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Attorneys for Peter L. Fear, Chapter 7 Successor Trustee

IN THE UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA - FRESNO DIVISION

In re:

MARIO ALBERTO GUERRA,

Debtor.

Case No. 17-11365-B-7

Chapter 7

DC No.: RWR-3

Date: April 24, 2019

Time: 9:30 a.m.

Dept: B

Ctzm: 13, Fifth Floor

Location: 2500 Tulare Street
Fresno, CA

Judge: Honorable Rene Lastreto II

TRUSTEE'S MOTION TO EMPLOY SPECIAL COUNSEL

Comes now Peter L. Fear, Chapter 7 Successor Trustee, respectfully represents as follows:

I. INTRODUCTION

Peter L. Fear is the qualified and acting Chapter 7 Successor Trustee following the resignation of previous acting Trustee, Trudi G. Manfredo, of the bankruptcy estate of Mario Alberto Guerra. For purposes of this motion there is a related case, In re: Daniel Canchola, Case number 17-11346. James Edward Salven is the duly appointed, qualified and acting Trustee of the Canchola case.

Mr. Fear is now performing his duties as set forth in 11 U.S.C. § 704.

1 Among the assets in this case which need to be administered is a bad faith claim and
2 related tortious injuries suffered as a result of said bad faith held by the Debtor. The claim of bad
3 faith and related tortious injuries arises out of a traffic accident and the Debtor's insurance
4 company's alleged failure to tender the proper policy limits. This situation arose prior to the
5 Debtor filing for bankruptcy protection. At the present time, Trustee is in need of the assistance
6 of legal counsel to prosecute the above-referenced claims.

7 II. BACKGROUND

8 This Motion to Employ Special Counsel involves two separate bankruptcy proceedings.
9 Debtor Mario Alberto Guerra is the owner of Guerra Produce. Mr. Guerra had in his employ an
10 individual by the name of Daniel M. Canchola. On December 11, 2013, a complaint was filed in
11 the Fresno County Superior Court that alleges Canchola and Guerra (along with other
12 Defendants) negligently caused a traffic accident resulting in the wrongful death and serious
13 injuries of several persons. The Debtors, Guerra and Canchola, had insurance coverage but a
14 dispute arose over the amount of coverage. It is contended that Infinity Insurance under-insured
15 the Guerra vehicle as a matter of law and that Infinity Insurance may be obligated to honor a
16 policy limit of \$750,000.

17 A trial was set to begin on April 24, 2017, in the Fresno County Superior Court. A Good
18 Faith Settlement Hearing was set for April 13, 2017. On April 12, 2017, Mario Alberto Guerra
19 filed a Chapter 7 bankruptcy in this court bearing case number 17-11365. Peter L. Fear serves as
20 the acting Chapter 7 Successor Trustee in the Guerra case. On April 11, 2017, Daniel M.
21 Canchola filed a Chapter 7 bankruptcy case in this court bearing case number 17-11346. James
22 E. Salven serves as the acting Chapter 7 Trustee in the Canchola case. The Plaintiffs in the state
23 court litigation sought and obtained relief from stay. Trustee is informed that the Plaintiffs
24 reached an agreement with Debtor's insurance company that paid to Plaintiffs the lower policy
25 limits without restricting Plaintiffs' future recovery should they successfully bring a bad faith
26 claim to recover the full amount of the alleged policy limits. The unusual agreement regarding a
27 potential future bad faith claim was facilitated by the insurance company. Given the nature of the
28 unusual agreement, the Debtors' claims against the insurance company will more than likely be a

1 bifurcated claim, separate from the bad faith claim that the Plaintiffs may have, and will seek
2 recovery for injuries suffered by the Debtors and not the Plaintiffs. Thus, by virtue of this
3 agreement, Infinity Insurance paid the Plaintiffs the lower policy limit, dismissed the lawsuit and
4 preserved the rights of the parties to bring their perceived bad faith claims.

5 The Debtors, Guerra and Canchola had insurance coverage but a dispute arose over the
6 amount of coverage. It is contended that Infinity Insurance under-insured the Guerra vehicle as a
7 matter of law and that Infinity Insurance may be obligated to honor a policy limit of \$750,000.00.
8 It is believed that Guerra and Canchola have a bad faith claim and related claims for tortious
9 injuries suffered as a result of such bad faith against the insurance carrier and special counsel is
10 necessary to prosecute that action. Special Counsel is willing to represent both Debtors' estates
11 in one action. An application to employ special counsel is being filed concurrently in both
12 bankruptcy cases. Prior to her resignation as Trustee, Ms. Manfredo as the acting Trustee of this
13 estate and Mr. Salven, on behalf of the Canchola bankruptcy estate, reached an agreement to
14 share any proceeds from the bad faith litigation. Mr. Fear, as the Successor Trustee and Mr.
15 Salven will be seeking approval of that agreement by separate motion.

16 17 III. APPLICATION TO EMPLOY SPECIAL COUNSEL

18 Trustee wishes to employ David M. Moeck, Esq., who is duly admitted to practice law in
19 the California courts. Trustee seeks to have said firm represent the him as special counsel in this
20 case with respect to the prosecution of the above-described claim. Trustee has selected David M.
21 Moeck, Esq., for the reason that he has experience in these types of litigation matters, and is
22 willing to represent Trustee on a contingency-fee basis with respect to the prosecution of the
23 above claim. Trustee believes that the employment of David M. Moeck, Esq., is in the best
24 interest of the bankruptcy estate in that prosecution of the claims is likely to involve significant
25 attorney time and effort. Moreover, the outcome of the case is very uncertain; Trustee has no
26 funds with which he can employ an attorney at an hourly rate; Trustee is unsure of whether any
27 benefit to Debtor's bankruptcy estate will ultimately be derived, and employment of counsel on a
28 contingency-fee basis is a way in which the downside risk of such litigation may be minimized,

while allowing the bankruptcy estate to pursue claims, which at the present time Debtor believes are valid and substantial, and, in the event of a recovery, simply share the benefit of such recovery with the attorney(s) who are willing to prosecute the claim.

The professional services that David M. Moeck, Esq., is to render are fully described in the Attorney-Client Contingent Fee Contract, a copy of which is included in the accompanying Exhibit Documents as Exhibit "A".

To the best of the Trustee's knowledge, David M. Moeck, Esq., did not represent either Debtor Guerra or Debtor Conchola, or any creditor or other party in the bankruptcy case. David M. Moeck, Esq., has no connection with any of the Debtor's other creditors, or any other party in interest, or their respective attorneys or accountants, or the United States Trustee, or any person employed in the office of the United States Trustee, except as disclosed in the declaration of David M. Moeck, Esq., submitted in support thereof, and is disinterested as that term is defined in 11 U.S.C. § 327 and Rule 2014 of the Federal Rules of Bankruptcy Procedure.

WHEREFORE, Trustee prays that the employment of David M. Moeck, Esq., under the terms specified to represent him as special counsel in this Chapter 7 bankruptcy proceeding be approved and for such other and further relief as is just and proper.

COLEMAN & HOROWITT, LLP

Dated: March 28, 2019.

By: /s/ Russell W. Reynolds
 RUSSELL W. REYNOLDS
 Attorneys for Peter L. Fear, Chapter 7
 Trustee