

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Thomas C. Holman  
Bankruptcy Judge  
Sacramento, California

July 28, 2009 at 9:32 A.M.

1. 08-32203-B-7 MICHAEL/IRMA ADAMS  
MAR #2

HEARING - FIRST  
AND FINAL APPLICATION FOR  
COMPENSATION BY COUNSEL FOR  
TRUSTEE (\$2,495.00 FEES;  
\$145.62 EXPENSES)  
6-23-09 [[42](#)]

DISCHARGED 12-23-08

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(1). In this instance and because of the size of this morning's three related calendars (140 matters), the court issues the following abbreviated tentative ruling. Any party may at the hearing request a more explanatory Disposition After Oral Argument.

The motion is granted to the extent set forth herein. The order approving applicant's employment (Dkt. 31) will be amended to state an effective date of November 5, 2008. The application is approved on a final basis for a total of \$2,495.00 in fees and \$145.62 in costs. Of that amount, \$2,640.62 shall be paid as a chapter 7 administrative expense. Except as so ordered, the motion is denied without prejudice.

This court authorized the employment of Marshall & Ramos, LLP ("Applicant") for the chapter 7 trustee on November 19, 2008 (Dkt. 31). The employment order does not state that the employment was effective as of an earlier date. This department does not approve compensation for work prior to the effective date of a professional's employment. DeRonde v. Shirley (In re Shirley), 134 B.R. 930, 943-944 (B.A.P. 9<sup>th</sup> Cir. 1992). However, the court construes the present application as requesting an effective date in the order approving applicant's employment retroactive to November 5, 2008. The request for that effective date is granted. Due to the administrative requirements for obtaining court approval of professional employment, this department allows in an order approving a professional's employment an effective date that is not more than thirty (30) days prior to the filing date of the employment application without a detailed showing of compliance with the requirements of In re THC Financial Corp, 837 F.2d 389 (9<sup>th</sup> Cir. 1988) (extraordinary or exceptional circumstances to justify retroactive employment). Here, November 5, 2008 is five days prior to the filing date of the employment application. However, a recurrence of this fact pattern may show sufficient inattention to employment matters to lead, with or without opposition, to a different result under the "satisfactory explanation" prong of the THC Financial Corp. standard.

Applicant now seeks compensation for the period of November 5, 2008

through July 28, 2009 in the amount of \$2,495.00 in fees and \$145.62 in costs. As set forth in the attorney's application, the allowed fees and costs are reasonable compensation for actual, necessary and beneficial services. 11 U.S.C. § 330(a)(1).

The court will issue an order approving the application. Counsel for the trustee shall submit an amended order (which shall be titled "Amended Order Authorizing Employment of Marshall & Ramos, LLP as Counsel to Chapter 7 Trustee") stating an effective date for applicant's employment of November 5, 2008.

2. [09-31612](#)-B-11 MARGARET K. HAUCK AND HEARING - MOTION OF  
UST #1 SEPARATE PROPERTY THE UNITED STATES TRUSTEE  
FOR DISMISSAL OF CHAPTER 11  
CASE  
6-16-09 [[13](#)]

**Disposition Without Oral Argument:** Oral argument will not aid the court in rendering a decision on this matter.

This matter is continued to August 18, 2009 at 1:30 p.m.

This motion was initially set on this calendar. Movant attempted to continue the matter unilaterally from this calendar to the court's August 18, 2009, 1:30 p.m. calendar by filing an amended notice of hearing. (Dkt. 22). Continuances must be approved by the court. LBR 9014-1(j). Simply filing an amended notice of hearing is ineffective. However, in this instance, the court construes the amended notice of hearing as a request for court approval of the continuance and grants the request to continue this matter to the court's August 18, 2009, 1:30 p.m. calendar.

The court will issue a minute order.

3. [08-28818](#)-B-7 KEITH/HAZEL MILLER, VS. HEARING - DEBTOR'S  
TJW #1 MOTION TO VOID LIEN  
HOUSEHOLD FINANCE CORP. 6-17-09 [[38](#)]

DISCHARGED 10-14-08

**Disposition Without Oral Argument:** This motion is unopposed. Due to the size of this morning's three related calendars (140 matters), the court issues the following abbreviated ruling.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). The judicial lien in favor of Household Finance Corp., recorded in the official records of Solano County, Document No. 200800003704, is avoided as against the real property located at 642 Fiora Place, Fairfield, California ("Property").

For purposes of this motion, in the absence of opposition, the Property had a value of \$550,000.00 as of the petition date. Movant alleges without dispute that the unavoidable liens total in excess of \$620,000.00. The debtors claimed the Property as exempt under California Code of Civil Procedure Section 703.140(b)(1), under which they exempted

\$100.00. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the Property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the debtors' exemption of the Property, and its fixing is avoided.

The court will issue a minute order.

4. [09-28520](#)-B-7 JACK WOLF HEARING - MOTION FOR  
[09-2333](#) JSO #1 MORE DEFINITE STATEMENT  
BARELA INVESTMENTS, ET AL., VS. 6-27-09 [[9](#)]

ABC FINE QUALITY CABINETS, ET AL.

**Disposition Without Oral Argument:** Oral argument will not aid the court in rendering a decision on this matter.

The motion is denied as moot because the adversary proceeding was dismissed by order entered on July 17, 2009. (Dkt. 14).

The court will issue a minute order.

5. [08-33523](#)-B-11 AHMAD/DARCI JAYOUSI HEARING - MOTION  
KK #2 TO APPROVE STIPULATION FOR  
STERLING NATIONAL BANK, VS. RELIEF FROM AUTOMATIC STAY  
7-9-09 [[175](#)]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

6. [08-33523](#)-B-11 AHMAD/DARCI JAYOUSI HEARING - VERIFIED  
WSD #12 MOTION BY DEBTORS-IN-POSSESSION  
FOR THIRD EXTENSION OF TIME TO  
ASSUME OR REJECT NONRESIDENTIAL  
REAL PROPERTY LEASES  
7-6-09 [[169](#)]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

7. [09-21332](#)-B-7 CHARLES/IRMA BOCK, VS. HEARING - DEBTOR'S  
RHM #6 MOTION TO AVOID THE FIXING  
SHOP IRONWORKERS 790 OF JUDICIAL LIEN  
PENSION TRUST, ET AL. 6-9-09 [[66](#)]

DISCHARGED 5-8-09

**Disposition Without Oral Argument:** Oral argument will not aid the court in rendering a decision on this matter.

The motion is denied as moot.

The relief that debtors seek by this motion was already granted by order entered on June 12, 2009. (Dkt. 79).

The court will issue a minute order.

8. [09-21332](#)-B-7 CHARLES/IRMA BOCK, VS. HEARING - DEBTOR'S  
RHM #7 MOTION TO AVOID THE FIXING  
SHOP WORKERS LOCAL 790 OF JUDICIAL LIEN  
PENSION 6-9-09 [[61](#)]

DISCHARGED 5-8-09

**Disposition Without Oral Argument:** Oral argument will not aid the court in rendering a decision on this matter.

The motion is denied as moot.

The relief that debtors seek by this motion was already granted by order entered on June 12, 2009. (Dkt. 79).

The court will issue a minute order.

9. [09-20033](#)-B-7 KOW/NAI SAETEUN HEARING - DEBTORS'  
MOTION TO DISMISS CASE  
6-18-09 [[41](#)]

**Disposition Without Oral Argument:** This motion is unopposed. Due to the number of matters on this morning's three related calendars (140 matters), the court issues the following abbreviated ruling.

The motion is granted, and the case is dismissed.

The case is dismissed for cause pursuant to 11 U.S.C. § 707(a).

The court will issue a minute order.

10. [09-28541](#)-B-7      MICHAEL/DARLENE FRESHOUR      HEARING - DEBTORS'  
ADS #1      MOTION TO COMPEL TRUSTEE TO  
ABANDON ESTATE'S INTEREST  
IN DEBTORS' BUSINESS  
7-3-09    [[15](#)]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

11. [07-21846](#)-B-7      DANA ANDREWS      CONT. HEARING - MOTION TO  
[07-2119](#)      JJS #4      DISMISS THIRD AMENDED COMPLAINT  
DANA ANDREWS, VS.      5-29-09    [[134](#)]
- ANDREWS FAMILY REVOCABLE  
TRUST, ET AL.  
DISCHARGED 4-7-08  
CONT. FROM 7-14-09

**Tentative Ruling:** None.

12. [07-21846](#)-B-7      DANA ANDREWS      HEARING - MOTION  
[07-2119](#)      JJS #5      TO STRIKE DEBTOR'S ANSWER TO  
DANA ANDREWS, VS.      THE THIRD AMENDED COMPLAINT  
6-8-09    [[144](#)]
- ANDREWS FAMILY REVOCABLE  
TRUST, ET AL.  
DISCHARGED 4-7-08

**Tentative Ruling:** None.

13. [07-21846](#)-B-7      DANA ANDREWS      HEARING - MOTION  
[07-2119](#)      JJS #6      TO DISMISS DEBTOR'S  
DANA ANDREWS, VS.      CROSS-COMPLAINT  
6-8-09    [[141](#)]
- ANDREWS FAMILY REVOCABLE  
TRUST, ET AL.  
DISCHARGED 4-7-08

**Tentative Ruling:** None.

14. 07-21846-B-7 DANA ANDREWS  
07-2119 JJS #7  
DANA ANDREWS, VS.

HEARING - DEFENDANT  
PERRY'S MOTION FOR SANCTIONS  
AGAINST DEBTOR  
6-9-09 [147]

ANDREWS FAMILY REVOCABLE  
TRUST, ET AL.  
DISCHARGED 4-7-08

**Tentative Ruling:** Neither the respondent within the time for opposition nor the movant within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondent have consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f)(1)(ii) and (iii).

The request for imposition of sanctions is denied.

By this motion, defendant Gary Perry ("Perry") seeks to impose sanctions on debtor and debtor's counsel in the amount of \$6,435.00 on the theory that counsel has filed improper and frivolous motions in this proceeding, causing expense and delay to Perry. Perry seeks imposition of sanctions under Federal Rule of Civil Procedure 11. For the reasons described herein, the court does not find that Perry has carried his burden of showing that an imposition of sanctions are justified.

Sanctions under Federal Rule of Civil Procedure 11 are inappropriate. First, Federal Rule of Civil Procedure 11 is not applicable in this case; instead, Federal Rule of Bankruptcy Procedure 9011, which is an adaptation of Federal Rule of Civil Procedure 11, is applicable in bankruptcy proceedings. Second, even if the court construes Perry's request as one brought under Bankruptcy Rule 9011, sanctions are not appropriate under that rule. Perry has failed to show that he complied with the procedural requirements for initiating a motion for sanctions under Bankruptcy Rule 9011(c). A motion for sanctions under the rule "may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." Fed. R. Bankr. P. 9011(c)(1)(A). This requirement "is a mandatory procedural prerequisite. Motions made without compliance will not be heard, and sanctions resulting from such motions are subject to reversal." 10 Lawrence P. King, et. al., COLLIER ON BANKRUPTCY ¶ 9011.06[1][b]. Perry has not shown that he has complied with this mandatory requirement. The certificate of service filed with the motion indicates that the motion and its supporting paperwork were served on debtor and debtor's counsel on June 9, 2009, the same day they were filed with the court. The denial of the motion on procedural grounds does not imply that the motion would be granted had the proper procedure been followed.

The court will issue a minute order.

15. [08-33746](#)-B-7 NUEVO PARTNERS, LLC  
SRH #4

HEARING - APPLICATION BY  
DEBTOR'S COUNSEL REQUESTING  
FIRST AND FINAL COMPENSATION  
AND REIMBURSEMENT OF EXPENSES  
(BELDING, HARRIS & PETRONI,  
LTD.) (\$30,840.46)  
6-29-09 [[92](#)]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(1). In this instance and because of the size of this morning's three related calendars (140 matters), the court issues the following abbreviated tentative ruling. Any party may at the hearing request a more explanatory Disposition After Oral Argument.

Debtor's motion is granted to the extent set forth herein. The order approving applicant's employment (Dkt. 13) will be amended to state an effective date of September 4, 2008. The application is approved on a final basis for a total of \$28,505.00 in fees and \$1,336.71 in costs, for a total of \$29,841.71. Of that amount, \$29,841.71 shall be paid from an advance retainer deposit of \$45,000.00 ("Retainer") held by applicant. The amount of \$998.75 is disapproved and has been deducted accordingly because such amount was incurred after the conversion of this case from chapter 11 to chapter 7. See Lamie v. United States Trustee, 540 U.S. 526, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) (concluding that counsel for debtors in chapter 7 cases are not entitled to compensation from the estate). The chapter 7 trustee's request for turnover of the remainder of the Retainer, approximately \$15,158.29, is construed as a countermotion under LBR 9014-1(f)(2). As to that request, opposition may be presented at the hearing, and the court issues no tentative ruling on the merits of the countermotion. Except as so ordered, the motion is denied.

This court authorized the employment of Belding, Harris & Petroni, LTD ("Applicant") for the debtor on October 9, 2008 (Dkt. 13). The employment order does not state that the employment was effective as of an earlier date. This department does not approve compensation for work prior to the effective date of a professional's employment. DeRonde v. Shirley (In re Shirley), 134 B.R. 930, 943-944 (B.A.P. 9<sup>th</sup> Cir. 1992). However, the court construes the present application as requesting an effective date in the order approving applicant's employment retroactive to September 4, 2008. The request for that effective date is granted. Due to the administrative requirements for obtaining court approval of professional employment, this department allows in an order approving a professional's employment an effective date that is not more than thirty (30) days prior to the filing date of the employment application without a detailed showing of compliance with the requirements of In re THC Financial Corp, 837 F.2d 389 (9<sup>th</sup> Cir. 1988) (extraordinary or exceptional circumstances to justify retroactive employment). Here, September 4, 2008 is twenty-nine days prior to the filing date of the employment application. However, a recurrence of this fact pattern may show sufficient inattention to employment matters to lead, with or without opposition, to a different result under the "satisfactory explanation" prong of the THC Financial Corp. standard.

Applicant now seeks compensation for the period of September 4, 2008

through July 28, 2009 in the amount of \$29,503.75 in fees and \$1,336.71 in costs. With the exception of the amount of \$998.75 that was incurred after the conversion of this case to one under chapter 7, the allowed fees and costs are reasonable compensation for actual, necessary and beneficial services, as set forth in the attorney's application. 11 U.S.C. § 330(a)(1).

The court will issue an order approving the application and granting the request contained in the trustee's opposition. Counsel for the debtor shall submit an amended order (which shall be titled "Amended Order Authorizing Employment of Belding, Harris & Petroni, Ltd. as Counsel to Debtor") stating an effective date for applicant's employment of September 4, 2008.

16. [09-27846](#)-B-7 JERRY/MELENIE SAM HEARING - MOTION FOR  
KAR #2 ABANDONMENT OF PROPERTY  
BY TRUSTEE  
7-13-09 [[27](#)]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

17. [08-24557](#)-B-7 PETE/MARBE AGMATA HEARING - MOTION FOR  
DKC #8 ORDER APPROVING ALLOWANCE OF  
ATTORNEY'S FEES ON AN HOURLY  
FEE BASIS AND COSTS ADVANCED  
BY DENNIS COWAN, ATTORNEY FOR  
JOHN REGER, TRUSTEE (\$15,207.50  
FEES; \$260.26 COSTS)  
6-23-09 [[146](#)]

**Disposition Without Oral Argument:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). Therefore, this matter is resolved without oral argument.

The motion is granted to the extent set forth herein. The application is approved in the amount of \$15,207.50 in fees and \$260.26 in costs, for a total of \$15,467.76, payable as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

On April 10, 2008, the debtor filed a chapter 13 petition. The case was subsequently converted to one under chapter 7 on June 9, 2008. (Dkt. 34). On June 9, 2008, John W. Reger was appointed as the chapter 7 trustee of the instant case. By order entered on July 11, 2008 (Dkt. 83), the court approved employment of Dennis K. Cowan ("Cowan") as counsel for the chapter 7 trustee with an effective date of employment of June 16, 2008. Cowan now seek compensation for services for the period of June 16, 2008 through June 16, 2009, equaling \$15,207.50 in attorney's fees. As set forth in the application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

18. [09-26858](#)-B-7 JONATHAN TORRES  
MDM #1

HEARING - AMENDED  
TRUSTEE'S REQUEST FOR SANCTIONS  
AGAINST COUNSEL FOR DEBTOR  
6-22-09 [[20](#)]

DISCHARGED 6-3-09

**Tentative Ruling:** Neither the respondent within the time for opposition nor the movant within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondent have consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f)(1)(ii) and (iii).

The request for imposition of sanctions is denied without prejudice to the filing of a motion seeking reexamination of counsel's fees under 11 U.S.C. § 329 and Fed. R. Bankr. P. 2017.

By this motion the chapter 7 trustee seeks to impose sanctions on debtor's counsel in the amount of \$1,000.00 on the theory that counsel has been deleterious in his duties and has caused the trustee, the debtor, and the court to expend unnecessary time and money in this matter due to several continued meetings of creditors in this case. The trustee does not specify the authority under which he seeks sanctions. LBR 9014-1(d)(5). The court construes the motion as seeking sanctions pursuant to Local Rule 1001-1(g) and Federal Rule of Bankruptcy Procedure 9011. Nevertheless, the court does not find that the trustee has carried his burden of showing that an imposition of sanctions is justified in this case.

Sanctions under Local Bankruptcy Rule 1001-1(g) are inappropriate because LBR 1001-1(g) only states that "failure of counsel or of a party to comply with these Rules, with the FRCivP or the FRBP, or with any order of the Court may be grounds for imposition of any and all sanctions authorized by statute or Rule or within the inherent power of the Court. . . ." This local bankruptcy rule adds no independent basis for sanctions. The trustee must show that sanctions are appropriate under some statute, Rule or the court's inherent power.

Sanctions under Federal Rule of Bankruptcy Procedure 9011 are also inappropriate because the trustee has failed to show that he complied with the procedural requirements for initiating a motion for sanctions under Bankruptcy Rule 9011(c). Pursuant to Bankruptcy Rule 9011(c)(1), a motion for sanctions under the rule "may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." Fed. R. Bankr. P. 9011(c)(1)(A). This requirement "is a mandatory procedural prerequisite. Motions made without compliance will not be heard, and sanctions resulting from such motions are subject to reversal." 10 Lawrence P. King, et. al., COLLIER ON BANKRUPTCY ¶ 9011.06[1][b].

The trustee has not shown that he has complied with this mandatory

requirement. The certificate of service filed with the motion indicates that the motion and its supporting paperwork were served on debtor and debtor's counsel on June 19, 2009, the same day they were filed with the court.

The court will issue a minute order.

19. [09-23059](#)-B-7 TIMOTHY/DIANA VERNON HEARING - UNITED STATES TRUSTEE'S MOTION FOR IMPOSITION OF CIVIL PENALTY 6-30-09 [[37](#)]  
UST #1

DISCHARGED 6-3-09

**Disposition Without Oral Argument:** Oral argument will not aid the court in rendering a decision on this matter.

The motion for imposition of civil penalties (D.C. No. UST-1) was resolved by stipulation approved by order entered July 6, 2009 (Dkt. 43). This matter is dropped from the calendar.

20. [04-29060](#)-B-7 MICHAEL/LEONE CAREY HEARING - MOTION TO REOPEN BANKRUPTCY; TO ASSIGN A TRUSTEE TO ADMINISTER UNLISTED ASSETS REMAINING IN THE BANKRUPTCY ESTATE 6-23-09 [[54](#)]

DIS. 8-9-05; CLOSED 4-3-09

**Tentative Ruling:** This is an improperly filed motion under LBR 9014-1(f)(1). Because the debtors are in pro se, the court issues the following tentative ruling.

Pursuant to 11 U.S.C. § 350(b) and Fed. R. Bankr. P. 5010, the case is reopened. A chapter 7 trustee shall be reappointed.

The court will issue a minute order.

21. [04-29060](#)-B-7 MICHAEL/LEONE CAREY HEARING - UNITED STATES COUNTER MOTION FOR ABANDONMENT 7-10-09 [[56](#)]  
IRS #2

DIS. 8-9-05; CLOSED 4-3-09

**Disposition Without Oral Argument:** Oral argument will not aid the court in rendering a decision on this matter.

This matter is continued to August 25, 2009 at 9:32 am. to allow the newly appointed chapter 7 trustee time to assess the assets.

The court will issue a minute order.

22. [09-26064](#)-B-7 DIANE HOUSE  
DB #1

HEARING - MOTION  
FOR EXTENDING DEADLINE TO FILE  
COMPLAINT FOR DETERMINATION OF  
DISCHARGEABILITY OF A DEBT  
6-26-09 [[28](#)]

**Disposition Without Oral Argument:** This motion is unopposed. Due to the number of matters on this morning's three related calendars (140 matters), the court issues the following abbreviated ruling.

The motion is granted. The deadline to file a complaint objecting to discharge of the debtor is extended to and including August 28, 2009.

Fed. R. Bankr. P. 4004(b) permits an extension of time "[o]n motion of any party in interest, after hearing on notice" for cause shown, so long as the motion to extend was filed before the deadline has expired. The discrepancies in the debtor's schedules constitute "cause" for purposes of Fed. R. Bankr. P. 4004(b). Movant filed the instant motion on June 26, 2009. The deadline to file a non-dischargeability complaint was June 29, 2009.

The court will issue minute order.

23. [09-26064](#)-B-7 DIANE HOUSE  
SF #2

HEARING - MOTION TO  
EXTEND DEADLINE TO OBJECT  
TO DEBTOR'S DISCHARGE  
6-29-09 [[33](#)]

**Disposition Without Oral Argument:** This motion is unopposed. Due to the number of matters on this morning's three related calendars (140 matters), the court issues the following abbreviated ruling.

The motion is granted. The deadline to file a complaint objecting to discharge of the debtor is extended to and including August 28, 2009.

Fed. R. Bankr. P. 4004(b) permits an extension of time "[o]n motion of any party in interest, after hearing on notice" for cause shown, so long as the motion to extend was filed before the deadline has expired. The discrepancies in the debtor's schedules constitute "cause" for purposes of Fed. R. Bankr. P. 4004(b). Movant filed the instant motion on June 29, 2009. The deadline to file a non-dischargeability complaint was June 29, 2009.

The court will issue a minute order.

24. [09-29165](#)-B-11 JAMES REID  
UST #1

HEARING - MOTION  
OF THE UNITED STATES TRUSTEE  
FOR ORDER DISMISSING CASE  
6-19-09 [[21](#)]

**Disposition Without Oral Argument:** This motion is unopposed. Due to the number of matters on this morning's three related calendars (140 matters), the court issues the following abbreviated ruling.

The motion is granted and this case is dismissed.

Under 11 U.S.C. § 1112(b)(1), the court shall convert or dismiss a chapter 11 case, whichever is in the best interests of creditors and the estate, for cause. Section 1112(b) also limits the foregoing directive in several ways:

First, under section 1112(b)(1), the court shall not convert or dismiss the case, even if the movant establishes cause, if the court determines that specifically identified unusual circumstances exist and such circumstances establish that conversion or dismissal would not be in the best interests of creditors and the estate.

Second, under section 1112(b)(2), if cause is established and no specifically identified unusual circumstances are established, the court must convert or dismiss the case for cause unless the court determines that a trustee should be appointed under section 1104(a)(3). Section 1104(a)(3) states that, rather than converting or dismissing the case, the court may appoint a chapter 11 trustee if doing so would be in the best interests of creditors and the estate.

Third, under section 1112(b)(2), if cause is established and no specifically identified unusual circumstances are established, the court must convert or dismiss the case for cause unless the debtor or another party in interest opposing dismissal or conversion establishes the requirements of section 1112(b)(2)(A) and (B). Under section 1112(b)(2), the debtor or other opposing party in interest must establish that:

(1) There is a reasonable likelihood that a plan will be confirmed within the time limitations specified in the subsection;

(2) The grounds for converting or dismissing the case include an act or omission by the debtor other than substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; and

(3) There exists a reasonable justification for the act or omission demonstrating cause to dismiss the case and the act or omission will be cured within a reasonable time fixed by the court.

7 Lawrence P. King, et. al. Collier on Bankruptcy § 1112.04 (15<sup>th</sup> ed. rev. 2007).

Section 1112(b)(4) sets forth a non-exhaustive list of examples of "cause."

Under Section 1112(b)(4)(F), cause for dismissal or conversion is established by the "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." In this case, cause for dismissal exists under 11 U.S.C. § 1112(b)(4)(F). Debtor has failed to comply with reporting requirements. Periodic reports and summaries of the operation of a business are required by 11 U.S.C. § 704(a)(8), as incorporated by 11 U.S.C. § 1106(a)(1). LBR 2015-1 requires a debtor to file and serve monthly operating reports on the fifteenth day following any month's end. The debtor has failed to file a monthly operating report for the month of May.

On July 26, 2009, the debtor filed a statement of non-opposition to the instant motion. Thus, the debtor has not made any showing to avoid dismissal under 11 U.S.C. § 1112(b).

The court will issue a minute order.

25. [09-31767](#)-B-7 DONALD TALLY HEARING - MOTION TO RECONSIDER APPLICATION FOR WAIVER OF THE CHAPTER 7 FILING FEE  
7-13-09 [[10](#)]

**Tentative Ruling:** This is an improperly filed motion under LBR 9014-1(f)(1). Because the debtor is in pro se, the court issues the following tentative ruling.

The motion is granted, and the chapter 7 filing fee is waived.

The court will issue a minute order.

26. [09-22668](#)-B-7 TANIA DICKSON CONT. HEARING - MOTION FOR REDEMPTION  
MEH #1 6-4-09 [[16](#)]

DISCHARGED 6-1-09  
CONT. FROM 6-30-09

**Disposition Without Oral Argument:** This matter continued from June 30, 2009 with a briefing schedule. Debtors' supplemental brief was due by July 7, 2009. Replies, if any, were due by July 14, 2009. Nothing further has been filed in this matter. Due to the number of matters on this morning's three related calendars (140 matters), the court issues the following abbreviated ruling.

The motion is denied without prejudice.

The debtor has failed to meet her burden of establishing the replacement value of the subject vehicle.

The court will issue a minute order.

27. [08-20569](#)-B-11 DUNMORE HOMES, INC. HEARING - MOTION TO SEVER OR IN THE ALTERNATIVE MOTION FOR SEPARATE TRIAL OF COUNTER-CLAIMS OF THE TRUSTEE  
[09-2030](#) JHC #1 6-23-09 [[106](#)]  
TRAVELERS CASUALTY AND  
SURETY COMPANY OF AMERICA, VS.  
SIDNEY DUNMORE

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

28. [08-20569](#)-B-11 DUNMORE HOMES, INC.  
[09-2030](#) GJH #2  
TRAVELERS CASUALTY AND  
SURETY COMPANY OF AMERICA, VS.  
SIDNEY DUNMORE

CONT. HEARING - MOTION  
TO DISMISS COMERICA BANK'S  
COUNTERCLAIM AND CROSSCLAIM  
6-2-09 [[90](#)]

CONT. FROM 6-30-09

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(1). In this instance, and due to the number of matters on this morning's three related calendars (140 matters), the court issues the following abbreviated ruling.

The chapter 7 trustee's ("trustee") motion to dismiss Comerica Bank's counterclaim and cross-claim is granted in part, and denied in part. As to Comerica Bank's cross-claim against Dunmore Homes, Inc., the motion is granted and the cross-claim is dismissed. As to Comerica Bank's counterclaim against DHI Development, the motion is denied.

Defendant seeks judgment on the pleadings under Federal Rule of Bankruptcy Procedure ("F.R.Bankr.P.") 7012(b) incorporating Federal Rule of Civil Procedure ("F.R.Civ.P.") 12(c). The standard for a motion under F.R.Civ.P. 12(c) is the same as the standard for a motion under F.R.Civ.P. 12(b)(6). 2 Moore's Federal Practice, § 12.38 (Matthew Bender 3d ed.).

"The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable here under F.R.B.P. 7012, is to test the legal sufficiency of a plaintiff's claims for relief. In determining whether a plaintiff has advanced potentially viable claims, the complaint is to be construed in a light most favorable to the plaintiff and its allegations taken as true... The complaint should not be dismissed for a failure to state a claim unless it appears that the plaintiff can prove no set of facts in support of the claim which would entitle plaintiff to relief." Quad-Cities Constr., Inc. v. Advanta Business Services Corp. (In re Quad-Cities Constr., Inc.), 254 B.R. 459, 465 (Bankr. D. Idaho 2000).

The court agrees with the trustee's assertion that Comerica Bank lacks standing as to its cross-claim because it seeks to avoid an alleged fraudulent transfer by DHI Development to Dunmore Homes, Inc., which claim is property of the DHI Development bankruptcy estate. Only the bankruptcy trustee for DHI Development has standing to bring claims based on allegedly fraudulent transfers by DHI Development. The trustee's motion as to Comerica Bank's counterclaim is denied. The counterclaim alleges a fraudulent transfer from Sidney Dunmore to DHI Development. That claim does not belong to the DHI Development bankruptcy estate; rather, it is a claim against the DHI Development bankruptcy estate. The trustee's argument that the automatic stay precludes Comerica Bank from proceeding on the counterclaim is without merit. The automatic stay does not apply to proceedings commenced against the debtor in the bankruptcy court where the debtor's bankruptcy is pending. In re Teerlink Ranch Ltd., 886 F.2d 1233, 1237 (9<sup>th</sup> Cir. 1989); In re N. Coast Vill., Ltd., 135 B.R. 641, 643 (9<sup>th</sup> Cir. 1992).

The court will issue a minute order.

29. [08-20569](#)-B-11 DUNMORE HOMES, INC. HEARING - MOTION  
[09-2030](#) SMR #3 TO SEVER OR IN THE ALTERNATIVE  
TRAVELERS CASUALTY AND MOTION FOR SEPARATE TRIAL OF  
SURETY CO. OF AMERICA, VS. TRUSTEE LEON SZLEZINGER'S  
SIDNEY B. DUNMORE, ET AL. COUNTS TWO, THREE, AND FOUR  
6-30-09 [[113](#)]

**Tentative Ruling:** This motion was properly filed under LBR 9014-1(f)(1). In this instance and due to the number of matters on this morning's three related calendars (140 matters), the court issues the following abbreviated ruling.

The motion to sever Count Two, Three, and Count Four (the "Counts") of the Liquidation Trustee's ("trustee") Counterclaim is granted. Except as so ordered, the motion is denied.

The court finds that severance under Fed. R. Civ. P. 21, made applicable to this proceeding by Fed. R. Bankr. P. 7021, is appropriate here. Movant has demonstrated that "[s]everance acts in furtherance of convenience in this proceeding, is not prejudicial and serves to expedite this matter which is in the interest of judicial economy." In re Powderburst Corp., 154 B.R. 307, 314 (Bankr. E.D. Cal. 1993).

The Counts relate to different claims than those relevant to the issues surrounding the claims against the Tax Refund. According to Comerica Bank, the claims at issue in the Counts are claims against Dunmore, New York arising from projects in Merced and Placer Counties, while the claims that relate to the Tax Refund arise from Sidney Dunmore's personal guaranties of loans on a project in Sacramento County. According, the claims at issue in the Counts are not relevant to the instant litigation, they have simply been filed by a party to this litigation against another party to this litigation.

The court will issue a minute order.

30. [06-22976](#)-B-7 KEVIN ARCHBOLD HEARING - MOTION  
BLL #30 FOR ORDER APPROVING ATTORNEYS  
FEES AND COST AND AUTHORIZING  
PAYMENT AT TRUSTEE'S DISCRETION  
(\$15,381.14)  
6-22-09 [[445](#)]

DISCHARGED 10-18-07

**Tentative Ruling:** This motion was properly filed under LBR 9014-1(f)(1). In this instance and due to the number of matters on this morning's three related calendars (140 matters), the court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. The application is approved for a total of \$15,537.50 in fees and costs of \$381.14. Of that

amount, \$15,797.02 shall be paid as an administrative expense by the chapter 7 trustee. Except as so ordered, the motion is denied.

On August 7, 2006, the debtor filed a chapter 7 petition. On August 7, 2006, John W. Reger was appointed as the chapter 7 trustee of the instant case. By order entered on October 13, 2006 (Dkt. 51), the court approved employment of Byron Lee Lynch ("Lynch") as counsel for the chapter 7 trustee, effective August 9, 2006. Lynch now seek compensation for services for the period of September 1, 2008 through June 20, 2009, equaling \$15,797.02 in professional fees. As set forth in the application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

31. [09-29376](#)-B-7 JOSE/ELVIA TORRES HEARING - TRUSTEE'S  
MDM #1 REQUEST FOR SANCTIONS AGAINST  
COUNSEL FOR DEBTOR  
6-22-09 [[14](#)]

**Tentative Ruling:** Neither the respondent within the time for opposition nor the movant within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondent have consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f)(1)(ii) and (iii).

The request for imposition of sanctions is denied without prejudice to the filing of a motion seeking reexamination of counsel's fees under 11 U.S.C. § 329 and Fed. R. Bankr. P. 2017.

By this motion the chapter 7 trustee seeks to impose sanctions on debtor's counsel in the amount of \$1,000.00 on the theory that counsel has been deleterious in his duties and has caused the trustee, the debtor, and the court to expend unnecessary time and money in this matter due to several continued meetings of creditors in this case. The trustee does not specify the authority under which he seeks sanctions. LBR 9014-1(d)(5). The court construes the motion as seeking sanctions pursuant to Local Rule 1001-1(g) and Federal Rule of Bankruptcy Procedure 9011. Nevertheless, the court does not find that the trustee has carried his burden of showing that an imposition of sanctions is justified in this case.

Sanctions under Local Bankruptcy Rule 1001-1(g) are inappropriate because LBR 1001-1(g) only states that "failure of counsel or of a party to comply with these Rules, with the FRCivP or the FRBP, or with any order of the Court may be grounds for imposition of any and all sanctions authorized by statute or Rule or within the inherent power of the Court. . . ." This local bankruptcy rule adds no independent basis for sanctions. The trustee must show that sanctions are appropriate under some statute, Rule or the court's inherent power.

Sanctions under Federal Rule of Bankruptcy Procedure 9011 are also inappropriate because the trustee has failed to show that he complied with the procedural requirements for initiating a motion for sanctions

under Bankruptcy Rule 9011(c). Pursuant to Bankruptcy Rule 9011(c)(1), a motion for sanctions under the rule "may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." Fed. R. Bankr. P. 9011(c)(1)(A). This requirement "is a mandatory procedural prerequisite. Motions made without compliance will not be heard, and sanctions resulting from such motions are subject to reversal." 10 Lawrence P. King, et. al., COLLIER ON BANKRUPTCY ¶ 9011.06[1][b].

The trustee has not shown that he has complied with this mandatory requirement. The certificate of service filed with the motion indicates that the motion and its supporting paperwork were served on debtor and debtor's counsel on June 22, 2009, the same day they were filed with the court.

The court will issue a minute order.

32. [09-26377](#)-B-7 CRISTAL BISPO, VS. HEARING - MOTION  
DES #1 TO AVOID LIEN  
PARAGON WAY, INC. 6-29-09 [[13](#)]

**Disposition Without Oral Argument:** The motion is continued to September 1, 2009 at 9:32 a.m. On or before July 28, 2009, the date of this hearing, the debtors shall serve the motion, its supporting papers, and notice of the continued hearing on Paragon Way, Inc. in the manner required by Fed. R. Bankr. P. 7004. The debtors shall also file the notice of the continued hearing with the court. Proof of service shall be filed within three court days thereafter. LBR 9014-1(e)(2). If the debtors fails to do any of the foregoing, the motion will be denied without prejudice.

The debtors failed to serve Paragon Way, Inc. in the manner required by Fed. R. Bankr. P. 7004.

The court will issue a minute order.

33. [98-34077](#)-B-13J JERRY PRATER HEARING - RESPONDENT'S  
[09-2137](#) MOTION TO DISMISS FIRST  
JERRY PRATER, VS. AMENDED ADVERSARY COMPLAINT  
HOMEQ SERVICING CORP. 6-12-09 [[31](#)]

DISCHARGED 2-25-03

**Tentative Ruling:** This motion was properly filed under LBR 9014-1(f)(1). In this instance and due to the number of matters on this morning's three related calendars (140 matters), the court issues the following abbreviated ruling.

The motion to dismiss the adversary complaint is denied.

The following sets forth the legal standard on a motion to dismiss for failure to state a claim upon which relief may be granted:

The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable here under Fed. R. Bankr. P. 7012, is to test the legal sufficiency of a plaintiff's claims for relief. In determining whether a plaintiff has advanced potentially viable claims, the complaint is to be construed in a light most favorable to the plaintiff and its allegations taken as true. Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Church of Scientology of Cal. v. Flynn, 744 F.2d 694, 696 (9th Cir.1984). . . .

Quad-Cities Constr., Inc. v. Advanta Business Services Corp. (In re Quad-Cities Constr., Inc.), 254 B.R. 459, 465 (Bankr. D. Idaho 2000). In addition, the court notes that, under the Supreme Court's most recent formulation of the standard for a motion to dismiss under Rule 12(b)(6), a defendant need not demonstrate that a plaintiff can prove "no set of facts" in support of his claim. See Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1964-66 (2007). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. Id. ("[A] plaintiff's obligation to provide 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."). Factual allegations must be enough to raise a right to relief above the speculative level. Id., citing to 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed. 2004) ("[T]he pleading must contain something more. . . than. . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action").

Movant has not shown that the complaint fails to state a cause of action for contempt. Movant simply argues that plaintiff cannot succeed on the complaint because of defenses: laches, voluntary payment, and absence of any conduct attributable to HomEq. Those defenses might succeed on a motion for summary judgment, but not on a motion to dismiss.

The court will issue a minute order.

34. [09-28083](#)-B-7 LEY NGAR

HEARING - DEBTOR'S  
MOTION TO ABANDON PROPERTY  
7-6-09 [[18](#)]

**Disposition Without Oral Argument:** Oral argument will not aid the court in rendering a decision on this matter.

This motion is denied without prejudice for procedural defects.

The motion suffers from the following procedural defects. First, the debtor's notice of hearing fails to specify whether and when written opposition must be filed. LBR 9014-1(d)(3) provides that "[t]he notice of hearing shall advise potential respondents whether and when written opposition must be filed, the deadline for filing and serving it, and the names and addresses of the persons who must be served with any opposition." LBR 9014-1(d)(3). Second, the debtor failed to assign a docket control number to the instant motion. LBR 9014-1(c)(1) provides

that "[i]n motions filed in the bankruptcy case, a Docket Control Number (designated as DC No.) shall be included by all parties immediately below the case number on all pleadings and other documents, including proofs of service, filed in support of or opposition to motions." (emphasis added) LBR 9014-1(c)(1). Docket control numbers assist the court in its preparation for calendars and assist all parties in locating easily on the docket all papers related to a particular motion. The motion is not supported by evidence, e.g., a declaration. Pursuant to LBR 9014-1(d)(6), every motion shall be accompanied by evidence establishing its factual allegations and demonstrating that the movant is entitled to the relief requested. A failure to comply with the requirements of the Local Bankruptcy Rules constitutes grounds to deny the motion. LBR 1001-1(g).

The court will issue a minute order.

35. [09-23690](#)-B-7 3109 KING ST PROPERTY MGMT/ HEARING - MOTION  
[09-2157](#) PROMULGATRESS, ET AL. TO DISMISS COMPLAINT FOR LACK  
HSBC BANK MD WEBB OF STANDING, LACK OF SUBJECT  
MORTGAGE, ET AL., VS. MATTER JURISDICTION, FAILURE  
PATRICK BOLDEN, ET AL. TO STATE A CLAIM UPON WHICH  
RELIEF CAN BE GRANTED, AND  
INSUFFICIENCY OF SERVICE OF  
PROCESS OR, IN THE ALTERNATIVE  
FOR A MORE DEFINITE STATEMENT  
6-25-09 [[14](#)]

**Disposition Without Oral Argument:** Oral argument will not assist the court in resolving this matter.

This matter is continued to August 18, 2009 at 9:32 a.m.

The court will issue a minute order.

36. [09-33090](#)-B-7 MARK ETTLIN CONT. HEARING - MOTION TO  
STRIKE CHAPTER 7 BANKRUPTCY  
CASE DUE TO DUPLICATE FILING  
6-30-09 [[8](#)]

CONT. FROM 7-15-09

**Disposition Without Oral Argument:** Oral argument will not aid the court in rendering a decision on this matter.

This motion is denied without prejudice for procedural defects.

The motion suffers from the following procedural defects. First, the debtor's notice of hearing fails to specify whether and when written opposition must be filed. LBR 9014-1(d)(3) provides that "[t]he notice of hearing shall advise potential respondents whether and when written opposition must be filed, the deadline for filing and serving it, and the names and addresses of the persons who must be served with any opposition." LBR 9014-1(d)(3). Second, the debtor failed to assign a docket control number to the instant motion. LBR 9014-1(c)(1) provides that "[i]n motions filed in the bankruptcy case, a Docket Control Number

(designated as DC No.) shall be included by all parties immediately below the case number on all pleadings and other documents, including proofs of service, filed in support of or opposition to motions." (emphasis added) LBR 9014-1(c)(1). Docket control numbers assist the court in its preparation for calendars and assist all parties in locating easily on the docket all papers related to a particular motion. A failure to comply with the requirements of the Local Bankruptcy Rules constitutes grounds to deny the motion. LBR 1001-1(g).

The court will issue a minute order.