitted).

7 During the period it was represented by Arent Fox, the majority of JLAMP’s legal work was
8 performed by Mr. Purcell, JLAMP’s lead trial counsel, and Douglas Hewlett, a sixth-year
9 associate. Mr. Purcell billed 743.4 hours and Mr. Hewlett billed 197.6 hours. M. Douglas
10 Flahaut, of counsel, billed 0.7 hours advising on a jurisdictional issue.

11 Mr. Purcell’s billing rate is \$820/hour for trial work and \$785/hour for all other work.⁴ Mr.
12 Purcell is a partner at Arent Fox and has been practicing since 1992. Mr. Hewlett’s billing rate
13 was \$460/hour in 2018 and \$505/hour in 2019. Mr. Hewlett has been practicing since 2013. Mr.
14 Flahaut’s billing rate is \$595/hour. Mr. Flahaut is of counsel at Arent Fox and has been
15 practicing since 2006.

16 MBN objects to the hourly rates of JLAMP’s counsel as excessive, arguing that no attorneys
17 for MBN billed more than \$500/hour.

18 “The ‘prevailing market rates in the relevant community’ set the reasonable hourly rate for
19 purposes of computing the lodestar amount.... ‘Generally, when determining a reasonable hourly
20 rate, the relevant community is the forum in which the district court sits.’ Within this geographic
21 community, the district court should ‘tak[e] into consideration the experience, skill, and
22 reputation of the attorney [or paralegal].’” *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1205–
23 06 (9th Cir. 2013) (internal citations omitted).

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⁴ The billing rates set forth in this paragraph do not reflect the 10% discount that Arent Fox extended to JLAMP.

1 Taking into account the experience, skill, and reputation of JLAMP's counsel, the Court
2 finds that the hourly rates charged are reasonable. The hourly rates are consistent with prevailing
3 market rates for practitioners of comparable experience, skill, and reputation in the Central
4 District of California. MBN's argument that the rates are excessive, simply because they exceed
5 the rates charged by MBN's counsel, misses the mark. Nothing within the reasonable hourly rate
6 calculation requires that the rates charged by the prevailing party be on parity with the rates
7 charged by opposing counsel. Further, MBN's argument presumes, without any supporting
8 evidence, that its own rates are a proxy for prevailing market rates. Because MBN has not
9 introduced any persuasive evidence that the rates of JLAMP's counsel exceed prevailing market
10 rates, its objection is overruled.

11 The Court must next determine whether the number of hours expended on the litigation by
12 JLAMP's counsel was reasonable. "Ultimately, a 'reasonable' number of hours equals '[t]he
13 number of hours ... [which] could reasonably have been billed to a private client.'" *Gonzalez*,
14 729 F.3d at 1202 (internal citations omitted).

15 JLAMP seeks fees in the amount of \$20,855.25 for time spent preparing and litigating three
16 motions to compel MBN to comply with its discovery obligations (the "Motions to Compel").⁵
17 All three Motions to Compel were granted,⁶ and JLAMP was awarded attorneys' fees in the
18 aggregate amount of \$16,000 as compensation for the costs of litigating the Motions to Compel,
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20 ⁵ The fees sought in connection with the Motions to Compel are set forth on pages 20–23 of JLAMP's billing
21 records (see Doc. No. 336, Ex. 1). Certain of the time entries combine work on the Motions to Compel with work on
22 unrelated matters. These block-billed entries prevent the Court from ascertaining the precise amount of fees that
23 JLAMP seeks for work on the Motions to Compel. With respect to block-billed time entries, the Court assumes that
all the fees pertain to work on the Motions to Compel. The lack of specificity in the billing entries must be construed
against JLAMP. In calculating the total fees sought for work on the Motions to Compel, the Court has applied the
10% courtesy discount that counsel extended to JLAMP.

24 ⁶ See Order Granting Real Party in Interest JL AM Plus, LLC's Motion to Compel Further Responses to Requests
for Production of Documents [ECF No. 179], Pursuant to Hearing Minutes [ECF No. 195] [Doc. No. 201]; Order
25 Granting Real Party in Interest JL AM Plus, LLC's Motion to Compel the Deposition of Morad Neman [ECF No.
168], Pursuant to Hearing Minutes [ECF No. 192] [Doc. No. 197]; and Order Granting Real Party in Interest JL AM
Plus, LLC's Motion to Compel Further Responses to Interrogatories and Initial Disclosures [ECF No. 172], Pursuant
to Hearing Minutes [ECF No. 191] [Doc. No. 196].

pursuant to Civil Rule 37(a)(5)(A).⁷ The \$16,000 awarded to JLAMP has been paid in full by MBN.⁸ JLAMP is not entitled to a double recovery and will not be awarded the \$20,855.25 it seeks for time spent on the Motions to Compel.

JLAMP seeks fees in the amount of \$42,144.75 for time spent attempting to set aside a final judgment entered in favor of Mr. Neman.⁹ JLAMP's efforts to set aside that final judgment were unsuccessful. Under California law, "[i]f a plaintiff has prevailed on some claims but not others, fees are not awarded for time spent litigating claims unrelated to the successful claims, and the trial court 'should award only that amount of fees that is reasonable in relation to the results obtained.'" *Chavez v. City of Los Angeles*, 47 Cal. 4th 970, 989, 224 P.3d 41, 53 (2010). JLAMP is not entitled to receive fees of \$42,144.75 on account of its unsuccessful attempt to set aside the final judgment in Mr. Neman's favor.

Aside from the duplicative recovery sought in connection with work on the Motions to Compel and the recovery sought for work performed attempting to set aside the final judgment in favor of Mr. Neman, the hours billed by JLAMP's counsel are reasonable. The litigation involved complex issues of fact and law. To prove the value of the Interests¹⁰ at the time of the Transfers, JLAMP was required to introduce expert testimony retroactively valuing the Properties as of 2013, as well as expert testimony as to the value of the fractionalized Interests in the Properties. Trial lasted five days. To prepare for trial, JLAMP's counsel was required to

⁷ JLAMP sought a fee award of \$27,500 in connection with the Motions to Compel, but the Court found that JLAMP was entitled to fees of only \$16,000. *See* Final Ruling Granting Motion to Compel Further Responses to Requests for Production of Documents [Doc. No. 195] at 7; Final Ruling Granting Motion to Compel the Deposition of Morad Neman [Doc. No. 192] at 8; and Final Ruling Granting Motion to Compel Further Responses to Interrogatories [Doc. No. 191] at 8.

⁸ *See* Declaration of Simon Neman [Doc. No. 337, Ex. A] (showing that MBN paid JLAMP \$16,000 by way of a check that was negotiated on April 27, 2018).

⁹ The fees sought in connection with the JLAMP's attempt to set aside the final judgment in Mr. Neman's favor are set forth on pages 45–50 of JLAMP's billing records (see Doc. No. 336, Ex. 1). As explained in note 5, block-billed entries are construed against JLAMP. In calculating total fees sought, the Court has applied the 10% courtesy discount that counsel extended to JLAMP.

¹⁰ Terms not defined herein have the meaning set forth in the Memorandum of Decision.

1 review thousands of pages of documents, including leases, financial records, tax returns, and
2 loan agreements.

3 The four continuances of the trial also increased JLAMP's fees, because JLAMP was
4 required to prepare witnesses, meet with experts, and engage in other trial preparation prior to
5 each of the continued trial dates. Each continuance was granted upon MBN's motion, over
6 JLAMP's opposition.¹¹ MBN sought the continuances as a result of delays in the criminal
7 sentencing of one of its key witnesses, Mr. Neman. Had trial occurred before Mr. Neman's
8 criminal sentencing, Mr. Neman would have asserted his Fifth Amendment right against self-
9 incrimination, rather than offering any testimony as to the Transfers at issue. The Court found
10 that the continuances were necessary to avoid prejudice to MBN, which would have been unable
11 to fully defend itself absent Mr. Neman's testimony.¹²

12 MBN argues that the trial preparation fees JLAMP incurred prior to those trial dates that
13 were ultimately continued should be disallowed as duplicative and unnecessary. MBN advances
14 two theories to support this proposition. First, MBN contends that by the time of the second trial
15 continuance, JLAMP should have realized that further continuances would likely be granted and
16 that preparation for an imminent trial was unnecessary. Second, MBN contends that JLAMP
17 brought upon itself the need to prepare for trial multiple times by failing to stipulate to the
18 continuances sought by MBN.

19 Neither of MBN's arguments has merit. With respect to the first argument, it would have
20 been foolhardy for JLAMP to forego trial preparation on the assumption that each of MBN's
21 requests for a continuance would be granted. Such a course of action would have left JLAMP
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24 ¹¹ The reasons for each of the continuances are set forth in the *Memorandum of Decision (1) Granting in Part and*
25 *Denying in Part Defendant's Motion to Continue Trial, (2) Vacating Hearing on Defendant's Motion, and (3)*
Vacating Trial Set for November 16, 2018 [Doc. No. 295] (the "Continuance Memorandum").

¹² See generally Continuance Memorandum.

1 unprepared for trial if any of MBN's requests for a continuance—each vigorously opposed by
2 JLAMP—had been denied.

3 With respect to MBN's second argument, JLAMP was not required to acquiesce to MBN's
4 multiple requests for a continuance of the trial. Contrary to MBN's characterization, the
5 continuances were not "inevitable,"¹³ and it was reasonable for JLAMP to contest each delay of
6 the trial. When adjudicating each of MBN's requests for a further continuance, the Court
7 considered the five factors set forth in *Fed. Sav. & Loan Ins. Corp. v. Molinara*, 889 F.2d 899
8 (9th Cir. 1989).¹⁴ MBN's assertion that it had become obvious by the time of the second
9 continuance that each further request for a continuance would be granted mischaracterizes the
10 record. The manner in which the Court would apply and weigh each of the *Molinara* factors
11 could not have been predicted by counsel prior to the Court's ruling upon each continuance
12 request.

13 MBN contends that JLAMP is not entitled to recover \$12,005 in fees for work performed by
14 paralegals. The Court disagrees. The use of paralegals, who bill at a far lower rate than attorneys,
15 is an effective means of controlling costs, and is to be encouraged.

16 After deducting \$20,855.25 in fees sought in connection with the Motions to Compel and
17 \$42,144.75 in fees sought in connection with the failed attempt to set aside the final judgment in
18 favor of Mr. Neman, the Court finds that JLAMP is entitled to fees billed by Arent Fox in the
19 amount of \$578,081.76.¹⁵

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23 ¹³ See MBN Opposition [Doc. No. 337] at 6.

24 ¹⁴ See Continuance Memorandum at 2–5.

25 ¹⁵ The calculation is as follows: JLAMP sought total fees of \$641,081.76 (consisting of \$625,486.76 for litigation work and \$15,595 for preparing its fee application). From this sum, the Court has deducted \$63,000 (consisting of \$20,855.25 in duplicative fees sought in connection with the Motions to Compel and \$42,144.75 in fees sought in connection with the failed attempt to set aside the final judgment in favor of Mr. Neman).

II. JLAMP is Not Entitled to An Award of the Costs Incurred in Connection With Expert Witnesses in Excess of the \$40 Per Diem Witness Fee

JLAMP seeks an award of the costs in the amount of \$115,032.71 on account of the three expert witnesses it retained. JLAMP is not entitled to expert witness costs in excess of the \$40 per diem witness fee under either Civil Rule 54(d)(1) or Cal. Civ. Proc. Code §§ 1032 and 1033.5(a)(8).

A. JLAMP is Not Entitled to Expert Witness Costs In Excess of the Per Diem Witness Fee Under Civil Rule 54(d)(1)

Civil Rule 54(d)(1) provides that “costs ... should be allowed to the prevailing party.” Title 28 U.S.C. § 1920 sets forth the kinds of expenses that a federal court may award as costs to the prevailing party. Title 28 U.S.C. § 1920(6) provides that costs for experts may not be awarded unless the experts are appointed by the Court. Further, in *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, the Supreme Court has held that when taxing the expenses of a litigant’s witness as costs, federal courts “are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920.” 482 U.S. 437, 445, 107 S. Ct. 2494, 2499, 96 L. Ed. 2d 385 (1987). Those statutes provide that costs for witnesses may not exceed an attendance fee of \$40 per day plus a travel allowance.

JLAMP cites *In re Toys R Us-Delaware, Inc.—Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 444 (C.D. Cal. 2014) for the proposition that it is entitled to recover its expert witness expenses as costs. JLAMP’s reliance upon *Toys R US-Delaware, Inc.* is misplaced, because that case involved claims under the Fair Credit Reporting Act, which contains a fee-shifting provision that has been interpreted to allow the prevailing party to recover otherwise non-taxable costs. *See Grove v. Wells Fargo Fin. California, Inc.*, 606 F.3d 577, 580 (9th Cir. 2010).

JLAMP also points to *In re Media Vision Technology Securities Litigation*, 913 F.Supp. 1362, 1366-67 (N.D. Cal. 1996), in which the court taxed expert witness costs upon concluding

1 that the expert testimony was “crucial or indispensable” to the litigation. *Media Vision*, 913
2 F.Supp. at 1366. *Media Vision* reached this conclusion by relying upon *Farmer v. Arabian*
3 *American Oil Co.*, 379 U.S. 227, 85 S.Ct. 411, 13 L.Ed.2d 248 (1964), a case that the Supreme
4 Court expressly disapproved in *Crawford Fitting*. See *Crawford Fitting*, 482 U.S. at 442–43.
5 *Media Vision*’s holding regarding the taxation of expert witness costs is not good law.

6 JLAMP’s reliance upon *Ackerman v. W. Elect. Co., Inc.*, 113 F.R.D. 143 (N.D. Cal. 1986) is
7 similarly misplaced. *Ackerman* was decided prior to *Crawford Fitting*, which overruled cases
8 holding that federal courts had discretion to tax expert witness costs.

9 *B. JLAMP is Not Entitled to Expert Witness Costs In Excess of the Per Diem Witness Fee Under*
10 *Cal. Civ. Proc. Code §§ 1032(b) and 1033.5(a)(8)*

11 As noted, the Court found that JLAMP was entitled to recover fees and costs because the
12 litigation qualified as an “action on a contract” as that term is broadly defined under California
13 law. Cal. Civ. Proc. Code § 1032(b) provides that “a prevailing party is entitled as a matter of
14 right to recover costs in any action or proceeding.” Cal. Civ. Proc. Code § 1033.5 sets forth the
15 items allowable as costs under Cal. Civ. Proc. Code § 1032. Cal. Civ. Proc. Code § 1033.5(a)(8)
16 provides that fees of expert witnesses are taxable as costs only if the expert witnesses were
17 appointed by the Court. Therefore, JLAMP is not entitled to recover its expert witness fees as
18 costs under Cal. Civ. Proc. Code §§ 1032 and 1033.5(a)(8).

19 *C. JLAMP’s Expert Witness Costs are Limited to \$120.00*

20 JLAMP proffered three expert witnesses, each of whom presented one day of testimony.
21 Pursuant to 28 U.S.C. § 1821(b) and *Crawford Fitting*, expert witness costs are limited to \$40
22 per day for each expert witness. JLAMP is entitled to costs of \$120.00 on account of its expert
23 witnesses.¹⁶

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25 ¹⁶ The Court declines to award a travel allowance because JLAMP has submitted no evidence of its expert
witnesses’ travel expenses.

1 **III. JLAMP is Entitled to Costs in the Amount of \$16,919.11**

2 JLAMP seeks costs in the amount of \$16,919.11. The requested costs consist of expenses for
3 legal research, electronic data management services, and messenger services. Having reviewed
4 JLAMP's billing records, the Court finds that the costs requested are reasonable. JLAMP is
5 entitled to costs in the amount of \$16,919.11.

6 **IV. Conclusion**

7 Based upon the foregoing, JLAMP is entitled to an award of attorneys' fees and costs in the
8 amount of \$595,120.87, consisting of \$578,081.76 in attorneys' fees billed by Arent Fox,
9 \$120.00 in per diem fees for expert witnesses, and \$16,919.11 in costs.

10 The Court will enter judgment consistent with this Memorandum of Decision.

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22 Date: October 7, 2019

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24 _____
25 Gregg W. Zive
United States Bankruptcy Judge