

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement
Fresno Federal Courthouse
2500 Tulare Street, 5th Floor
Courtroom 11, Department A
Fresno, California

PRE-HEARING DISPOSITIONS

DAY: WEDNESDAY
DATE: FEBRUARY 27, 2019
CALENDAR: 1:30 P.M. CHAPTERS 11 AND 9 CASES

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

1. [18-14414](#)-A-11 **IN RE: TITUS INDUSTRIAL, INC.**
[LKW-4](#)

CONTINUED MOTION TO BORROW
12-18-2018 [[52](#)]

TITUS INDUSTRIAL, INC./MV
LEONARD WELSH

Final Ruling

Motion: Retroactively Approve Borrowing

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Civil minute order

The debtor in possession (DIP) has moved for retroactive approval of borrowing \$20,000 from Roberta Hale in order to make payroll to its employees in November 2018 and cover other expenses incurred by the debtor in its operations.

The motion was set for hearing on the notice required by LBR 9014-1(f)(1). In the absence of opposition by the responding party, the rules of default apply. Fed. R. Bankr. P. 9014(c); Fed. R. Civ. P. 55, incorporated by Fed. R. Bankr. P. 7055. Upon default, a motion's well-pleaded facts are taken as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987). Additionally, failure to file written opposition not less than 14 days preceding the date, or continued date, of the hearing is deemed a waiver of opposition to the motion. LBR 9014-1(f)(1)(B); see *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The default of the responding party is entered, and the matter is resolved without oral argument.

LEGAL STANDARDS

Section 364(b) of Title 11 provides that "The court, after notice and a hearing, may authorize the trustee [or debtor in possession via section 1107) to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense."

To obtain retroactive approval of borrowing, however, the DIP must satisfy a three-part test. The test includes a showing that: (1) the loan would have likely been authorized if a timely application had been made; (2) other creditors are not prejudiced by the transaction; and (3) the debtor and the creditor acted in good faith in connection with the transaction. *In re American Cooler Co.*, 125 F.2d 496 (2nd Cir. 1942).

"Pursuant to § 364(a), a debtor-in-possession may obtain without prior court authorization unsecured credit allowable under § 503(b)(1) as an administrative expense if the debt is incurred in the ordinary course of business. Where, however, a loan is made to a debtor-in-possession without court approval outside the ordinary course of business, the lender will only be given administrative

expense priority if the equities in favor of so doing are compelling." *Peninsula Nat'l Bank v. Allen Carpet Shops, Inc. (In re Allen Carpet Shops, Inc.)*, 27 B.R. 354, 358 (Bankr. E.D.N.Y. 1983) (citing *Wolf v. Nazareth Fair Grounds & Farmers Mkt., Inc.*, 280 F.2d 891 (2nd Cir. 1960)).

ANALYSIS

Here, the DIP seeks retroactive approval of its borrowing \$20,000 from Roberta Hale in order to make payroll to its employees in November 2018 and cover other expenses incurred by the debtor in its operations.

The motion papers, along with the declarations of the DIP's general manager and attorney filed on February 12, 2019, adequately address the requirements of the *American Cooler* decision. The loan was made for the DIP to meet its payroll, expense reimbursement, and insurance premium obligations. Accordingly, the court will approve the borrowing retroactively. Mrs. Hale will be granted an administrative expense claim under section 503(b)(1).

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

The debtor-in-possession's motion for approval of borrowing retroactively has been presented to the court. Having entered the default of respondents for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the motion is granted. The court approves retroactively as of November 9, 2018 the debtor-in-possession's borrowing of \$20,000 from Roberta Hale. Roberta Hale is granted an administrative expense claim for \$20,000, without interest.

2. [18-14414](#)-A-11 **IN RE: TITUS INDUSTRIAL, INC.**
[LKW-5](#)

CONTINUED MOTION TO ASSUME LEASE OR EXECUTORY CONTRACT
12-20-2018 [\[56\]](#)

TITUS INDUSTRIAL, INC./MV
LEONARD WELSH

Final Ruling

Motion: Assume Nonresidential Real Property Lease

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Civil minute order

The debtor in possession (DIP) has moved to assume a lease of a nonresidential real property in Bakersfield, California.

The motion was set for hearing on the notice required by LBR 9014-1(f)(1). In the absence of opposition by the responding party, the rules of default apply. Fed. R. Bankr. P. 9014(c); Fed. R. Civ. P. 55, incorporated by Fed. R. Bankr. P. 7055. Upon default, a motion's well-pleaded facts are taken as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987). Additionally, failure to file written opposition not less than 14 days preceding the date, or continued date, of the hearing is deemed a waiver of opposition to the motion. LBR 9014-1(f)(1)(B); see *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The default of the responding party is entered, and the matter is resolved without oral argument.

LEGAL STANDARDS

Section 365 of Title 11 gives the debtor in possession (DIP) limited options for its unexpired leases and executory contracts. 11 U.S.C. § 365(a), (f). The DIP has the option to assume, to assume and assign, or to reject. *Id.*; *In re Standor Jewelers West, Inc.*, 129 B.R. 200, 201 (B.A.P. 9th Cir. 1991). "By assumption, the trustee or DIP elects to be bound by the terms of the agreement so that the other party must continue to perform thereunder. The contract or lease remains in force" Kathleen P. March, Hon. Alan M. Ahart & Janet A. Shapiro, *Cal. Practice Guide: Bankruptcy* ¶ 16:2 (rev. 2011). Statutory conditions precedent must be satisfied before a court may approve an assumption of an unexpired lease. See 11 U.S.C. § 365(b). These conditions include curing defaults, compensating the lessor for actual pecuniary losses, and providing adequate assurance of that these conditions will be met. *Id.* § 365(b)(1), (2). The DIP must also provide adequate assurance of future performance under the lease. *Id.* § 365(b)(3).

An unexpired nonresidential real property lease "shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of- (i) the date that is 120 days after the date of the order for relief; or (ii) the

date of the entry of an order confirming a plan." 11 U.S.C. § 365(d)(4)(A).

In evaluating motions to assume or reject, the court applies the business judgment rule. See *In re Pomona Valley Med. Group*, 476 F.3d 665, 670 (9th Cir. 2007); *Durkin v. Benedor Corp. (In re G.I. Indus., Inc.)*, 204 F.3d 1276, 1282 (9th Cir. 2000); March, Ahart & Shapiro, *supra*, ¶¶ 16:1535-1536, 16:515 (rev. 2011). In applying the business judgment rule, the bankruptcy court gives the decision to assume or reject only a cursory review under the presumption that "the [DIP] acted prudently, on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the bankruptcy estate." *In re Pomona Valley*, 476 F.3d at 670.

ANALYSIS

This motion is timely. The case was filed on October 30, 2018 and the motion was filed on December 20, 2018, 51 days post-petition. No plan has been confirmed.

Here, the DIP seeks to assume a lease of a nonresidential real property in Bakersfield, California. The lease is attached as Exhibit A to the supporting declaration of Scott Hale. ECF Nos. 58 & 59. The lease is between the DIP, as lessee, and the Boone 1991 Living Trust, as lessor.

There are no defaults to be assumed under the lease. The DIP has over \$624,000 in receivables to collect on, providing the lessor with adequate assurance of future performance on the lease. To the DIP's knowledge, the lessor has not suffered any pecuniary losses.

The motion papers, along with the supplemental declaration of the DIP's general manager filed on February 12, 2019, adequately address the requirements of section 365(b). Accordingly, the motion will be granted and the court will authorize the assumption of the subject lease.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

The debtor-in-possession's motion for assumption of the nonresidential real property lease with the Boone 1991 Living Trust has been presented to the court. Having entered the default of respondents for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the motion is granted. The court authorizes the debtor-in-possession to assume its unexpired lease with the Boone 1991 Living Trust of the nonresidential real property in Bakersfield, California.

3. [18-11651](#)-A-11 **IN RE: GREGORY TE VELDE**
[MB-15](#)

CONTINUED MOTION TO ASSUME LEASE OR EXECUTORY CONTRACT
11-21-2018 [[1139](#)]

RANDY SUGARMAN/MV
MICHAEL COLLINS
JOHN MACCONAGHY/ATTY. FOR MV.

Final Ruling

Motion: Assume Lease

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

LEGAL STANDARDS

Section 365 of Title 11 gives the trustee limited options for its unexpired leases and executory contracts. 11 U.S.C. § 365(a), (f). The trustee has the option to assume, to assume and assign, or to reject. *Id*; *In re Standor Jewelers West, Inc.*, 129 B.R. 200, 201 (B.A.P. 9th Cir. 1991). "By assumption, the trustee or DIP elects to be bound by the terms of the agreement so that the other party must continue to perform thereunder. The contract or lease remains in force" Kathleen P. March, Hon. Alan M. Ahart & Janet A. Shapiro, *Cal. Practice Guide: Bankruptcy* ¶ 16:2 (rev. 2011). Statutory conditions precedent must be satisfied before a court may approve an assumption of an unexpired lease. See 11 U.S.C. § 365(b). These conditions include curing defaults, compensating the lessor for actual pecuniary losses, or providing adequate assurance of that these conditions will be met. *Id.* § 365(b)(1), (2). The trustee must also provide adequate assurance of future performance under the lease. *Id.* § 365(b)(3).

In evaluating motions to assume or reject, the court applies the business judgment rule. See *In re Pomona Valley Med. Group*, 476 F.3d 665, 670 (9th Cir. 2007); *Durkin v. Benedor Corp. (In re G.I. Indus., Inc.)*, 204 F.3d 1276, 1282 (9th Cir. 2000); March, Ahart & Shapiro, *supra*, ¶¶ 16:1535-1536, 16:515 (rev. 2011). In applying the business judgment rule, the bankruptcy court gives the decision to assume or reject only a cursory review under the presumption that "the trustee acted prudently, on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the bankruptcy estate." *In re Pomona Valley*, 476 F.3d at 670.

ANALYSIS

Here, the trustee seeks to assume lease associated with the operation of the Pacific Rim Dairy. A copy of the lease is attached as an exhibit to the declaration of Gregory John teVelde. ECF # 613-614. The leases are between the debtor, as lessee and debtor and Mark Tigner, as lessor.

The motion states that § 365(b) is satisfied because there are no defaults under either lease to be assumed, and the lessor has not suffered any pecuniary loss resulting from default under either lease to be assumed.

Based on the facts asserted in the motion regarding the statutory conditions precedent under § 365(b), and under the rules of default applicable in the absence of opposition, the court approves the assumption. The trustee's decision to assume is based on sound business judgment and has been made in good faith.

CONCLUSION

Accordingly, the motion is granted. The moving party will prepare and lodge an order consistent with this ruling.

4. [18-11651](#)-A-11 **IN RE: GREGORY TE VELDE**
[MB-24](#)

MOTION TO SELL
2-1-2019 [[1568](#)]

RANDY SUGARMAN/MV
MICHAEL COLLINS
JOHN MACCONAGHY/ATTY. FOR MV.

No Ruling

5. [18-11651](#)-A-11 **IN RE: GREGORY TE VELDE**
[MB-25](#)

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH BOARDMAN TREE FARM, LLC
2-5-2019 [[1585](#)]

RANDY SUGARMAN/MV
MICHAEL COLLINS
JOHN MACCONAGHY/ATTY. FOR MV.
OST 2/6/19 RESPONSIVE PLEADING

No Ruling

6. [18-11651](#)-A-11 **IN RE: GREGORY TE VELDE**
[WW-51](#)

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH RIVER CITY ENVIRONMENTAL, INC.
2-13-2019 [[1614](#)]

RILEY WALTER/MV
MICHAEL COLLINS
RILEY WALTER/ATTY. FOR MV.

No Ruling

7. [18-11651](#)-A-11 **IN RE: GREGORY TE VELDE**
[ELR-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY
2-13-2019 [[1622](#)]

FRINGS RANCH, LP/MV
MICHAEL COLLINS
JOSEPH SOARES/ATTY. FOR MV.

No Ruling

8. [17-12781](#)-A-7 **IN RE: DALIP NIJJAR**
[17-1066](#)

STATUS CONFERENCE RE: AMENDED COMPLAINT
1-31-2018 [[151](#)]

SALVEN V. NIJJAR ET AL
PETER SAUER/ATTY. FOR PL.
ECF ORDER #194 SETTING PRETRIAL CONFERENCE FOR 7/24/19

No Ruling

9. [11-17165](#)-A-11 **IN RE: OAKHURST LODGE, INC., A CALIFORNIA**
CORPORATION

CONTINUED STATUS CONFERENCE RE: CHAPTER 11 VOLUNTARY
PETITION
6-22-2011 [[1](#)]

DONNA STANDARD

No Ruling