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3 **NOT FOR PUBLICATION**
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5 UNITED STATES BANKRUPTCY COURT
6 EASTERN DISTRICT OF CALIFORNIA

7 In re Case No. 06-10342-A-7F
8 RODGER L. McAFEE DC No. DRJ-1
9 Debtor.
10 _____/

11 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**
12 **RE APPLICATION FOR COMPENSATION BY DARRELL SOUZA**

13 A hearing was held August 20, 2008, on the application by
14 Darrell Souza for compensation as real estate broker. Chapter 7
15 trustee Beth Maxwell Stratton opposed the application. Following
16 testimony by Ana Maria Martel, Dale Samuelian, Beth Stratton, and
17 Darrell Souza, as well as the introduction of documentary
18 evidence, the matter was taken under submission. This memorandum
19 contains findings of fact and conclusions of law required by
20 Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of
21 Civil Procedure 52. This is a core proceeding as defined in 28
22 U.S.C. §157(b) (2) (A) and (O).

23 Background Facts.

24 Rodger L. McAfee filed a voluntary chapter 11 petition on
25 March 27, 2006. In May 2006, the court ordered the appointment
26 of a chapter 11 trustee, and Stratton was appointed chapter 11
27 trustee on May 15, 2006. Subsequently, the case was converted to
28 chapter 7, and Stratton was appointed as chapter 7 trustee.

A major asset of the estate was real property consisting of

1 1,477 acres, more or less, located at 2025 West Washington Road,
2 El Nido, California (the "El Nido Property"). Stratton sought
3 this court's authority to employ Darrell Souza as real estate
4 broker to market and sell the El Nido Property. That Application
5 was filed May 30, 2006. The Application states at paragraph
6 three that:

7 "If Broker has rendered services which have substantially
8 benefitted the estate and either the debtor's Chapter 11
9 case is converted over to a case under Chapter 7 or the
10 Property is disposed of by Trustee other than by sale
through Broker, Broker shall be entitled to submit a fee
application for compensation at the hourly rate of \$150 per
hour for his services rendered."

11 At the time the chapter 11 case was filed, the debtor was
12 indebted to the United States of America, Department of
13 Agriculture Farm Service Administration (the "USDA") under a
14 number of farm loans made during the 1980's. These loans were
15 secured by the El Nido Property. In 1996, the USDA filed an
16 action for foreclosure in the United States District Court for
17 the Eastern District of California. The District Court granted
18 the United States' motion for an order of judicial sale and for
19 final order of foreclosure. The bankruptcy case was ultimately
20 filed on the eve of the foreclosure sale.

21 On August 16, 2006, the USDA filed its proof of secured
22 claim in the amount of \$6,714,874.09. As of March 20, 2007, the
23 claim amount was \$6,819,812.32, together with accruing interest
24 and attorneys' fees and costs.

25 Prior to the time the trustee employed Souza and the court
26 approved that employment, the debtor had contemplated employing
27 Souza as broker. Therefore, when the trustee employed him, Souza
28 represented to the trustee that he was familiar with the El Nido

1 Property.

2 Subject to court approval, which was granted, the trustee
3 and Souza entered into an "Exclusive Right to Sell Listing
4 Agreement" (the "Listing Agreement"). The Listing Agreement gave
5 Souza an exclusive authorization to sell the El Nido Property
6 from June 5, 2006, through November 5, 2006. The Listing
7 Agreement provides at paragraph one for the terms of compensation
8 to the broker. Paragraph one provides that Souza will be
9 entitled to 5% of the selling price, provided that:

10 "a. Broker procures a buyer who offers to purchase the
11 property during the above time period, or any written
12 extension, on the terms specified or on any other terms
13 acceptable to Owner.

14 b. The property is sold, exchanged, or otherwise
15 transferred during the above listing period, or any written
16 extension, by Owner, of through any other source.

17 c. The property is withdrawn from sale, or transferred,
18 conveyed, or leased without the consent of Broker, or made
19 unmarketable by Owner's voluntary act during the above
20 listing period.

21 d. An agreement to sell or exchange the property is made
22 by owner within ninety (90) days after the termination of
23 this Agreement to persons with whom Broker has had
24 negotiations during the listing period; provided that the
25 names of such persons are submitted in writing to the owner
26 prior to the Owner entering into a new listing agreement
27 with another broker or within five (5) days after the
28 termination of this Agreement, whichever occurs first.
Presentation of a written offer during the term of the
listing constitutes sufficient notice of such persons. this
provision will not apply if, during the term of the
protection period, a valid Exclusive Listing Agreement is
entered into with another licensed real estate broker."

29 The Listing Agreement expired on November 5, 2006, without a
30 sale. However, on January 12, 2007, Souza and the trustee
31 entered into a modification of the Listing Agreement. The
32 modification provided that the Listing Agreement would expire on
33 July 1, 2007, and that:

1 "The commission shall be 2½% for any sale which results from
2 Stratton's auction of the property."

3 During the initial listing term, Souza presented two offers
4 to the trustee. One offer was for \$4,000,000 and the other offer
5 was for \$5,000,000. The trustee rejected the \$4,000,000 offer
6 because she did not believe that the USDA would accept it. At
7 the hearing, the trustee testified that she did not recall the
8 \$5,000,000 offer although she was made aware of it in preparation
9 for the hearing. In any event, she would not have accepted it.

10 Having received no acceptable offers during the initial term
11 of the Listing Agreement, the trustee decided to auction the El
12 Nido Property. She discussed the auction concept with Souza, who
13 was enthusiastic about it. The modification of the Listing
14 Agreement provided for the El Nido Property to be auctioned.

15 A hearing on the auction was held July 11, 2007. Prior to
16 that date, Souza had assured the trustee that he had a buyer who
17 would bid \$6,000,000 for the El Nido Property and that other
18 people would appear at the auction hearing to overbid.
19 Nonetheless, no bidders appeared at the auction hearing.

20 Ana Maria Martel is the Assistant United States Attorney who
21 represents the USDA with respect to the McAfee debt. Ms. Martel
22 testified that she talked regularly with Ms. Stratton about the
23 prospects for sale of the El Nido Property. She had been led to
24 understand that there was a great deal of excitement about the
25 auction. Souza had represented that there would be a \$6,000,000
26 opening bid and a number of bidders. No one appeared. Souza
27 recommended reducing the price, but the USDA disagreed. Martel
28 was very disappointed about the results of the auction based on

1 what she had been led to believe by Souza.

2 Ana Maria Martel was contacted by Darrell Souza prior to the
3 auction in July 2007. Souza telephoned her to inquire if the
4 USDA would sell its interest in the notes it held on the El Nido
5 Property for \$4.2 million. Martel declined the offer and
6 telephoned Stratton to let her know about the proposal from
7 Souza.

8 Both Stratton and Martel testified that Souza had contacted
9 Martel prior to the auction date, during the term of the extended
10 Listing Agreement, to propose that the USDA sell its notes for
11 \$4.2 million. Souza, on the other hand, testified that he did
12 not contact Martel until after the auction and after his listing
13 had expired. The court finds the testimony of Stratton and
14 Martel to be more credible in this regard.

15 After the failed auction, Stratton decided to employ a
16 different broker. She employed Pearson Realty, Dale Samuelian
17 broker. The application to employ Pearson Realty was filed July
18 24, 2007, and the order granting the application was filed August
19 1, 2007. Samuelian procured a buyer for the El Nido Property,
20 and following a hearing on noticed motion, the El Nido Property
21 was sold for \$5,600,000.

22 After Samuelian was employed, he inspected and researched
23 the El Nido Property. He determined that the El Nido Property is
24 subject to the Williamson Act and thus may not be split into
25 twenty acre parcels. He determined that there is no water on the
26 El Nido Property and there are no well heads. There was no
27 farming history with the Farm Service Administration. He also
28 determined that there were open well casings on the El Nido

1 Property and that the open well casings present a significant
2 risk of harm and liability. Because of the lack of developed
3 water and the Williamson Act restriction, Samuelian advised the
4 trustee that the El Nido Property had previously been listed at
5 an overly high price. On this advice, the trustee and the USDA
6 agreed to reduce the listing price, and a sale was effectuated.
7 Souza had never advised the trustee about the open well casings
8 or about the Williamson Act restrictions.

9 Souza asks the court to approve compensation to him pursuant
10 to paragraph three in the Application for authority to employ
11 him. He asserts that paragraph three applies to him and that he
12 provided a benefit to the estate. The trustee disputes both
13 contentions.

14 In support of his application, Souza has provided the court
15 with time sheets and cost records. At the hearing, he testified
16 that some time after the services were performed, he and his
17 assistant utilized his telephone and e-mail records to prepare
18 the time sheets. He believes that he spent more time trying to
19 sell the El Nido Property than the time records indicate.

20 Discussion.

21 There is no dispute that the sale of the El Nido Property
22 occurred outside the parameters of Souza's Listing Agreement.
23 The parties agree that Souza did not procure the sale and that he
24 is not entitled to compensation under paragraph one of the
25 Listing Agreement. He did not procure the buyer; the El Nido
26 Property was not sold during the listing period or the extension
27 of it; the El Nido Property was not withdrawn from sale without
28 Souza's consent or made unmarketable; it was not sold within

1 ninety days of the termination of the Listing Agreement to anyone
2 with whom Souza had had negotiations.

3 Therefore, if Souza is to be allowed any compensation, it
4 must be solely under the terms of paragraph thee of the
5 Application for authority to employ him. Again, paragraph three
6 states:

7 “If Broker has rendered services which have substantially
8 benefitted the estate and either the debtor’s Chapter 11
9 case is converted over to a case under Chapter 7 or the
10 Property is disposed of by Trustee other than by sale
through a Broker, Broker shall be entitled to submit a fee
application for compensation at the hourly rate of \$150 per
hour for his services rendered.”

11 The trustee testified that this language is typically used
12 by chapter 7 trustees. According to the trustee, the purpose of
13 this language is to allow compensation to real estate brokers in
14 chapter 7 cases when either the debtor converts to chapter 13
15 after employment of the broker or the trustee sells the estate’s
16 interest in the property to the debtor after the employment of
17 the broker. In either of those instances, the broker’s services
18 in marketing the property arguably benefit the estate. If the
19 debtor converts to chapter 13 after a chapter 7 trustee seeks to
20 sell the debtor’s property, the debtor will be required to
21 propose a chapter 13 plan that pays creditors at least the
22 liquidation value of the property the chapter 7 trustee sought to
23 sell. If a chapter 7 trustee sells the estate’s interest in real
24 property to a chapter 7 debtor, the creditors and the estate
25 benefit. Therefore, it is not uncommon for trustees to seek
26 approval of compensation on an hourly rate basis for brokers in
27 both situations.

28 The trustee did not explain why the language was included in

1 the Application to employ Souza, but the trustee did state that
2 she did not believe it is applicable here. Rather, according to
3 the trustee, Souza should rely entirely on his Listing Agreement
4 which does not provide for compensation here.

5 The language in paragraph three of the Application is
6 typically found in applications to employ brokers in chapter 7
7 cases. The trustee did include this language in the Application
8 in this case. It says that if Souza, as broker, "has rendered
9 services which have substantially benefitted the estate," and the
10 El Nido Property "is disposed of by Trustee other than by sale
11 through" Souza, Souza shall be entitled to submit a fee
12 application for compensation at an hourly rate of \$150 per hour.

13 The paragraph does apply. The question then remains whether
14 Souza rendered services that substantially benefitted the estate.
15 The court is unable to find that Souza did render services that
16 substantially benefitted the estate.

17 Souza did not inform the trustee about the open well
18 casings. And, he did testify that it was his responsibility to
19 so advise the trustee. He also testified that he believed the
20 well casings were covered with plywood. Nonetheless, he did have
21 a responsibility to inform the trustee about the open well
22 casings, and he failed to carry it out.

23 The brochure that Souza prepared does not inform potential
24 buyers that there are Williamson Act restrictions on the El Nido
25 Property so that it cannot be split into twenty acre parcels. In
26 fact, the brochure Souza prepared states, "Zoning A-1 General
27 Agriculture, minimum 20 acre parcels."

28 The brochure that Souza prepared showed that there was "pipe

1 line irrigation" while in fact the El Nido Property lacks
2 irrigation.

3 Finally, Souza breached his duty to the trustee by
4 presenting to the USDA, during the term of his Listing Agreement,
5 an offer from a buyer to purchase the notes held by the USDA.

6 The time records that Souza asks the court to consider in
7 support of his application are not persuasive. For instance, he
8 includes over 20 hours for labeling and addressing post cards, a
9 clerical task, for which he asks the court to allow compensation
10 of \$150 per hour.

11 He also asks the court to approve reimbursement of his
12 expenses for purchase of post cards, newspaper ads, postage and
13 delivery services, in the amount of \$3,355.10. Nothing in
14 paragraph three of the Application would allow compensation for
15 expenses.

16 Souza has not demonstrated that he provided a substantial
17 benefit to the estate. While he did present the trustee with an
18 offer for \$4,000,000 and an offer for \$5,000,000, he failed to
19 inform the trustee about the true condition of the El Nido
20 Property. Despite the extension of his Listing Agreement, he was
21 unable to procure a sale.

22 Although the language about compensation to a broker in
23 paragraph three of the Application to employ Souza is facially
24 applicable, under the facts of this case, it cannot result in
25 compensation to Souza. This case is unlike the two fact
26 scenarios for which paragraph three was designed. In each of
27 those instances (conversion to chapter 13 after employment of a
28 broker in a chapter 7 case or sale of the non-exempt equity in

1 property to a chapter 7 debtor after employment of a broker in a
2 chapter 7 case), the work by the broker actually benefits the
3 estate. Here, Souza's work did not substantially benefit the
4 estate. For the foregoing reasons, the court will issue an
5 order denying the application.

6 DATED: September ____, 2008

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/s/

WHITNEY RIMEL, Judge
United States Bankruptcy Court