

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

March 10, 2016 at 10:30 a.m.

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1. [15-28108](#)-E-11 WILLARD BLANKENSHIP MOTION TO COMPROMISE
RLC-5 Stephen M. Reynolds CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH THE SLEEP TRAIN,
INC.
2-9-16 [[54](#)]

Tentative Ruling: The Motion to Approve Compromise has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct Notice **Not** Provided. The Debtor-in-Possession failed to file a Proof of Service with the instant Motion. 28 days' notice is required.

The Motion For Approval of Compromise has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties in interest are entered.

The Motion For Approval of Compromise is denied without prejudice

Willard Blankenship, the Debtor in Possession, ("Movant") requests that

the court approve a compromise and settle competing claims and defenses with The Sleep Train, Inc. ("Settlor"). The claims and disputes to be resolved by the proposed settlement are those arising from the alleged damage cause by the employees of the Settlor to the Movant's property during delivery and removal of a new bed and box spring.

Unfortunately, the Movant failed to file a Proof of Service along with the Motion. Without the Proof of Service, the court cannot determine if sufficient notice was given. The Notice of Hearing indicates that the Movant filed the instant Motion pursuant to Local Bankr. R. 9014-1(f)(1), which requires a minimum of 28 days notice. Without a Proof of Service, the Motion is denied without prejudice.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Approve Compromise filed by Willard Blankenship, Debtor-in-Possession, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Approve Compromise is denied without prejudice.

**THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING
IF MOVANT CAN SHOW PROPER GROUNDS FOR WHICH THE REQUESTED
RELIEF MAY BE ENTERED IN LIGHT OF THE FORGOING ISSUES**

ALTERNATIVE RULING

Willard Blankenship, the Debtor in Possession, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with The Sleep Train, Inc. ("Settlor"). The claims and disputes to be resolved by the proposed settlement are those arising from the alleged damage cause by the employees of the Settlor to the Movant's property during delivery and removal of a new bed and box spring.

Movant and Settlor has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement is set forth in the Settlement Agreement filed as Exhibit 1 in support of the Motion, Dckt. 57):

- A. For the consideration of \$1,029.00 paid by Settlor, the receipt and sufficient of which is acknowledged, the Movant releases and forever discharges Settlor and its parent, subsidiaries, affiliated entities, employees, agents and assigns, including, but not limited to Mattress Firm, Inc., from all claims, demands, expenses, attorneys' fees, costs, actions, causes of action or suits of any kind, description or nature whatsoever, including claims for injury to person or damage to personal property, which may have arisen or may later arise out of the events occurring on or about October 19, 2015 at 1304 Aspen Place, Davis, California and surrounding the delivery or removal by employees, agents or assignees of Settlor of mattresses and/or box springs and/or related items.

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- B. This release is intended to cover all claims, past, present or future, which can or may ever be asserted by Movant, his/her heirs, executors, or assigns against any Settlor as a result of the above-described event.
- C. This release expresses the full and complete settlement of all claims. Movant recognizes that liability for such claims is expressly denied by the settling parties
- D. Movant agrees to pay all costs and attorneys' fees that may be incurred by the settling parties in defending any claim brought by Movant in violation of this agreement.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;
2. Any difficulties expected in collection;
3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and
4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Under the terms the Settlement all claims of the Estate, including any pre-petition claims of the Debtor, are fully and completely settled, with all such claims released. Settlor has granted a corresponding release for Debtor and the Estate.

Probability of Success

The Movant asserts that there is not a question of whether the bed was damaged when the new mattress was installed. The Movant asserts the determination of the cost to repair is the risk factor in this matter.

Difficulties in Collection

The Movant asserts that collection would likely not be difficult because the Settlor is a well-known and active public company.

Expense, Inconvenience and Delay of Continued Litigation

Movant argues that litigation would result in significant costs that would end up costing more than the repair of the actual damage to Movant's bed. The proposed settlement eliminates this cost. The settlement

was the product of negotiations by the Movant and not Movant's counsel.

Paramount Interest of Creditors

Movant argues that settlement is in the paramount interests of creditors since as the compromise provides prompt payment to creditors which could be consumed by the additional costs and administrative expenses created by further litigation.

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to the Movant to purchase or prosecute the property, claims, or interests of the estate to present such offers in open court. At the hearing -----.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate. The settlement provides for the immediate settlement of the damage claim without the need of litigation. The court concurs with the Movant that the cost of litigating would eviscerate any recovery the Movant may end up receiving. The terms of the settlement allows for the immediate release and settles all potential claims. motion is granted.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Approve Compromise filed by Willard Blankenship, Debtor-in-Possession, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Approve Compromise between Movant and The Sleep Train, Inc. ("Settlor") is granted and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed as Exhibit 1 in support of the Motion (Docket Number 57).

IT IS FURTHER ORDERED All monies paid to the Debtor in Possession pursuant to the settlement shall be deposited in the client trust account of Stephen Reynolds, attorney for Debtor in possession and not disbursed except upon further order of this court.

2. 16-20852-E-11 MATHIOPOULOS 3M FAMILY MOTION TO USE CASH COLLATERAL
DNL-1 LIMITED PARTNERSHIP 2-25-16 [13]
J. Luke Hendrix

Tentative Ruling: The Motion for Authority to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor-in-Possession, creditors and Office of the United States Trustee on February 25, 2016. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion for Authority to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----.

The Motion for Authority to Use Cash Collateral is granted.

Mathiopoulos 3M Family Limited Partnership ("Debtor-in-Possession") filed the instant Motion for Authority to Use Cash Collateral on February 25, 2016. Dckt. 13.

The Debtor-in-Possession owns real property identified as 3105, 3111, 3119, 3125, 3127, 3129, 3133, 3137, 3141, and 3145 Penryn Road, Penryn, California ("Property"). The Property consists of a business center with approximately 30,700 square feet of rentable building space, with tenants that the Debtor-in-Possession rents out to commercial tenants.

The Debtor-in-Possession states that Wells Fargo Bank, N.A. ("Creditor") asserts a first deed of trust and assignment of rents against the Property to secure a promissory note with a balance of approximately

\$2,900,000.00.

Debtor-in-Possession argues that it is vital and necessary for the continued operation of the business to use cash collateral to pay necessary preserve the Property, including property taxes, business expenses, and Property upkeep.

Debtor-in-Possession anticipates that by using the cash collateral it will generate post-petition accounts receivable and/or accumulated cash sufficient to provide adequate protection to the secured creditors.

The Debtor-in-Possession offers a portion of the accounts receivable and accumulated cash it will generate post petition as replacement collateral to the Creditor, to the extent that the Creditor's collateral is diminished from the Debtor-in-Possession's use of cash collateral. The replacement liens on post-petition accounts receivable and cash shall be of the same scope, in the same priority, and subject to the same infirmities and defenses as existed pre-petition.

Debtor-in-Possession requests the court authorize the use of rents generated from the Property to pay the business expenses through May 31, 2016, and any other related payments necessary to preserve the Property through May 31, 2016, and any other related payments necessary to preserve the Property through May 31, 2016 in an amount not to exceed \$3,000.00, as well as the April 2016 taxes in the amount of \$21,113.93, which is due April 10, 2016.

Debtor-in-Possession requests that the court authorizes the adequate protection payments to Creditor in the amount of \$13,193.11, beginning March 15, 2016 and continuing thereafter on the 15th day of each month through May 2016.

Debtor-in-Possession estimates the following expenses that will be incurred through May 31, 2016.

<u>EXPENSE</u>	<u>AMOUNT</u>
Property Insurance	\$1,045.41 per month
Pacific Gas and Electric	\$200.00 per month (approximate)
Recology Auburn (garbage)	\$400.00 per month (approximate)
Telephone for business	\$150.00 per month (approximate)
Pest control	\$123.60 per month (approximate)

Telephone for Fire and Security	\$120.00 per month (approximate)
Life Insurance Policies (4)	\$617.82 per month
Property Maintenance, Landscaping, Parking Lot Cleaning	\$704.00 per month
Misc (fuel, office supplies, equipment repair, postage, advertisement, etc.)	\$500.00 per month (approximate)

Total Cash Collateral Request	\$3,860.83

Debtor-in-Possession also provides for proposed use for cash collateral as to non-monthly expenses:

<u>EXPENSE</u>	<u>AMOUNT</u>
Placer County Water Agency	\$1,000.00 due February 2016 and \$1,000.00 due April 2016 (approximate amount due every two months)
Sewer	\$2,275.00 due March 2016 (due every three months)
Stanley Security for Fire Alarm	\$101.13 due March 2016 (due every three months)

Total Cash Collateral Authorized Pending Noticed Hearing	\$4,376.13 through May 2016

STIPULATION

On February 25, 2016, the Debtor-in-Possession and the Creditor filed a Stipulation for use of cash collateral and adequate protection payments. Dckt. 17. The Stipulation provides for the following:

1. Creditor consents to Debtor-in-Possession's use of the rents from the Property to pay the expenses through May 31, 2016, and any other related payments necessary to preserve the Property through May 31, 2016 in an amount not to exceed \$3,000.00.
2. Creditor consents to Debtor-in-Possession's use of the rents

from the Property to pay the April 2016 property taxes.

3. Debtor-in-Possession shall provide adequate protection payments to Creditor in the form of monthly interest payments at the nondefault contract rate under Creditor's promissory note (\$13,193.11), beginning March 15, 2016 and continuing thereafter on the 15th day of each month through May 2016.
4. Creditor's lien against the Property and security interest in the rents from the Property which Debtor-in-Possession held, had an interest or had the rights to as of the February 12, 2016 are referred to collectively herein as the "Pre-Petition Collateral."
5. Creditor's pre-petition lien and security interests, if any, in the Pre-Petition Collateral will remain duly perfected, enforceable, unavoidable and effective as of the Petition Date without delivery, filing or recordation of any financing statements, instruments or other documents after the petition date.
6. Creditor is hereby granted, effective as of the petition date, a valid, duly perfected and unavoidable lien against and security interest ("Post-Petition Lien") in all rents which Debtor-in-Possession has or in the future holds, has an interest in or has any rights to. The Post-Petition Replacement Lien shall only be valid if Creditor has an allowed secured claim and only granted to secure Creditor's claims against Debtor-in-Possession's estate in an amount equal to any post-petition diminution in the value of the Pre-Petition Collateral, and will be subordinated to the compensation and expense reimbursement (excluding professional fees) allowed to any trustee appointed in the case. The Replacement Liens shall be in addition to all claims, security interest, liens and rights existing in favor of Creditor, and automatically valid, duly perfected, enforceable, unavoidable and effective as of the petition date, without execution, delivery, filing or recordation of any financing statements, instruments or other documents; and no filing or recordation or other act in accordance with any applicable local, state, federal or common law rules or regulations shall be necessary to create or to perfect such lien and security interest. Notwithstanding any of the foregoing, the Replacement Liens do not include any liens on claims for relief arising under the Bankruptcy Code (11 U.S.C.) §§ 506(c), 544, 545, 547, 548, and 549.
7. Debtor-in-Possession shall prepare or obtain and furnish to Creditor the following on or before the following dates:
 - a. On or before March 18, 2016,
 - i. A current rent roll for the Property;
 - ii. Copy of all leases and modification to said leases of current tenants of the Property; and

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- iii. Debtor-in-Possession's 2014 tax return.
 - b. On or before the fifteenth of each month, starting April 15, 2016, a copy of the current rent roll for the Property or a statement it has not changed from the previous one provided and copies of the leases of any new tenants and modification to any current leases of the Property that have not already been provided to Creditor.
 - c. On or before fifteen days after it is completed, a copy of the 2015 tax return.
8. Upon ten business days written notice from Creditor, Debtor-in-Possession shall make the Property available for one or more physical inspections of the Property, so that Creditor may conduct and complete inspections including but not limited to appraisals and environmental reviews.
9. Creditor does not consent to any surcharge of its interest in the Property, Pre-Petition Collateral or Post-Petition Collateral under 11 U.S.C. § 506(c), and neither the negotiation nor the execution, approval or implementation of this Agreement is or may be deemed to be consent to such surcharge. Further, Debtor-in-Possession waives any right to seek a surcharge of Creditor's interests in the Property, Pre-Petition Collateral or Post-Petition Property under 11 U.S.C. § 506(c), provided this waiver is only effective during the period in which Debtor-in-Possession is authorized to use cash collateral.
10. Neither the treatment of Creditor under this Agreement and/or Creditor's acceptance of any of the payments pursuant to this Agreement violates any of the commonly labeled "one-form-of-action" or "anti-deficiency" rules, including, but not limited to, those set forth in Sections 726, 580a, 580b, and 580d of the California Code of Civil Procedure, nor does it affect any rights of Creditor to proceed with its pending foreclosure action for the remaining amounts owing should Creditor's foreclosure no longer be stayed in the future pursuant to the bankruptcy.
11. Termination Events. Debtor-in-Possession's right to use the cash collateral will automatically cease and terminate on the earliest occurrence of any of the following "Termination Events":
- a. On June 1, 2016;
 - b. The date on which the order approving this Agreement is reversed, revoked, stayed or rescinded;
 - c. The entry of any order granting Creditor or any other creditor relief from the automatic stay with regard to

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any of the Property or rents;

- d. The date on which Debtor-in-Possession shall grant or file an application or motion with the court for approval of any security interest in or lien on the assets of Debtor-in-Possession or Debtor-in-Possession's estate senior to Creditor's security interest or liens other than the security interest and liens created in favor of Creditor by the order approving this agreement;
 - e. The date on which Debtor-in-Possession files any objection to the validity, amount, allocability, unavailability, perfection or priority of Creditor's pre-petition, security interest or liens as set forth herein;
 - f. Entry of an order confirming any Chapter 11 plan in this bankruptcy case;
 - g. Entry of an order converting this case, for any reason, to a case under a different Chapter of the Bankruptcy Code;
 - h. Entry of an order appointing a trustee or examiner in the within Chapter 11 case;
 - i. Entry of an order dismissing the Chapter 11 case; and
 - j. The service by Debtor-in-Possession of a motion or notice of a motion to
 - i. Convert this Chapter 11 case, for any reason, to a case under a different Chapter of the Bankruptcy Code;
 - ii. To appoint a trustee or examiner in this Chapter 11 case or
 - iii. To dismiss this Chapter 11 case.
12. Debtor-in-Possession's right to use the cash collateral will also automatically cease and terminate on the occurrence of any of the following. "Additional Termination Events" if Debtor-in-Possession does not cure the specified default within 10 business days after Creditor provides written notice of such default to Debtor-in-Possession's counsel and the Creditor's committee (or the twenty largest unsecured creditors if no committee has been formed):
- a. Debtor-in-Possession's breach of any provision of this Agreement (other than those covered in the preceding paragraph);
 - b. Debtor-in-Possession's breach of any provision of the loan documents that does not conflict with this

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Agreement or the Bankruptcy Code and Rules, or

c. Debtor-in-Possession's failure to comply with any requirement of the Bankruptcy Code or Rules.

13. Notwithstanding that a Termination Event has occurred or will occur, Debtor-in-Possession and Creditor can, without further order of the court, extend the effect of this Agreement to any date they both agree to in writing in an agreement filed with the court. Such specified date will then be treated as the Expiration Date, and all the terms of this Agreement will apply accordingly.

Dckt. 17.

APPLICABLE LAW

Pursuant to 11 U.S.C. § 1101, a Debtor-in-Possession serves as the trustee in the Chapter 11 case when so qualified under 11 U.S.C. § 322. As a Debtor-in-Possession, the Debtor-in-Possession can use, sell, or sell property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless--

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease--

(I) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Fed. R. Bankr. P. 4001(b) provides the procedures in which a trustee or Debtor-in-Possession may move the court for authorization to use cash collateral. In relevant part, Fed. R. Bankr. P. 4001(b) states:

(b)(2) Hearing

The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

DISCUSSION

In the instant case, the Debtor-in-Possession is seeking authorization of the court to use cash collateral to pay necessary expenses to avoid immediate and irreparable harm to the estate and Property.

The court may authorize use of cash collateral so long as the creditor is adequately protected. 11 U.S.C. § 363(e). The Debtors-in-Possession have the burden of proof on the issue of adequate protection. 11 U.S.C. § 363(p)(1). Adequate protection includes providing periodic cash payments to cover the loss in value of the creditor's interest. 11 U.S.C. § 361(1). Additionally, a substantial equity cushion in property provides adequate protection. See *In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984).

Here, the Debtor-in-Possession and Creditor have filed a stipulation in which the Creditor consents to the Debtor-in-Possession's use of cash collateral. The adequate protection payment proposed is \$13,193.11, beginning March 14, 2016, and continuing thereafter on the 15th day of each month through May 2016. The court finds that the adequate protection payment is sufficient given the facts of the instant case.

The court authorizes the use of cash collateral, pursuant to the order of the court, for the period March 1, 2016 through May 31, 2016, including the required adequate protection payments. The court does not pre-judge and authorize the use of any monies for "plan payments" or use of any "profit" by the Debtor in Possession. All surplus Cash Collateral from the Property shall be held in a cash collateral account and separately accounted for by the Debtor in Possession.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Authority to Use Cash Collateral filed by Debtor-in-Possession pursuant to the terms of the Stipulation with Wells Fargo Bank, N.A. ("Creditor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Use Cash Collateral is granted, pursuant to this order, for the period March 1, 2016 through May 31, 2016, that the cash collateral may be used through May 31, 2016, to pay the following expenses, granting the Debtor-in-Possession a variance of ten percent in any

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individual line item expense as long as the total amount used does not exceed the total amount allowed:

<u>EXPENSE</u>	<u>AMOUNT</u>
Adequate Protection Payment to Wells Fargo	\$13,193.11 per month
Property Insurance	\$1,045.41 per month
Pacific Gas and Electric	\$200.00 per month (approximate)
Recology Auburn (garbage)	\$400.00 per month (approximate)
Telephone for business	\$150.00 per month (approximate)
Pest control	\$123.60 per month (approximate)
Telephone for Fire and Security	\$120.00 per month (approximate)
Life Insurance Policies (4)	\$617.82 per month
Property Maintenance, Landscaping, Parking Lot Cleaning	\$704.00 per month
Misc (fuel, office supplies, equipment repair, postage, advertisement, etc.)	\$500.00 per month (approximate)

<u>EXPENSE</u>	<u>AMOUNT</u>
Placer County Water Agency	\$1,000.00 due February 2016 and \$1,000.00 due April 2016 (approximate amount due every two months)
Sewer	\$2,275.00 due March 2016 (due every three months)
Stanley Security for Fire Alarm	\$101.13 due March 2016 (due every three months)

IT IS FURTHER ORDERED that the creditors having an interest in the cash collateral are given replacement liens in the post-petition rents in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim, which replacement lien is perfected by the issuance of this order, no further act of creditors required.

IT IS FURTHER ORDERED Debtor-in-Possession waives any right to seek a surcharge of Creditor's interests in the Property, Pre-Petition Collateral or Post-Petition Property under 11 U.S.C. § 506(c), only for the expenses which are authorized to be paid with the cash collateral during the period in which Debtor-in-Possession is authorized to use cash collateral by this order.

IT IS FURTHER ORDERED that if Creditor asserts that an event for the "automatic" termination of the use of cash collateral has occurred, Creditor shall file an ex parte motion for order terminating use of cash collateral and supporting pleadings (evidence of the event of termination) and lodge with the court a proposed order termination the use of cash collateral. Creditor shall immediately serve (electronically and by First Class Mail) the ex parte motion and supporting pleadings and provide telephonic notice to counsel for the Debtor in Possession and the U.S. Trustee. If the Debtor in Possession disputes the event of termination, counsel for Debtor in Possession shall notify the court and counsel for Creditor. The court may, upon review the ex parte motion set an emergency hearing *sua sponte* or may rule on the ex parte motion without hearing.

IT IS FURTHER ORDERED the hearing on the Motion is continued to 10:30 a.m. on May 5, 2015, to consider a supplemental to the Motion to extend the authorization to use cash collateral. On or before April 21, 2016, the Debtor in Possession shall file and serve supplemental pleadings for the further use of cash collateral and notice of the May 5, 2016 hearing. Any opposition to the requested use of cash collateral shall be filed and served on or before April 28, 2016.

3. [12-36884-E-7](#) JENNY PETTENGILL
RAH-2 Richard A. Hall

MOTION TO COMPEL ABANDONMENT
2-25-16 [[232](#)]

Tentative Ruling: The Motion to Abandon Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on February 24, 2016. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Abandon Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----
-----.

The Motion to Abandon Property is denied.

The Motion filed by Jenny Pettengill ("Debtor") requests the court to order the Trustee to abandon the following four assets:

1. Loomis Leasing, Inc. located at 8789 Auburn Folsom Rd., #C105 Granite Bay, CA 95746
2. Dino Transport, Inc. located at 8789 Auburn Folsom Rd., #C105, Granite Bay, CA 95746
3. MetProm located at 8789 Auburn Folsom Rd., #C105 Granite Bay,

CA 95746

4. Trusban located at 8789 Auburn Folsom Rd., #C105 Granite Bay, CA 95746

The Declaration of Debtor has been filed in support of the motion and values each of the assets at \$0.00. Dckt. 234. The Debtor asserts that Stanislav Lazutkine holds a 50% community property interest in each of the asserts.

APPLICABLE LAW

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Ninth Circuit has stated that the "principle of abandonment was developed ... to protect the bankruptcy estate from the various costs and burdens of having to administer property which could not conceivably benefit unsecured creditors of the estate." *In re KVN Corp., Inc.*, 514 B.R. 1, 6 (B.A.P. 9th Cir. 2014) (citing *In re Paolella*, 79 B.R. 607, 610 (Bankr. E.D. Pa. 1987); *In re K.C. Mach. & Tool Co.*, 816 F.2d 238 (6th Cir. 1987) (internal citations omitted). Furthermore, "absent an attempt by the trustee to churn property worthless to the estate just to increase fees," the abandonment of assets should very rarely be ordered. *In re KVN Corp., Inc.*, 514 B.R. 1, 6 (B.A.P. 9th Cir. 2014) (citing *In re K.C. Mach. & Tool Co.*, 816 F.2d at 246; see also *Vu v. Kendall (In re Vu)*, 245 B.R. 644, 647-48 (9th Cir. BAP 2000)) (internal citations omitted).

In a motion brought pursuant to § 554(b), the movant has the burden of making out a prima facie case. *In re Paolella*, 79 B.R. 607, 610 (Bankr. E.D. Pa. 1987); *In re Galloway*, No. BAP AZ 13 1085, 2014 WL 4212621, at *6 (B.A.P. 9th Cir. Aug. 27, 2014); *In re Buerge*, No. BAP KS 12 074, 2014 WL 1309694, at *19 (B.A.P. 10th Cir. Apr. 2, 2014).

If a stock's value is unknown, then it is axiomatic that the debtor failed to meet his burden to compel abandonment. *In re Buerge*, No. BAP KS 12 074, 2014 WL 1309694, at *19 (B.A.P. 10th Cir. Apr. 2, 2014) ("We conclude compelled abandonment is not available where the value of the property has not been established"); *In re Dillon*, 219 B.R. 781 (Bankr. M.D. Tenn. 1998).

DISCUSSION

A review of the Debtor's Schedule B and C reveal the following as to each of the assets:

- I. Loomis Leasing, Inc. located at 8789 Auburn Folsom Rd., #C105 Granite Bay, CA 95746
 - A. Schedule B, Dckt. 112
 1. Community Property
 2. Value: Unknown

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- B. Schedule C, Dckt. 112
 - 1. No exemption claimed
- II. Dino Transport, Inc. located at 8789 Auburn Folsom Rd., #C105, Granite Bay, CA 95746
 - A. Schedule B, Dckt. 112
 - 1. Community Property
 - 2. Value: Unknown
 - B. Schedule C, Dckt. 112
 - 1. No exemption claimed
- III. MetProm located at 8789 Auburn Folsom Rd., #C105 Granite Bay, CA 95746
 - A. Schedule B, Dckt. 112
 - 1. Community Property
 - 2. Value: Unknown
 - 3. "Debtor believes the value of the company is in excess of \$50,000,000."
 - 4. "Location: Unknown"
 - B. Schedule C, Dckt. 112
 - 1. No exemption claimed
- IV. Trusban located at 8789 Auburn Folsom Rd., #C105 Granite Bay, CA 95746
 - A. Schedule B, Dckt. 112
 - 1. Community Property
 - 2. Value: Unknown
 - 3. "Debtor believes the value of the company is in excess of \$50,000,000."
 - 4. "Location: Unknown"
 - B. Schedule C, Dckt. 112
 - 1. No exemption claimed

The Debtor states in her declaration that she "believe[s] and assert[s]"

that the reasonable, fair-market value" of each asset is \$0.00. Dckt. 234. She acknowledges that no exemptions have been claimed in any of the assets. She concludes, however, that:

Based on the value of [the assets], the interest of the co-owner and the claimed exemptions, if any, I believe and assert that the values of the estate's interest in [the assets] is \$0.00.

Dckt. 234, ¶ 10.

The Motion states that the valuation of the assets at \$0.00 is "[b]ased on the dearth of effort to liquidate these assets and the Declarations filed herewith." Dckt. 232, ¶ 18.

Neither the Motion nor the Declaration provides any testimony or evidence as to how the Debtor valued the assets at \$0.00 when, at least for MetProm and Trusban, the Debtor indicated on the Schedule B that the value of each company exceeds \$50,000,000.00.

Furthermore, as to Trusban, the court does not understand how the location of the corporation, which is now listed as being located in Granite Bay, California, has a location listed as "unknown."

In Stanislav Lazutkine's bankruptcy, the Debtor filed a nearly identical Motion as to the instant Motion, requesting the same relief in Mr. Lazutkine's case. Case No. 13-21893, Dckt. 176. The Motion nor the Declaration address the fact that the Mr. Lazutkine's Schedules do not include interests in MetProm nor Trusban. The only additions are to indicate that "[t]he property [Debtor] seeks to abandon was partially listed on [Mr. Lazutkine's] February 13, 2013 petition. In the ensuing months these assets have not been administered." Dckt. 176, ¶ 3.

The Debtor has facially failed to provide any evidence of the valuation of the assets. As previous courts have found, if the Debtor lists the value of a stock as "unknown," it is "axiomatic that the debtor failed to meet his burden to compel abandonment." *In re Buerge*, No. BAP KS 12 074, 2014 WL 1309694, at *19 (B.A.P. 10th Cir. Apr. 2, 2014). The Debtor attempts to provide legal conclusions as to the value but does not provide any admissible or justifying evidence that the value of the assets are \$0.00. Nor does the Debtor explain why, in Mr. Lazutkine's bankruptcy case, he indicates that Loomis and Dino Transport dissolved but the Debtor in her case does not provide such information.

This very motion appears to disprove Debtor's contention. If the value of these assets were \$0.00, Debtor would not have wasted the money to file the present Motion. Therefore, these assets have value, which Debtor has failed or refused to disclose to, or is actively hiding from, the Trustee.

Therefore, the Debtor has failed to meet her burden to show that the Assets are burdensome to the estate or that the Asset is of inconsequential value and benefit to the estate." The Motion is denied.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Abandon Property filed by Jenny Pettengill ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is denied.

Tentative Ruling: The Motion to Abandon Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Stanislav Lazutkine ("Debtor"), Debtor's attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on February 24, 2016. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Abandon Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----
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The Motion to Abandon Property is denied.

The Motion filed by Jenny Pettengill ("Creditor") requests the court to order the Trustee to abandon the following four assets:

1. Loomis Leasing, Inc. located at 8789 Auburn Folsom Rd., #C105 Granite Bay, CA 95746
2. Dino Transport, Inc. located at 8789 Auburn Folsom Rd., #C105, Granite Bay, CA 95746

3. MetProm located at 8789 Auburn Folsom Rd., #C105 Granite Bay, CA 95746
4. Trusban located at 8789 Auburn Folsom Rd., #C105 Granite Bay, CA 95746

The Declaration of Creditor has been filed in support of the motion and values each of the assets at \$0.00. Dckt. 176. The Creditor asserts that Stanislav Lazutkine ("Debtor") holds a 50% community property interest in each of the asserts.

APPLICABLE LAW

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Ninth Circuit has stated that the "principle of abandonment was developed ... to protect the bankruptcy estate from the various costs and burdens of having to administer property which could not conceivably benefit unsecured creditors of the estate." *In re KVN Corp., Inc.*, 514 B.R. 1, 6 (B.A.P. 9th Cir. 2014) (citing *In re Paolella*, 79 B.R. 607, 610 (Bankr. E.D. Pa. 1987); *In re K.C. Mach. & Tool Co.*, 816 F.2d 238 (6th Cir. 1987) (internal citations omitted). Furthermore, "absent an attempt by the trustee to churn property worthless to the estate just to increase fees," the abandonment of assets should very rarely be ordered. *In re KVN Corp., Inc.*, 514 B.R. 1, 6 (B.A.P. 9th Cir. 2014) (citing *In re K.C. Mach. & Tool Co.*, 816 F.2d at 246; see also *Vu v. Kendall (In re Vu)*, 245 B.R. 644, 647-48 (9th Cir. BAP 2000)) (internal citations omitted).

In a motion brought pursuant to § 554(b), the movant has the burden of making out a prima facie case. *In re Paolella*, 79 B.R. 607, 610 (Bankr. E.D. Pa. 1987); *In re Galloway*, No. BAP AZ 13 1085, 2014 WL 4212621, at *6 (B.A.P. 9th Cir. Aug. 27, 2014); *In re Buerge*, No. BAP KS 12 074, 2014 WL 1309694, at *19 (B.A.P. 10th Cir. Apr. 2, 2014).

If a stock's value is unknown, then it is axiomatic that the debtor failed to meet his burden to compel abandonment. *In re Buerge*, No. BAP KS 12 074, 2014 WL 1309694, at *19 (B.A.P. 10th Cir. Apr. 2, 2014) ("We conclude compelled abandonment is not available where the value of the property has not been established"); *In re Dillon*, 219 B.R. 781 (Bankr. M.D. Tenn. 1998).

DISCUSSION

A review of the Debtor's Schedule B and C reveal the following as to each of the assets:

- I. Loomis Leasing, Inc. located at 8789 Auburn Folsom Rd., #C105 Granite Bay, CA 95746
 - A. Schedule B, Dckt. 1
 1. "Loomis Leasing, Inc. [Dissolved] Failed transportation business; Ceased operations in

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- 2010"
- 2. Community Property
- 3. Value: \$0.00
- B. Schedule C, Dckt. 1
 - 1. No exemption claimed
- II. Dino Transport, Inc. located at 8789 Auburn Folsom Rd., #C105, Granite Bay, CA 95746
 - A. Schedule B, Dckt. 1
 - 1. "Dino Transport, Inc. [100% ownership interest] Failed transportation business; Ceased operation in 2010"
 - 2. Community Property
 - 3. Value: \$0.00
 - B. Schedule C, Dckt. 1
 - 1. No exemption claimed
- III. MetProm located at 8789 Auburn Folsom Rd., #C105 Granite Bay, CA 95746
 - A. Schedule B, Dckt. 1
 - 1. Not listed
 - B. Schedule C, Dckt. 112
 - 1. No exemption claimed
- IV. Trusban located at 8789 Auburn Folsom Rd., #C105 Granite Bay, CA 95746
 - A. Schedule B, Dckt. 1
 - 1. Not listed
 - B. Schedule C, Dckt. 112
 - 1. No exemption claimed

The Creditor states in her declaration that she "believe[s] and assert[s] that the reasonable, fair-market value" of each asset is \$0.00. Dckt. 179. She acknowledges that no exemptions have been claimed in any of the assets. She concludes, however, that:

Based on the value of [the assets], the interest of the co-

owner and the claimed exemptions, if any, I believe and assert that the values of the estate's interest in [the assets] is \$0.00.

Dckt. 179, ¶ 12.

The Motion states that the valuation of the assets at \$0.00 is "[b]ased on the dearth of effort to liquidate these assets and the Declarations filed herewith." Dckt. 232, ¶ 18.

Neither the Motion nor the Declaration provides any testimony or evidence as to how the Creditor valued the assets at \$0.00 when, at least for MetProm and Trusban, the Creditor indicated on her Schedule B in her case that the value of each company exceeds \$50,000,000.00.

The Motion nor the Declaration address the fact that the Debtor's Schedules do not include interests in MetProm nor Trusban. The majority of the Motion and the Declaration are identical to those filed in the Creditor's own bankruptcy case. The only additions are to indicate that "[t]he property [Creditor] seeks to abandon was partially listed on [Debtor's] February 13, 2013 petition. In the ensuing months these assets have not been administered." Dckt. 176, ¶ 3.

The Creditor has facially failed to provide any evidence of the valuation of the assets. As previous courts have found, if the Debtor lists the value of a stock as "unknown," it is "axiomatic that the debtor failed to meet his burden to compel abandonment." *In re Buerge*, No. BAP KS 12 074, 2014 WL 1309694, at *19 (B.A.P. 10th Cir. Apr. 2, 2014). The Creditor attempts to provide legal conclusions as to the value but does not provide any admissible or justifying evidence that the value of the assets are \$0.00. Nor does the Creditor explain why two of the assets the Creditor is attempting to have abandoned are not listed on the Debtor's schedule nor why the Debtor indicates that two of the companies (Loomis and Dino Transport), which dissolved in 2010, have any assets to actually administer.

This very motion appears to disprove Creditor's contention. If the value of these assets were \$0.00, Creditor would not have wasted the money to file the present Motion. Additionally, Creditor is the debtor in her own case, in which these assets constitute property of that estate as well. She has failed to disclose the value of these assets in that case as well. Therefore, these assets have value, which Creditor, both in this case and as debtor in her own case, has failed or refused to disclose to, or is actively hiding from, the Trustee.

Therefore, the Creditor has failed to meet her burden to show that the Assets are burdensome to the estate or that the Asset is of inconsequential value and benefit to the estate." The Motion is denied.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Abandon Property filed by Jenny

March 10, 2016 at 10:30 a.m.

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Pettengill ("Creditor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is denied.