UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

April 5, 2018, at 10:30 a.m.

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1. **17-22347-E-11** **UST-1** | **UNITED CHARTER LLC** **Jeffrey Goodrich** | **CONTINUED MOTION TO CONVERT CASE TO CHAPTER 7 AND MOTION TO DISMISS CASE** **1-24-18 [143]**

Tentative Ruling: 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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, creditors, parties requesting special notice on January 24, 2018. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(4) (requiring twenty-one-days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen-days' notice for written opposition).

The Motion to Convert has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Convert or Dismiss the Chapter 11 Bankruptcy Case is granted, with the court ordering the appointment of a Chapter 11 trustee as being in the best interests of the bankruptcy estate and creditors.

This Motion to Convert the Chapter 11 bankruptcy case of United Charter LLC ("Debtor in Possession") has been filed by Tracy Hope Davis ("Movant"), the United States Trustee. Movant asserts that the case should be dismissed or converted based on the following grounds:

A. Debtor in Possession is operating on a continuing-loss basis and has been unable to sell property to generate funds, and

B. Debtor in Possession has not filed operating reports timely and has not attached bank statements to all of those reports.

Specifically, Movant argues post-petition liabilities exceed net cash receipts by more than $83,000.00. *See* Dckt. 142 at 4, 8 (December 2017 Operating Report). Debtor in Possession's cash receipts are artificially inflated by capital contributions of nearly $70,000.00 *See Id.* at 8.

Operating reports were not filed timely for April, June, October, and December 2017. *See* Dckt. 26, 31, 98, 142; *see also* 11 U.S.C. § 1112(b)(4)(F). Movant reports that the delays range from eight to thirty days. Additionally, bank statements were not attached to the operating reports for July, August, and September 2017. *See* Dckt. 36, 70, 79.

Movant argues that conversion is better than dismissal because a Chapter 7 trustee could evaluate whether pre-petition of $344,409.47 to Debtor in Possession's managing member may be recoverable as preferences.

DEBTOR IN POSSESSION'S OPPOSITION

Debtor in Possession filed an Opposition on February 15, 2018. Dckt. 160. Debtor in Possession states that once post-petition interest accrual for East-West Bank's claim is adjusted in the operating reports to reflect the bank's appraised value, then any diminution of the estate will be insignificant by the end of January 2017 and is expected to be a surplus by the time of this hearing. *Id.* at 2:7–10. Debtor in Possession also argues that any diminution is offset by a likely increase in property values.

Debtor in Possession argues that a successful reorganization is probable because rents have increased, which should lead to increased net proceeds. *Id.* at 2:15–16. Debtor in Possession continues to attempt to lease property and expects two leases to possibly add $12,200.00 to gross income by the time set for plan confirmation.

As to the bank statements and operating reports, Debtor in Possession reports that all of the bank statements have been filed and that they had been inadvertently omitted. Debtor in Possession argues that any tardiness in filing reports has been decreasing steadily and that the January 2018 report was filed timely. Additionally, Debtor in Possession intends to seek employment of an accountant to assist with the operating reports.

Looking at the January 2018 Operating Report, Debtor in Possession argues that post-petition liabilities exceed net cash receipts by only $6,374, which it argues is a relatively small loss that should be overcome by the February 2018 operating report—in which Debtor in Possession expects to report a net operating profit of $22,863.00. *Id.* at 10:13–19.

Debtor in Possession stress that the "relevant inquiry is whether [Debtor in Possession's] monthly income is improving at a pace that promises profits sufficient to confirm a reorganization plan." *Id.* at 10:23–24.

Debtor in Possession stresses that its managing members (Raymond Zhang and Cindy Zhang) have acted in good faith by investing "over $70,000 of capital in this case." *Id.* at 13:11. Debtor in Possession presents that the Zhangs have put "their own capital into [Debtor in Possession's] operations." *Id.* at 13:15.

MARCH 1, 2018 HEARING

At the hearing, the court noted that a stipulation had been filed by Debtor in Possession and the U.S. Trustee to continued the hearing to 10:30 a.m. on April 5, 2018. The court also noted that the continue was stated to be for the parties to work in good faith to prosecute this case. Dckt. 189. The court continued the hearing to 10:30 a.m. on April 5, 2018. Dckt. 191.

SUPPLEMENTAL DECLARATION OF JEFFREY GOODRICH

Debtor in Possession's Counsel filed a Supplemental Declaration on March 22, 2018. Dckt. 209. Counsel states that his testimony is based upon information and belief. *Id.* at 1:26.5–2:1. Counsel's admission that everything in the Declaration is based upon information and belief means that he is not actually providing any personal knowledge testimony and has no credible testimony complying with Federal Rules of Evidence 601 and 602 for the court.

Counsel also further qualifies his testimony in the form of certification used at the end of the declaration. Instead of saying that his testimony is true and correct under penalty of perjury as required by 28 U.S.C. § 1746(2), he qualifies his testimony by admitting that it is not based on personal knowledge, stating "I declare under penalty of perjury that the foregoing is true and correct **to the best of my knowledge and belief** and that this declaration was executed at Greenbrae, California on March 22, 2018." Declaration, Dckt. 209 at 3:1–3 (emphasis added).

Inadequacy of Witness Information and Belief Testimony

The court has been presented with this Declaration in which the witness provides testimony based on "information and belief." This Declaration is the testimony of a witness that is presented in writing in lieu of the witness being put on the stand. Non-expert witness testimony must be based on the personal knowledge of the witness. FED. R. EVID. 602. As discussed in Weinstein's Federal Evidence § 602.02:

> A witness may testify only about matters on which he or she has first-hand knowledge. Because most knowledge is inferential, personal knowledge includes opinions and inferences grounded in observations or other first-hand experiences. The witness's testimony must be based on events perceived by the witness through one of the five senses.

The Ninth Circuit Court of Appeal recently addressed this personal knowledge issue in United *States v. Whittemore*, 776 F.3d 1074, 1082 (9th Cir. 2015), stating:

> Under Rule 602, "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. Rule 602 requires any witness to have sufficient memory of the events such that she is not forced to "fill[] the gaps in her memory with hearsay or speculation." 27 Charles Alan Wright Et Al., Federal Practice & Procedure Evidence § 6023 (2d ed. 2007). Witnesses are not "permitted to speculate, guess, or voice suspicions." *Id.* § 6026. However, "[p]ersonal knowledge includes opinions and inferences grounded in observations and experience." *Great Am. Assurance Co. v. Liberty Surplus Ins. Co.*, 669 F. Supp. 2d 1084, 1089 (N.D. Cal. 2009) (citing United States v. Joy, 192 F.3d 761, 767 (7th Cir. 1999)). Lay witnesses may testify about inferences pursuant to Rule 701:
>
> > If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.
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> FED. R. EVID. 701.

As discussed in Moore's Federal Practice, Civil § 8.04, the use of "information and belief" is a pleading device for the use in a complaint (or motion) to allow a plaintiff (movant) to fill in the gaps of alleging a claim pending discovery.

> [4] Allegations Supporting Claims for Relief May Be Made on Information and Belief
>
> Rule 8 does not expressly permit statements supporting claims for relief to be made on information and belief (see § 8.06[5]). However, Rule 11 permits a pleader, after reasonable inquiry, to set forth allegations that "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery" (see Ch. 11, Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions). Courts have read the policy underlying Rule 8, together with Rule 11, to permit claimants to aver facts that they believe to be true, but that lack evidentiary support at the time of pleading. Generally, however, such averments are allowed only when the facts that would support the allegations are solely within the defendant's knowledge or control.
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> Nothing in the Twombly plausibility standard (see [1], above) prevents a plaintiff from pleading on information and belief. A pleading is sufficient if the pleading as a whole, including any allegations on information and belief, states a plausible claim. On the other hand, if the pleading fails to permit a plausible inference of wrongdoing,

> or if the allegations are nothing more than legal conclusions, the pleading will not survive a motion to dismiss.

This is incorporated to Federal Rule of Bankruptcy Procedure 9011, which repeats the provisions of Federal Rule of Civil Procedure 11(b), stating:

> (b) Representations to the court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances[,]—
>
> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> >
> > (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> >
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> >
> > (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Though allowed as a pleading device, the certification required by 28 U.S.C. § 1746 does not allow testimony in declaration to be provided under penalty of perjury being true because the witness merely "is informed and believes (or desires because likely it would mean the witness party would prevail) it is true."

> § 1746. Unsworn declarations under penalty of perjury
>
> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

> (1) If executed without the United States: "**I declare** (or certify, verify, or state) **under penalty of perjury** under the laws of the United States of America **that the foregoing is true and correct**. Executed on (date).
>
> (Signature)".
>
> (2) If executed within the United States, its territories, possessions, or commonwealths: "**I declare** (or certify, verify, or state) **under penalty of perjury** that the **foregoing is true and correct**. Executed on (date).
>
> (Signature)".

28 U.S.C. § 1746 (emphasis added).

Counsel has not testified under penalty of perjury that the statements are true and correct, but only that they are true and correct **only to the best of his knowledge and belief**.

Counsel would have presented that he and Mr. Olson, as independent counsel for Raymond Zhang and Cindy Zhang, negotiated an agreement to transfer the Estate's insider preference claims to a liquidating trust, with Steven Ferlman as the proposed trustee.

DECLARATION OF WAYNE BIER

Wayne Bier ("Creditor") filed a Declaration on March 26, 2018. Dckt. 214. Creditor states that he has personal knowledge, "except as to matters stated upon information and belief, and as to those matters I believe my to be true." *Id.* at 1:26–2:1. Creditor's admission that his testimony is at least partially based upon information and belief calls into question whether Creditor has any personal knowledge testimony to present to the court.

Creditor would have presented to the court that his claim is secured by property that is the primary asset of the Estate. He states that he reviewed the pleadings in opposition to this Motion, and he strongly opposes conversion or dismissal, believing that Mr. Zhang's efforts have significantly improved the value of the property since this case was filed.

The court notes that Mr. Bier's testimony does not address the status of his repaying the unauthorized payments from property of the bankruptcy estate that Mr. Zhang, as the responsible representative of the fiduciary Debtor in Possession, made to Mr. Bier on his pre-petition claim. FN.1.

FN.1. In addition to Mr. Bier's testimony being qualified as based only on the best of his knowledge and belief, his certification statement fails to comply with the minimal requirements of 28 U.S.C. § 1746(1) for a declaration executed outside of the United States. The Bier Declaration states that it was executed in "Subic Bay, Phlippnes [sic]".

APPLICABLE LAW

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).

When a Chapter 11 bankruptcy is filed, an estate comprised of all of the debtor's property is created, to which a fiduciary is installed to administer the estate in the interests of the creditors. Often, this fiduciary is the debtor in possession who is part of the debtor's existing management. The debtor in possession may operate the business and perform specific bankruptcy functions. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 978 (2017). When the debtor is a corporation, the debtor in possession has fiduciary obligations to the corporation, its creditors, and shareholders, which fall upon the officers and directors. *In re Count Liberty, LLC*, 370 B.R. 259, 276 (Bankr. C.D. Cal. 2007) (citing *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985); *Wolf v. Weinstein*, 372 U.S. 633, 649 (1963)); *Holta v. Zerbetz (In re Anchorage Nautical Tours, Inc.)*, 145 B.R. 637, 643 (B.A.P. 9th Cir. 1992). This structure may present conflicts of interest for the debtor's management who are required to act in the best interests of the corporation and shareholders as well as in the best interests of the bankruptcy estate, shareholders, and creditors. *In re Schepps Food Stores, Inc.*, 160 B.R. 792, 797–98 (Bankr. S.D. Tex. 1993). Ultimately, the business may not be operated as it had before filing for bankruptcy, and may be illustrated where a debtor in possession fails to inform creditors and the court of the status of the business in an attempt to ensure business survival. *See e.g.*, *In re Devers*, 759 F.2d 751 (9th Cir. 1985).

An attorney for a debtor in possession is a fiduciary of the bankruptcy estate. *In re Count Liberty, LLC*, 370 B.R. at 280. The attorney's fiduciary duties stem from the fiduciary duties owed to the debtor in possession and the responsibilities attached to the attorney's status as an officer of the court. *Id.* at 281. To ensure the integrity of the bankruptcy proceedings, the attorney has a heightened duty of care and must be proactive in rendering advice that will enable the debtor in possession to properly discharge the debtor in possession's own fiduciary obligations. *Id.* at 281–82.

DISCUSSION

The court has informed Debtor in Possession's counsel at prior hearings that the Zhangs can not (not just may not) place capital contributions into Debtor in Possession's estate. *See, e.g.*, Dckt. 149. At the January 25, 2018 hearing, the court explained:

> Schedules D, E, and F filed in this case demonstrate that the reorganization taking place is a three-party restructure: Debtor in Possession/ Raymond Zhang (principal), East-West Bank (Secured Claim), and Wayne Bier (secured claim). For unsecured claims, the only significant non-insider is the City of Stockton for "fines" in the amount of $27,613.45 (which claim is listed as disputed). Schedules, Dckt. 12 at 9–12. That a limited number of parties would seek to use a Chapter 11 proceeding as a structure to achieve a better financial result for all is not inappropriate, and in fact it exemplifies conduct that persons in other bankruptcy cases should emulate.
>
> Though a limited group, federal law requires certain conduct of the various "players" in a bankruptcy case, including accurate disclosures, the fiduciary capacity of a "debtor in possession," and compliance with the law. While the court appreciates the need for there to be "reasonable" compliance with the law and for "formalities" not to unduly hinder the parties in their effective prosecution of a bankruptcy case, cutting too many corners will only lead to potentially greater negative consequences for the parties and their attorneys than would otherwise exist.
>
> The court noted [at the August 31, 2017 hearing] that the operation of the bankruptcy estate by Debtor in Possession is being funded significantly through a cash inflow labeled as "Capital Contributions." In reviewing the July 2017 monthly operating report, the court saw that it states that "Capital Contributions" totaling $25,500.00 were made to the bankruptcy estate since this case was commenced. Dckt. 36 at 8. That represents 35.17% of the total cash receipts for the bankruptcy estate since this case was commenced.
>
> The court clarified that the concept of a "capital contribution" and the bankruptcy estate are inconsistent. A capital contribution is defined under California law as being:
>
> > " (c) 'Contribution' means **any benefit provided by a person to a limited liability company**:
> >
> > (1) In order to become a member upon formation of the limited liability company and in accordance with an agreement between or among the persons that have agreed to become the initial members of the limited liability company.

> (2) In order to become a member after formation of the limited liability company and in accordance with an agreement between the person and the limited liability company.
>
> (3) In the **person's capacity as a member and in accordance with the operating agreement or an agreement between the member and the limited liability company**."

Cal. Corp. § 17701.02(c). The "capital contribution" would be made to the limited liability company by one of the members. The limited liability company is United Charter, LLC, Debtor that commenced this voluntary bankruptcy case.

By operation of federal law all of the assets of Debtor were transferred into the bankruptcy estate in this case upon the filing of the bankrupt petition. 11 U.S.C. § 541(a). Because this is a Chapter 11 case, a bankruptcy trustee was not immediately appointed to manage the bankruptcy estate, but Debtor accepted the role of serving as "Debtor in Possession," 11 U.S.C. § 1001(1), who then exercises the powers and is subject to the fiduciary obligations of a bankruptcy trustee. 11 U.S.C. § 1107. The bankruptcy estate is not Debtor, the property of the bankruptcy estate is not Debtor's property, and Debtor exercises power and control over the property of the estate (here the real estate and its operation) solely in its fiduciary capacity as Debtor in Possession.

The "capital contribution" made by the member of United Charter, LLC would have been to Debtor, United Charter, LLC. It has not been explained how the money was then transferred from United Charter, LLC into the bankruptcy estate. The bankruptcy estate is not a "limited liability company" that has "members" from whom "capital contributions" may be received.

The most common method by which new money is placed in a bankruptcy estate is by a loan made pursuant to 11 U.S.C. § 364. Other than for an unsecured loan in the ordinary course of business, court authorization for such a loan is required. If court authorization is not obtained, the "lender's" right and ability to be repaid for the loan is impaired.

If things "do not go well" and this case is converted to one under Chapter 7 or if a Chapter 11 trustee is appointed, it has already been disclosed that there is a substantial preference that such trustee may be pursuing against the principal of Debtor. Debtor in Possession (Debtor and its principal as the managing member) has chosen not pursuing such preference at this time, believing that there may well be time for any subsequently appointed trustee to pursue it at a later date. The decision not to assert such rights may limit how long Debtor can serve as Debtor in Possession, or how the conduct of Debtor in fulling the fiduciary role of Debtor in Possession, counsel for Debtor in Possession, and the principal who is acting for

> Debtor in Possession if the preference is less collectable at that later date after the trustee is appointed than if Debtor in Possession had pursued it from day one.
>
> Additionally, the principal making the "capital contribution" may be believing that if the "finances hit the fan" in this case, whatever he may owe on a preference can be offset against the "capital contributions." While such an offset might be properly provided for as part of court-approved post-petition credit pursuant to 11 U.S.C. § 364, none exists here and the principal (who, with the assistance of other professionals of the bankruptcy estate, has made the decision that the estate should not be seeking the recovery of the preference from him) may be in for a rude awakening of an even bigger loss.
>
> With respect to such "capital contributions," Counsel for Debtor in Possession addressed that he and independent counsel for the member making such "capital contributions" will be addressing the points.

Dckt. 149.

Despite the court's explicit language and warning, Debtor in Possession continues to report that the Zhangs are contributing capital directly into Debtor in Possession to fund this case. *See* Dckt. 160 at 13:11, 13:15. That is not legally permissible, or even possible.

The filing of this case created a separate bankruptcy estate that divested United Charter LLC of its pre-petition assets and that was established to administer assets for the benefit of creditors. An outside party cannot make contributions directly into a bankruptcy estate out side of a loan envisioned under 11 U.S.C. § 364. Any contributions that the Zhangs have been making are separate from this case and are part of United Charter LLC as it exists independently from these bankruptcy proceedings. Those funds can be used for operation of the business, but they cannot become property of the estate.

Use of any capital contributions to keep this case alive is not evidence of good faith and only shows the court that Debtor in Possession, its counsel, and the Zhangs will take whatever action they want to appear as though there are sufficient funds in this case to fund a Chapter 11 plan.

Instead of heeding the court's repeated admonitions that the capital contributions cannot be used the way that Debtor in Possession wishes to use them, Debtor in Possession and its counsel continue to report to the court that they and the Zhangs do not care what they may do with funds.

In reviewing the latest operating report for January 2018, Debtor in Possession reports a profit from the Statement of Operations of $18,287.00 for the current month, but Debtor in Possession also reports a cumulative loss of ($33,241.00). Dckt. 156. Also reported is that for January 2018 and December 2017, Debtor in Possession made more than double the amount of disbursements ($131,163.00) to the amount of incoming receipts ($62,808.00).

In January 2018, it appears that Debtor in Possession was only able to report a profit from the Statement of Operations because Debtor in Possession removed $68,991 in accrued post-petition interest

from East-West Bank's claim. Debtor in Possession asserts that such a reduction was appropriate because the bank's appraisal conducted in November 2017 "indicates that no interest should accrue postpetition on [the bank's] secured claim other than $57,969, which is the difference between its Proof of Claim amount and the fair market value of its collateral." Dckt. 160 at 8:19–22.

The Statement of Cash Receipts and Disbursements reveals that an additional $2,000.00 was designated as a capital contribution in January 2018, and presumably, those funds came from the Zhangs. Cumulatively, $72,168.00 is listed as capital contribution. Dckt. 156 at 9.

Conflict in Asserting Rights of Bankruptcy Estate

As this court has addressed, there is a potential substantial preference claim that the bankruptcy estate could prosecute against Mr. Zhang. In the proposed Chapter 11 Plan filed on February 22, 2018, all such preference claims shall revest in Debtor. Plan Part 7, ¶ (f); Dckt. 166. This provision makes a reference to some unidentified claims being subject to a tolling agreement. *Id.*

In the proposed Disclosure Statement, it is referenced that Mr. Zhang and the Debtor in Possession have entered into a tolling agreement whereby any action on possible preference recoveries from Mr. Zhang will be tolled until September 30, 2023 – six and one-half years after this Bankruptcy Case was filed. Proposed Disclosure Statement, pp. 30:21–27.5; Dckt. 167.

As the court has discussed with counsel for Debtor in Possession, the court finds it problematic that the fiduciary of the bankruptcy estate chooses to enforce the rights of the estate against all others, but the fiduciary of the estate chooses not to enforce the estate's rights against the fiduciary himself. Further, such delay could work as a device for the defendant fiduciary, Mr. Zhang, to theoretically spend, transfer, or hide assets. One possible remedy to protect the rights and interests of the estate was to have Mr. Zhang post a bond or provide collateral to secure any such potential claim for which he sought to delay enforcement. No such bond or collateral has been proposed.

Unauthorized Creditor Payment

A declaration has been provided for Wayne Bier, a purported creditor with a secured claim in this case. Mr. Bier's potential claim and the unauthorized disbursement of estate monies to him by Mr. Zhang, in his fiduciary capacity as the responsible representative for the fiduciary Debtor in Possession, has been noted by the court. Civil Minutes, March 1, 2018 Status Conference; Dckt. 184 at 9. In those Civil Minutes, the court identifies $21,000.00 of reported post-petition payment made from property of the Bankruptcy Estate by Mr. Zhang to Mr. Bier that were not authorized. The explanation provided by counsel for Debtor in Possession was that Mr. Zhang "felt morally obligated" to pay monies to Mr. Bier.

In the Declaration filed by Mr. Bier, while he argues that he does not concur in the U.S. Trustee's determination that this case needs to be converted or dismissed, he does not address the unauthorized payments he has received. Additionally, he argues:

> "I strongly oppose conversion or dismissal of this case. My understanding is that the Debtor has filed a reorganization plan and is making progress increasing the

> occupancy of, and income received from, the Subject Property. I believe the efforts of the Debtor in Possession's managing member, Raymond Zhang, have significantly improved the value of the Subject Property since the filing of this bankruptcy case, and I have confidence that Mr. Zhang will succeed in leasing most if not all of the remaining available tenant spaces on the Subject Property. I do not believe that the administrative expenses of an independent trustee can be justified at this time given the Debtor in Possession's progress to date."

Declaration, Dckt. 214 at 2:16–23. The Mr. Zhang in whom he believes is the same Mr. Zhang who has made the unauthorized $21,000.00 payment of estate monies to Mr. Bier.

Ruling

Cause exists to grant relief in this case pursuant to 11 U.S.C. § 1112(b). The Motion is granted, and the court orders the appointment of a Chapter 11 trustee. There are on-going leases in this case, and a Chapter 11 trustee may well be able to continue in the operation of the business, possibly reorganizing the business, and providing for restructuring the payment terms for the secured debt in this case. If such a plan is not possible, the Chapter 11 trustee has the opportunity to market and sell the property in the ordinary course of business, not as part of a Chapter 7 liquidation.

Debtor and Mr. Bier will still "have seats at the table" in communicating with the Chapter 11 trustee about how to best advance a plan in this case, as do all the creditors. This will also give Mr. Zhang an independent trustee to deal with immediately with respect to any preference claim(s) that may exist, with such recovered monies used to help fund a plan, rather than delayed litigation pushed out after a plan if any, is ever confirmed.

If the Chapter 11 trustee believes that the case should be converted to one under Chapter 7, the trustee may move to have the case converted, providing the court with information and his or her opinion as to why the case needs to be converted.

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 Convert the Chapter 11 case filed by Tracy Hope Davis ("Movant"), the United States Trustee, 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 is granted, and the appointment of a Chapter 11 trustee is ordered by the court in this case.

2. **17-22347-E-11** **UNITED CHARTER LLC** **CONTINUED MOTION FOR COMPENSATION FOR THE VIRTUAL REALTY GROUP, BROKER(S)**
JJG-4 **Jeffrey Goodrich** **2-22-18 [169]**

No Tentative Ruling: 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.

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on February 22, 2018. By the court's calculation, 28 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Allowance of Professional Fees has not been set properly for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Allowance of Professional Fees is xxxxxxxxxx.

The Virtual Realty Group (Team VRG), the Broker ("Applicant") for United Charter, LLC, Debtor in Possession ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested pursuant to a listing agreement that calls for Applicant to receive a 6.00% commission for total lease payments. The order of the court approving employment of Applicant was entered on January 26, 2018. Dckt. 155. Applicant states that Debtor in Possession entered into a lease with H&K Express, Inc., on February 4, 2018, for a five-year term with monthly rent of $5,000 (subject to 3.00% annual increases).

Applicant requests $19,122.88 as a leasing commission, $9,556.44 of which will go to Applicant, and $9,556.44 of which will go to a cooperating broker identified as Ryker Flint Commercial.

MARCH 22, 2018 HEARING

At the hearing, the court continued the hearing to 10:30 a.m. on April 5, 2018, to allow Debtor in Possession to address issues related to the underlying lease that appears to have been entered into between Debtor (not Debtor in Possession) and the purported tenant.

INSUFFICIENT NOTICE OF MOTION

Applicant provided twenty-eight days' notice of this Motion. Federal Rule of Bankruptcy Procedure 2002(a)(6) requires a minimum of twenty-one days' notice of the hearing, and Local Bankruptcy Rule 9014-1(f)(1)(B) requires an additional fourteen days for parties to file written opposition. Those time periods do not run concurrently. Those two minimums total thirty-five days. Applicant has provided seven fewer days than the minimum. The court having continued the hearing to a date that is sufficient for notice, the court waives this defect.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate;
(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). A professional must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

APPLICABLE LAW

Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the professional's services, the manner in which services were performed, and the results of the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the professional exercise reasonable billing judgment?

In re Garcia, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis cab be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound*

Plywood), 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

Even if the court finds that the services billed by a professional are "actual," meaning that the fee application reflects time entries properly charged for services, the professional must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. A professional must exercise good billing judgment with regard to the services provided because the court's authorization to employ a professional to work in a bankruptcy case does not give that professional "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

> (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?
>
> (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

In re Puget Sound Plywood, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's services for the Estate include leasing commercial real estate.

DISCUSSION

Applicant seeks an award of $19,122.88 pursuant to a listing agreement with H&K Express, Inc., entered into in February 2018. The requested amount reflects the total commission that Applicant could receive over the period of a five-year lease.

The court's Order authorized the employment on the terms and conditions stated in the Lease Listing Agreement filed as Exhibit A, Dckt. 129. Order, Dckt. 155. Going to the actual Agreement, the stated terms include:

> 3. COMPENSATION:

Notice: The amount or rate of real estate commissions is not fixed by law. They are set by each Broker individually and may be negotiable between Owner and Broker (real estate commissions include all compensation and fees to Broker).

A. Owner agrees to pay to Broker as compensation for services, irrespective of agency relationship(s), as specified below:

(1) For fixed-term leases:

(a) Either ☒ 6.000 percent of the total rent for the term specified in paragraph 2 (or if a fixed term lease is executed, of the total rent payments due under the lease); or (ii) _____ ;

(b) Owner agrees to pay Broker additional compensation of _____; if a fixed term lease is executed and is extended or renewed. Payment is due upon such extension or renewal.

(2) For month-to-month rental: Either (I) _____ percent of _____; or (ii) _____

Dckt. 129 at 4.

The lease for which the compensation is sought is a five-year lease of 20,000 square feet to H & K Express, Inc. This case has been fraught with allegations of leases, alleged breaches of leases, failure to prosecute claims of the bankruptcy estate (preference actions against insiders), and the Responsible Representative treating the bankruptcy estate as his personal financial vehicle into which he could make "capital contributions."

Using the California Secretary of State website, the court checked for the existence of an H & K Express, Inc. The Secretary of State reports that there are two different active corporations in California with the name H & K Express. FN.1.

FN.1. https://businesssearch.sos.ca.gov/CBS/SearchResults?SearchType=CORP&SearchCriteria=H+%26+K+Express&SearchSubType=Keyword

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The Lease Agreement itself purports to be between H & K Express, Inc., and United Charter, LLC, Raymond Zhang, its Manager. Exhibit A, Dckt. 171. Again, Mr. Zhang appears to ignore the fact that United Charter, LLC, the debtor, does not have the right and power to be leasing property of the Bankruptcy Estate. On its face, the fiduciary Debtor in Possession does not appear to be the lessor. The Lease Agreement continues with this failure to have Debtor in Possession be a party to or to exercise its rights, and only its rights, to lease the property.

Debtor in Possession, Counsel for Debtor in Possession, and the Leasing Agent appear to have created a serious legal issue for the Bankruptcy Estate concerning whether there is any lease that can be enforced by the Bankruptcy Estate.

Before the court approves compensation for services **Provided to the Bankruptcy Estate** by a **Professional Hired By Debtor in Possession**, the court needs to believe that the services were provided **for Debtor in Possession and the Bankruptcy Estate**, as well as there being any **enforceable rights for the Bankruptcy Estate**.

The Motion is **xxxxxxxxxxxxxxxxxxxx**.

The court shall issue an 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 Allowance of Fees and Expenses filed by The Virtual Realty Group (Team VRG) ("Applicant"), Broker for United Charter, LLC, Debtor in Possession, ("Client") 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 is **xxxxxxxxxx**.

3. **17-22347-E-11** **UNITED CHARTER LLC** **CONTINUED MOTION TO USE CASH COLLATERAL**
JJG-7 **Jeffrey Goodrich** **3-8-18 [193]**

No Tentative Ruling: 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)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors, parties requesting special notice, and Office of the United States Trustee on March 8, 2018. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion for Authority to Use Cash Collateral was not properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor in Possession, creditors, 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 offer 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. At the hearing, **----------**.

The Motion for Authority to Use Cash Collateral is xxxxxxxxxxxxx.

United Charter LLC ("Debtor in Possession") moves for an order approving the use of cash collateral from Debtor in Possession's real property. Debtor in Possession does not request a specific period of time for its cash collateral request. Instead, Debtor in Possession refers to "the three-month period between the date of hearing on this motion and the date the DIP expects to have a confirmation hearing on its plan of reorganization." Dckt. 193 at 3:9–11. No confirmation hearing has been set.

Debtor in Possession's proposed budget includes the following expenses:

Expense Name	Amount
Cal Water	$118
PGE	$250

Insurance	$2,560.41
Maintenance	$200
Bay Alarm	$103
Contingency	$500
FTB	$76.84
Accounting	$1,200
Total	**$5,008.25**

MARCH 22, 2018 HEARING

At the hearing, Debtor in Possession requested that the hearing be continued to allow Debtor in Possession and East West Bank to complete discussions for a stipulation to use cash collateral. Dckt. 204. Creditor East West Bank concurred in requesting a continuance. The court continued the hearing to 10:30 a.m. on April 5, 2018. Dckt. 206.

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 lease 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.

Federal Rule of Bankruptcy Procedure 4001(b) provides the procedures in which a trustee or a debtor in possession may move the court for authorization to use cash collateral. In relevant part, Federal Rule of Bankruptcy Procedure 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

For prior motions to authorize the use of cash collateral, the court had approved a stipulation between Debtor in Possession and East West Bank that included an agreement between the parties that the bank be paid net monthly proceeds as adequate protection. *See* Dckt. 149. Now, Debtor in Possession wishes to avoid making those payments.

The bank has not responded to this Motion, possibly because of Debtor in Possession's failure to prove that service was provided, but given Debtor in Possession's request not to make adequate protection payments each month, the court anticipates that the bank will want to present arguments opposing the Motion in what has a been a very contentious case between Debtor in Possession and East West Bank.

Review of Monthly Operating Reports

On March 15, 2018, Debtor in Possession filed its Monthly Operating Report for February 2018. Dckt. 200. It is asserted that this Monthly Operating Report shows how the bankruptcy estate is turning the corner.

On it, Debtor in Possession shows $26,500.00 in "Gross Sales." *Id.* at 2. Because the Bankruptcy Estate is the lessor of commercial property, the "Gross Sales" are gross rents. Debtor in Possession also states "income" in the form of a "Deposit" in the amount of $10,000.00. If this is a rental deposit, it commonly includes first and last months' rents and a security deposit. *See* H & K Express Lease, Exhibit A; Dckt. 171 at 5. Thus, at best a portion of this would be the first month of rent (if due in the month the payment is made) while most would be held to pay future obligations or be refunded. It is likely that the $10,000 is not income, but a "deposit" for which there needs to be a corresponding deduction/reserve.

The February 2018 monthly operating reports shows minimal expenses, with the only expense being paid being PG&E ($2,000 of the $2,195 in expenses).

Expenses

For the requested three months of operation, Debtor in Possession lists minimal expenses. There is no set aside for property taxes. There is no set aside for necessary professional fees. There is no set aside for taxes (other than a minor $75 per month). The proposed budget does not appear to be a real, accurate projection of the actual expenses of operating the business.

Decision

At the hearing, East West Bank stated **xxxxxxxxxxx**.

The Motion is **xxxxxxxxxxxxx**.

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 United Charter LLC ("Debtor in Possession") 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 is **xxxxxxxxxxxx**.

4. **17-22347-E-11** **UNITED CHARTER LLC** **MOTION OF DEBTOR IN POSSESSION TO SURCHARGE COLLATERAL TO PAY FOR PROPERTY TAXES AND LEASING COMMISSIONS**
JJG-8 **Jeffrey Goodrich** **3-22-18 [207]**

No Tentative Ruling: 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)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on parties requesting special notice on March 22, 2018. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Surcharge Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor in Possession, creditors, 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 offer 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. At the hearing, ----------.

The Motion to Surcharge Collateral is xxxxx.

United Charter LLC ("Debtor in Possession") requests an order pursuant to 11 U.S.C. §§ 506(c) and 1107 to surcharge East West Bank's and Wayne Bier's ("Creditors") cash collateral for reasonable and necessary costs and expenses of preserving Creditors' real property and rental cash collateral.

Debtor in Possession argues that 11 U.S.C. § 506(c) gives it a right to recovery from property securing an allowed claim the reasonable and necessary costs and expenses of preserving such property to the extent of any benefit to the holder of the claim.

Debtor in Possession notes that East West Bank holds a secured claim in the amount of $4,580,000.00, secured by an industrial warehouse in Stockton, California ("Property"), together with rents collected on the Property.

Debtor in Possession argues that this Motion is presented in the event that the court does not authorize the use of cash collateral at the April 5, 2018 hearing—by a separate motion. Debtor in Possession argues that paying property taxes is necessary and reasonable to preserve the Property without reducing East West Bank's claim from penalties for unpaid taxes.

At the hearing, the court authorized / did not authorize Debtor in Possession to use cash collateral. Therefore, this Motion is **xxxxxxxxxxxxxx**.

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 Surcharge Collateral filed by United Charter LLC ("Debtor in Possession") 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 is **xxxxxxxxxxxx**.

5. **17-22347-E-11** **UNITED CHARTER LLC** **CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY, MOTION FOR TURNOVER OF CASH COLLATERAL, MOTION TO APPOINT TRUSTEE, MOTION TO DISMISS CASE AND/OR MOTION TO CONVERT CASE TO CHAPTER 7**
MET-1 **Jeffrey Goodrich**

EAST WEST BANK VS. **11-22-17 [80]**

No Tentative Ruling: 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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on November 22, 2017. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Relief from the Automatic Stay is xxxxxxxxxxxxx.

East West Bank ("Movant") seeks relief from the automatic stay with respect to United Charter LLC's ("Debtor in Possession") real property commonly known as 1904, 1908, 1912, 1916, 1920, 1928, 1936 Weber Avenue, 1881 E. Market Street, 1617, 1555, 1531, 1523 E. Main Street, Stockton, California ("Property"). Movant has provided multiple declarations to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The L. Kurth DeMoss Declaration states that there are seven pre-petition payments in default, with a pre-petition arrearage of $783,312.79. Dckt. 84. Pursuant to a cash collateral stipulation, the Declaration provides evidence that Movant has received $31,477.98 in payments as of November 2, 2017.

The DeMoss Declaration mentions an auction for the Property through auctioneer Ten-X and states that a review of the website during the auction showed bids of $4.5 million, $5.5 million, and then $7

million at the end of the auction. That testimony is further explained and clarified by the Declaration of Mary Tang. Dckt. 83. The Tang Declaration states that the Property did not sell for $7 million as listed on the Ten-X website; instead, the highest bid received was $3 million.

Grounds Stated with Particularity (FED. R. BANKR. P. 9013)
Upon Which the Requested Relief Is Based

The Motion for Relief From the Automatic Stay states with particularity the following grounds as the basis for the requested relief:

> "The Motion is based upon cause, lack of adequate protection, and lack of equity. In the alternative, Movant requests that the Court issue an order requiring a Chapter 11 Trustee to be appointed, the case dismissed, or the case be converted to Chapter 7.
>
> The Bankruptcy Court has jurisdiction over this proceeding pursuant to 11 U.S.C. §362, 28 U.S.C. §157 and §1334, and it is a core proceeding within the definition of 28 U.S.C. §157(b).
>
> On or about April 7, 2017, UNITED CHARTER LLC ("Debtor") filed a Petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court, Eastern District of California, Division of Sacramento, Case No. 17-22347.
>
> This Motion is based upon the Notice of Hearing, the Motion, the Memorandum of Points and Authorities, the Declarations of L. Kurth DeMoss, Colin Morrison, and Mary Ellmann Tang, the Exhibits to the Motion Notice of Hearing, and the pleadings on file herein, the records and files in this action, and upon such further oral and documentary evidence as may be presented."

Motion, p. 2:2–15.

On its face, the "grounds" appear to be the "factual finding" by Movant that there is a "lack of equity" in the Property, as well as Movant's legal conclusions that cause exists and that Movant's interests are not adequately protected. There is little for the court to consider as "grounds," but merely adopt the legal conclusions and one factual finding of Movant. As discussed below, such pleading does not satisfy the basic law and motion pleading requirements of the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure.

It may be that Movant asserts that the court can canvas the notice of hearing, the points and authorities, three declarations, all of the exhibits, all of the pleadings filed in this case, and the records and files in this bankruptcy case, as well as whatever else Movant (without regard to the Local Bankruptcy Rules for the proper filing of pleadings and evidence) dumps on the court at the hearing. Then from canvassing everything above, the court can then draft for Movant the grounds and state them as required by Federal Rule of Bankruptcy Procedure 9013 for Movant. As discussed below, the court declines the opportunity to provide such legal services for a party in a contested matter or adversary proceeding.

DEBTOR IN POSSESSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION

Debtor in Possession filed a Memorandum of Points and Authorities in Opposition on December 11, 2017. Dckt. 103. Debtor in Possession disagrees with Movant's portrayal of the condition of the Property, of Debtor in Possession's rehabilitation efforts, and with Debtor in Possession's compliance with the cash collateral stipulation.

Debtor in Possession relates that a property tenant in August 2016 was discovered operating an illegal marijuana business and had rewired the electrical wiring and built illegal interior walls and ceilings. Debtor in Possession was required to make numerous repairs to comply with building codes and to restore power. While those repairs were happening, Debtor in Possession was not receiving rental income and was unable to make its monthly mortgage payments, leading to default. Debtor in Possession filed this case to prevent a foreclosure sale.

Debtor in Possession argues that improvements have been made to the Property as well, including install a fence around more than fifteen acres, cleaning up all trash, removing weeds, trimming overgrown grass, and removing broken window glass. Currently, Debtor in Possession states that there are no uncorrected citations by the City of Stockton or any other government agency.

When the Property was offered at auction through Ten-X, Debtor in Possession did not receive a successful third-party bid that was sufficient to Movant's secured claim. Debtor in Possession decided to list the Property for sale in the local market and tried to secure a tenant in the interim period before a potential sale.

Debtor in Possession heard from seven prospective tenants, six of whom have shown a strong interest in leasing the Property. Two potential tenants signed leases that await court approval, two are waiting for approval from the City of Stockton, and two have withdrawn interest because of city requirements. The remaining potential tenant is Wal-Mart, who has not yet clarified its interest.

For the two tenants awaiting court approval, Debtor in Possession states that they will lease 38,000 square feet and add $9,000.00 per month in the first year to Debtor in Possession's gross revenue from the Property. Debtor in Possession expects the monthly gross from those two leases to increase to $10,500.00 in their second years.

The other two leases would cover 30,0000 square feet and add approximately $7,000.00 per month to Debtor in Possession's gross revenue from the Property. A lease by Wal-Mart could be for 45,000.00 square feet and could add between $15,000.00 and $18,000.00 per month to gross revenue. Debtor in Possession is also finalizing a listing agreement for the Property with a broker, John Anderson.

In contrast to Movant's contention, Debtor in Possession argues that the April 10, 2017 property taxes were paid late because of a misunderstanding about whether there was authority to pay the taxes. For the "irregular" payments, Debtor in Possession argues that irregularity is not an event of default under the cash collateral stipulation. Additionally, for the one notice of default issued, Debtor in Possession cured the default.

Debtor in Possession argues that Movant has not calculated the cash collateral stipulation correctly. Debtor in Possession interprets the stipulation to require it to pay to Movant all net rents collected, after payment of $7,785.00 in monthly expenses and after paying the April 10, 2017 property taxes. Debtor in Possession argues that the most recent Operating Report for October 2017 shows Movant being overpaid, when $23,713.00 was due and $31,477.98 was paid. *Compare* Dckt. 98 (Operating Report), *with* Dckt. 84 (DeMoss Declaration stating that $31,477.98 was paid).

Debtor in Possession states that a Plan of Reorganization and Disclosure Statement have been drafted and are being finalized and will show Movant as the only creditor with a secured claim.

Debtor in Possession contends that its actions in prosecuting this case do not warrant granting relief from the automatic stay for Movant. To Debtor in Possession, Movant's accusations are misleading in a case that is being prosecuted in good faith.

DECEMBER 21, 2017 HEARING

At the hearing, the parties addressed information that may be "in flux." Dckt. 121. Counsel for Debtor in Possession stated that the potential preference issue is being addressed, as well as how Debtor in Possession's principal can be an independent fiduciary that does not have a conflict of interest due to the alleged preference.

The court continued the hearing to 10:30 a.m. on January 25, 2018. Dckt. 122. Supplemental pleadings were ordered to be served and filed on or before January 10, 2018, and opposition on or before January 19, 2018. Any final reply could be presented orally at the hearing or filed on or before January 23, 2018.

MOVANT'S SUPPLEMENT

Movant filed a Supplement on January 10, 2018. Dckt. 130. Movant argues that it has received copies of two leases. One lease is for Lionel Anthony Villareal D.B.A. A-1 Mobil Company, and it commenced September 2017 at $4,000.00 per month for the first two years, and then $5,000.00 per month for the third year. The other lease is for Espino Juan Antonio Navarro D.B.A. Central Pallets, and it commenced December 1, 2017 at $9,000.00 per month for the first year, with increases of approximately $450.00 per month for next two years. Movant states that rent rolls have increased from $15,400.00 in September 2017 to $24,900.00.

Movant notes, though, that A-1 Mobil Company had two checks bounce in December 2017 and has not paid the $4,000.00 rent.

For property taxes that were due April 2017 and December 2017, the San Joaquin County Assessor's website does not show that either has been paid. Movant received bank statements from Debtor in Possession showing that $28,599.85 was paid in December 2017, and Movant believes that amount is for April 2017 taxes and penalties.

Movant studied the lease listing agreement attached to John Anderson's Second Supplemental Declaration in support of a Motion to Employ and noted that the agreement includes lot line adjustments. *See* Dckt. 129. Movant is not aware of any approved lot line adjustments, however.

Movant argues that property taxes increased significantly in December 2017, which should cause Debtor in Possession to set aside $13,066.20 per month to pay overhead expenses. Calculating from the $24,900.00 in rent currently, Movant notes that Debtor in Possession will have only $11,833.00 with which to pay.

Movant argues that the factual grounds it has set out above are grounds for relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1). Additionally, Movant argues that there is support for relief under 11 U.S.C. § 362(d)(2) as well. Movant argues that Debtor in Possession does not dispute a lack of equity. Then, Movant asserts that the increased property taxes, city citations, and vacant tenancies support a position that the Property is not necessary for an effective reorganization.

DEBTOR IN POSSESSION'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES

Debtor in Possession filed a Supplemental Memorandum of Points and Authorities on January 16, 2018. Dckt. 134. Debtor in Possession confirms that it has executed the two new leases mentioned by Movant and also states that a third lease was not consummated.

Debtor in Possession counters Movant by stating that A-1 Mobile paid December 2017's rent and owes only January 2018 rent. Debtor in Possession also asserts that the property taxes have been paid. Debtor in Possession notes that there is an issue, however, of whether the San Joaquin Tax Collector will waive a late penalty that Debtor in Possession believes was inappropriate.

Debtor in Possession states that the lot line reference in the lease listing agreement was meant to be a convenient reference for the broker, but nothing more.

Debtor in Possession agrees with Movant that the cash collateral budget will need to be adjusted because of the increase in property taxes, but before submitting a new budget, Debtor in Possession seeks to employ an appraiser to reassess the Property's value and then seek a court order valuing the Property under 11 U.S.C. § 506.

Legally, Debtor in Possession argues that there is no cause to grant relief because rental income has increased, and if the Property's value is tied to how much rental income it generates, then the Property has increased in value significantly.

Additionally, Debtor in Possession notes that Movant asserts that a net operating income of $26,111.38 will be required to keep its claim current. While Debtor in Possession does not have that income currently, Debtor in Possession believes that it will be able to present a confirmable plan because there is additional space at the Property that is available to be rented. Debtor in Possession asserts that the additional space can generate $30,000.00 to $35,000.00 per month.

Debtor in Possession argues that the unsecured claims will support confirmation of a plan and argues that its ability to increase rental income so quickly indicates that it can propose a feasibly plan.

JANUARY 25, 2018 HEARING

At the hearing, the court continued the matter to 10:30 a.m. on March 1, 2018. Dckt. 150. The court ordered that any supplemental pleadings for Movant be filed on or before February 8, 2018, and any replies by Debtor in Possession be filed by February 22, 2018. Dckt. 154.

DEBTOR'S IN POSSESSION'S SUPPLEMENTAL OPPOSITION

Debtor in Possession filed a Supplemental Opposition on February 15, 2018. Dckt. 165. Debtor in Possession notes that Movant has not filed additional pleadings, and Debtor in Possession requests that the court consider the various pleadings that Debtor in Possession has filed in relation to the United States Trustee's Motion to Convert this case.

MARCH 1, 2018 HEARING

At the hearing, the court announced that the hearing was continued to 10:30 a.m. on April 5, 2018, pursuant to the parties' stipulation. Dckt. 187. The court also ordered that supplemental pleadings, if any, be filed by March 26, 2018. Dckt. 188.

DISCUSSION

No supplemental pleadings have been filed.

As indicated above, the present Motion suffers from several pleading issues. Before getting to the substance of the Motion, the court first addresses Movant's election to combine multiple claims for different types of relief in one motion.

Monthly Operating Report

The last Monthly Operating Report filed by Debtor in Possession is for January 2018. MOR filed February 14, 2018, Dckt. 156. It states that the Estate's actual revenues are $20,908.00 and that expenses are ($2,621.00). For the period from the filing of the case through January 2018, Debtor in Possession reports running a negative cash flow of ($14,861.00).

Multiple Claims for Relief Combined into One Motion

The court notes that this Motion attempts to join multiple claims for relief in one motion. The Motion seeks different types of relief, based on different legal authorities, in this one Motion. These multiple claims for relief are stated as:

A. Grant Relief from the Automatic Stay

B. Order Debtor to Turn Over Cash Collateral to Movant (sounding as a mandatory injunction)

C. Appoint a Chapter 11 Trustee

D. Dismiss the Case

E. Convert the Case to Chapter 7

Motion, p. 2:16–21. The first states a claim for relief arising under 11 U.S.C. § 362. The second appears to be requesting a mandatory injunction for Debtor in Possession to deliver collateral to Movant. The third distinct request for relief is the appointment of a trustee, dismissal of a case, or conversion to Chapter 7 (the court required to consider these three alternatives when presented with a motion seeking relief of any of the other two).

Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018 allow a party to join as many claims as it may have against an opposing party in a complaint. However, for the bankruptcy court's contested matter practice (motions and applications not made in an adversary proceeding), the United States Supreme Court has not included Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018. Federal Rule of Bankruptcy Procedure 9014(b). Though this court may make such Rule 7018 provisions applicable in a contested matter, it has not done so for this contested matter, and Movant has not requested such application of Rule 7018 in this Contested Matter. Federal Rule of Bankruptcy Procedure 9014 does not provide a mechanism for a party to unilaterally impose the application in a contested matter.

The reason for the Supreme Court not allowing a party to combine various different claims for relief into one motion, as opposed to a complaint, is founded on several very practical principles. First, in a contested matter, the hearing can be conducted within fourteen to twenty-eight days. LOCAL BANKR. R. 9014-1(f); FED. R. BANKR. P. 9006(d), 2002. This can be contrasted to an adversary proceeding in which the responsive pleadings are not due until thirty-days after the issuance of a summons, no substantive motion generally not heard until nine to twelve months into the adversary proceeding, and the trial being conducted eighteen to twenty-four months after the complaint is filed.

Second, a motion may be only between the debtor and movant, such as a motion for relief from the automatic stay, or it may be between the movant and the world, such as a motion to dismiss, convert, or appoint a trustee. Throwing different claims for different relief in one motion can create a procedural mess of a conflicting "maybe they are, but maybe they are not, parties in interest" situation.

Request for "Turn Over" of Property of the Bankruptcy Estate

Included in the prayer of the Motion, Movant demands that the court order Debtor in Possession (though the motion states to have "Debtor" turn over the property of the estate, the court presumes that Movant actually is referencing Debtor in Possession, who is actually in possession of property of the bankruptcy estate) turn over "Cash Collateral" to Movant. The Motion does not state what grounds exist and any legal authority for the court to order such a "turn over" of the cash collateral.

In the twenty-page Points and Authorities, Movant provides a two-page discussion of "cash collateral. Dckt. 82 at 9–10. In the two pages, the legal discussion (which does not constitute grounds stated with particularity in the motion) why the court "must" order that the cash collateral be "turned over" to Movant consists of :

> "Movant duly filed a Notice of Perfection pursuant to § 546(b) on April 24, 2017. See Doc. #14. No other creditors claim an interest in the rents generated by the Property. Accordingly, the Court should order the Debtor to turn over the Cash Collateral to Movant."

Id., at 2:18–21. That statement reads in the general nature of the now clearly disapproved assertion that 11 U.S.C. § 105(a) empowers a bankruptcy judge to order whatever he or she thinks "right," notwithstanding any legal authority for such exercise of federal judicial power. *Stern v. Marshall*, 564 U.S. 462 (2011).

The Supreme Court has expressly provided in Federal Rule of Bankruptcy Procedure 7001(7) that a request for injunctive relief, such as a mandatory injunction requiring an opposing party to do something, must be by adversary proceeding. An exception is a proceeding to compel the debtor to deliver property to the trustee or a proceeding under 11 U.S.C. § 554(b) (compelling abandonment of property by a trustee, which abandonment is then made to the debtor) or § 725 (disposition of property not otherwise administered by a Chapter 7 trustee).

Interestingly, the term "turnover" and the court issuing an order for "turn over" of property arises under 11 U.S.C. § 542 and § 543, in which by motion the bankruptcy trustee may obtain an order for other persons to "turn over" property of the estate to the trustee. Movant is not a trustee and is not entitled to assert rights to have property of the estate "turned over" to Movant by virtue of a motion filed with the court.

Review of Minimum Pleading Requirements for a Motion

As addressed above, the Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. Fed. R. Bankr. P. 9013. The Rule does not allow the motion to merely be a direction to the court to "read every document in the file and glean from that what the grounds should be for the motion." That "state with particularity" requirement is not unique to the Bankruptcy Rules and is also found in Federal Rule of Civil Procedure 7(b).

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. *See* 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. *See* 556 U.S. 662 (2009).

Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law and motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law and motion process. These include sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from the automatic stay, motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact to other parties in a bankruptcy case and to the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ind. 2009) (holding that a proper motion must contain factual allegations concerning requirements of the relief sought, not conclusory allegations or mechanical recitations of the elements).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the pleading with particularity requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." The standard for "particularity" has been determined to mean "reasonable specification."

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

Not stating with particularity the grounds in a motion can be used as a tool to abuse other parties to a proceeding, hiding from those parties grounds upon which a motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Federal Rule of Bankruptcy Procedure 9013 may be a further abusive practice in an attempt to circumvent Bankruptcy Rule 9011 by floating baseless contentions to mislead other parties and the court. By hiding possible grounds in citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be

representations to the court concerning any actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

Review of Points and Authorities Grounds for Relief from Automatic Stay

While inappropriate as a pleading device by Movant, the court has reviewed the portion of Movant's Memorandum of Points and Authorities relating to the request for relief from the automatic stay to see if there is anything in the nature of irreparable harm that has been inadequately pleaded by Movant. Movant presents the following six arguments for cause under 11 U.S.C. § 362(d)(1):

1. A confirmable plan is not possible;

2. The auction requirement of $7.8 million price demonstrates that Debtor in Possession is not reasonable about settling debts;

3. Debtor in Possession has purposely failed to pay property taxes;

4. Cash collateral payments have been irregular;

5. Continued property violations are negatively affecting the Property; and

6. Debtor in Possession's actions regarding the auction may have been harmful to the Property's value.

The court is unpersuaded by any of the six arguments presented by Movant. First, a confirmable plan may be possible in this case. Movant presents its first argument on the grounds that the Property valuation and Debtor in Possession income are too low to pay debts through a Plan. Debtor in Possession has countered by describing how there may be several tenants in the near future that will increase gross revenue dramatically enough to fund a plan. The court declines to rule prematurely that a plan is not possible when Debtor in Possession presents evidence that a plan is being finalized and that more income could be arriving shortly (once the court approves lease agreements).

Second, Movant's entire argument that the auction price was unreasonable is based upon an assertion that Debtor in Possession "was being greedy." Dckt. 82 at 12:21–22. Merely seeking to receive a higher bid than the liabilities in this case is not indicative of greediness, and Movant's assertion is not conclusive proof of any act that warrants granting relief from the automatic stay. Movant has not presented any support for its "greediness" argument.

Third, Debtor in Possession has argued that property taxes were paid, despite Movant's assertion that they were not. Additionally, Debtor in Possession argues that the delay in paying them was due to a question of whether there was authority to pay them under the cash collateral stipulation. The court's latest order approving the continued use of cash collateral allocates $3,800.00 in monthly expenses for county property taxes, estimated to be paid as $22,800.00 semi-annually. Dckt. 77.

Fourth, irregularity of payments is not actually argued as being a ground for relief. Debtor in Possession has demonstrated that it has cured all defaults, but regardless, Movant only asserts that there have been a few "problems" receiving payments. Movant does not actually argue that any of the problems justify the court granting relief from the automatic stay.

Fifth, while Movant argues that it does not have confirmation that the marijuana violations have been resolved and that other tidiness violations have been issued, Debtor in Possession has provided a substantial timeline of events demonstrating how all violations have been cured. Debtor in Possession even asserts that as of now there are no violations on the Property asserted by the City of Stockton.

Sixth, Movant argues that redacting the minimum price for the Property at auction and that "increasing the bids to $4.5 million and $5.5 million" may have dampened the bidding process. As before, that contention is unsupported by any factual or legal basis, and Movant does not actually argue that its unsupported speculation is worthy of the court granting relief.

Under 11 U.S.C. § 362(d)(2), Movant argues that there is no equity in the Property valued at $4,580,000.00 with encumbrances of $5,357,181.59. Movant also alleges that the Property is not necessary for an effective reorganization because they are not generating sufficient revenue. As Debtor in Possession has presented, there may a significant increase in revenue in the near future, and the Property is necessary to generate those leasehold funds.

As stated by the court at the prior hearing, Movant's Motion for Relief from the Automatic Stay is lacking and has been rebutted sufficiently, both for the first hearing and now again with the supplemental pleadings, for the court to determine that denying the Motion is appropriate. Debtor in Possession has shown that it is receiving timely rent from the Property's tenants, that taxes have been paid (aside from late fees), that a broker is sought to be employed to generate more income, and that it is moving toward presenting a plan of reorganization. Movant's grounds have each been countered.

The court does not reach or address the additional requested relief. Denial of the Motion is without prejudice.

Additional Issues Raised By the Motion

In Movant's twenty pages of arguments, citations, quotations, conjecture, and speculation (the Points and Authorities) there is a passing reference made to an issue that may be significant in this case. If Movant had prepared a motion to convert, appoint a trustee, or dismiss, the issue may have been identified and advanced for the court to consider.

The relevant comments include:

> United Cabinet Supply ("UCS"), an entity owned by Zhang (the president and responsible representative of the Debtor in Possession), occupies space at the Properties and pays $6,000 per month in rent. UCS and other tenants have been late on lease payments causing delayed cash collateral payments to Movant. (Tang Decl. ¶10.)

> The September Cash Collateral check was received by Movant's counsel on October 18, 2017, but the amount of the check was only $3,235.00. Debtor's counsel explained that UCS and JAS Trucking paid late. (Tang Decl. ¶10.)
>
> . . .
>
> As evident in the Statement of Financial Affairs, between August 5, 2016 and March 28, 2017, the Debtor paid Raymond Zhang ("Zhang") $344,409.37, which was within the one year period prior to filing this case. Zhang is a co-borrower on the Note and managing member of Debtor (See Declaration for Non-Individual Debtor, Docket #12, p. 1)."

Dckt. 14 at 4:5–10; 5:11–14.

The above, if proven, may well be a basis for concluding that Debtor and Mr. Zhang have irreconcilable conflicts and are unable to serve as Debtor in Possession. However, when just thrown into a motion for relief from the stay, they are lost in the clutter of twenty pages of points and authorities and a motion instructing the court to read everything else in the file to identify the actual grounds asserted.

Additional Issues Arising During the Pendency of this Contested Matter

On Schedule A/B, Debtor states under penalty of perjury that the Property securing Movant's claim has a value of $7,885,018. Dckt. 12 at 4, 7–8, 9. On its proof of claim, Movant uses Debtor's statement of value as the value of its collateral. Proof of Claim No. 3. Movant's claim is stated to be $4,522,031.36 as of the commencement of the case. In the "Mothorities," Movant asserts that the secured claim has grown to $4,751,480.00 as of November 2, 2017. Dckt. 82 at 9:4–5.

While Debtor in Possession has tried to sell (by internet auction) the collateral and pay the secured claim, that sale did not generate a buyer to pay an amount sufficient for Debtor in Possession to seek approval of a sale. Debtor in Possession reported that it did not attempt to lease the Property to any new tenants, having followed the advice of the internet real estate broker that buyers would prefer to buy the Property without any more tenants in place.

Debtor in Possession is allowing to lapse the authorization to use cash collateral. The current order (Dckt. 77) expires on January 31, 2018. Debtor in Possession did not file pleadings for a further extension of that order, nor has Debtor in Possession filed a new motion for authorization to use cash collateral.

As of February 1, 2018, Debtor in Possession will not be authorized to use cash collateral to pay any expenses relating to any of the Properties.

As this court has previously addressed, Raymond Zhang the principal of Debtor in Possession, is also the recipient of what may be a preferential transfer in the amount of $344,409.37. Though raised as a concern, the court cannot find in the file for this case Mr. Zhang and the counsel for Debtor in Possession addressing that conflict. Rather, the statute of limitations for avoiding the preference is ticking down. The

court did not and does not find persuasive Debtor in Possession's contention (it being presented by counsel for Debtor in Possession) that there will be more than enough time for a trustee, if one is appointed, to prosecute such a claim. That assertion all but demands the court immediately appoint a trustee to work to recover the monies. Mr. Zhang has not posted a bond or otherwise provided the Estate with any security for that obligation, to the extent it exists (after being asserted by the fiduciary Debtor in Possession or trustee for the Bankruptcy Estate).

In looking at the claims filed in this case, in addition to Movant there are:

A. Internal Revenue Service.....$16,047 Priority Claim (POC 1)

B. Franchise Tax Board.....$ 0 (POC 2)

On its Schedules executed under penalty of perjury by Mr. Zhang, Debtor in Possession also lists a secured claim owed to Wayne Bier in the amount of ($580,000), a property tax secured claim of ($26,078), and general unsecured claims of $9,000.00 to unrelated parties, a disputed unsecured claim for "fines" owed to the City of Stockton, and an unsecured debt of $33,657.93 owed to Raymond Zhang.

At the end of the day, the "real" economic players are Movant, Mr. Bier (whom we have not seen in this case), and Mr. Zhang (both as a creditor and possible "debtor" owing a preference obligation to the Bankruptcy Estate).

At the hearing, **xxxxxxxxxxxxxxxxxxxxxxxx**.

The court shall issue an 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 Relief from the Automatic Stay filed by East West Bank ("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 is **xxxxxxxxx**.
>
> All further and other relief beyond relief from the automatic stay is **xxxxxxxxxxxx**.

6. **17-22347-E-11** **UNITED CHARTER LLC**
Jeffrey Goodrich

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
4-7-17 [1]

Debtor's Atty: Jeffrey J. Goodrich

Notes:
Continued from 3/1/18. Jeffrey Goodrich (counsel for the Debtor in Possession), Matthew Olson (or other attorneys appearing from his firm appearing as counsel for Raymond Zhang), Raymond Zhang, and Cindy Zhang (and any attorney representing Cindy Zhang), and each of them, shall appear in person at the 10:30 a.m. continued Status Conference on April 5, 2018. No Telephonic Appearances are permitted for the persons identified above.

Operating Report filed: 3/15/18

APRIL 5, 2018 STATUS CONFERENCE

At the Status Conference, **xxxxxxxxxxxxxxxxx**

7. **17-25403-E-13** **BYLLIE DEE**
Bert Carter

STATUS CONFERENCE RE: MOTION TO VACATE DISMISSAL OF CASE
3-27-18 [148]

DEBTOR DISMISSED: 03/26/2018

APPEARANCE OF BYLLIE DEE, THE CHAPTER 13 DEBTOR, AND BERT CARTER, JR., DEBTOR'S PURPORTED COUNSEL, REQUIRED AT THE APRIL 5, 2018 POST-DISMISSAL STATUS CONFERENCE

NO TELEPHONIC APPEARANCES PERMITTED

Debtor's Atty: Bert Carter, Jr.

Notes:
Set by court order filed 3/30/18 [Dckt 155]; Byllie Dee (Debtor) and Bert Carter, Jr. (Attorney for Debtor) to appear in person, no telephonic appearances permitted.

REVIEW OF CASE

Byllie Dee, the Chapter 13 Debtor ("Debtor") commenced the above captioned bankruptcy case on August 15, 2017. The bankruptcy case was dismissed by order of this court on March 26, 2018. Order, Dckt. 145. The order was entered after continuance of the original November 1, 2017 hearing, the continued January 17, 2018 hearing, and continued February 21, 2018 hearing. The final hearing was conducted on March 21, 2018. All hearings on the Motion to Dismiss were conducted at 10:00 a.m. The court's Findings of Fact and Conclusions of Law in dismissing the Chapter 13 case are set out in the Civil Minutes from the March 21, 2018 hearing, with a copy of the Civil Minutes attached hereto as Addendum A.

On March 27, 2018, a document titled Motion For an Order Vacating Dismissal and Reinstating Debtor's Chapter 13; Memorandum of Points and Authorities ("Motion") was filed. Dckt. 148. In the upper left-hand corner of the pleading are the name and address of lawyer Bert Carter, Jr., identifying him as "Attorney for Debtor Byllie Dee." No substitution of attorney has been filed replacing Debtor, in *pro se*, with Attorney Carter. No hearing was set or noticed for the document titled Motion.

The document titled Motion does not bear the signature of Attorney Carter, but merely an "/s/ Bert Carter Jr." typed name. *Id.* at 3:18. Federal Rule of Bankruptcy Procedure 9011 requires that all pleadings be signed.

> (a) Signature. **Every** petition, **pleading**, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, **shall be signed** by at least one

> attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. **An unsigned paper shall be stricken** unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

FED. R. BANKR. P. 9011 (emphasis added). This is the same signature requirement imposed under Federal Rule of Civil Procedure 11(a), for which a typed name is not sufficient to meet the requirements of this Rule. *Becker v. Montgomery*, 532 U.S. 757, 764 (2001); *Giebelhaus v. Spindriff Yachts*, 938 F.2d 962, 966 (9th Cir. 1991).

The "/s/ name of attorney" signature convention is allowed for electronic filing of documents by attorneys. However, such electronic filing is permitted only pursuant to that attorney being registered to electronically file documents, the documents being electronically filed, and the certifications and obligations arising under Local Bankruptcy Rule 9005.1-1 and Federal Rule of Bankruptcy Procedure 5005(a)(2).

The document titled Motion stated to be filed by Attorney Carter was not filed electronically, but physically delivered to the court's public service counter. As of March 30, 2018, the court does not have in front of it a motion, properly signed, for which relief may be granted.

Review of Grounds Stated in Document Titled Motion

The unsigned document titled Motion seeks relief from the order dismissing this case. The relief if sought pursuant to Federal Rule of Civil Procedure 60(b) and Federal Rule of Bankruptcy Procedure 9024. No declaration is provided in support of the unsigned document titled Motion was filed.

In the document titled Motion, it is stated that relief from the dismissal should be granted based on the following summarized grounds:

A Bert Carter, Jr. is now Debtor's attorney.

B. Bert Carter, Jr. has suffered a major medical illness rendering him unable to attend the hearing on March 21, 2018.

C. Debtor told Attorney Carter that Debtor would appear in Attorney Carter's place at the March 21, 2018 hearing.

D. Debtor thought he was supposed to appear at 1:30 p.m. on March 21, 2018, not at 10:00 a.m. as for the prior three hearings on the Motion to Dismiss.

E. It was Debtor's "mistake, inadvertence, surprise, or excusable neglect" that caused Debtor to not appear for Attorney Carter on March 21, 2018.

F. Debtor has cured the $667.00 default, Debtor has advised the Chapter 13 trustee that he is not required to file tax returns, that Debtor advised the

> court that he does not have any pay advices for income in the sixty days preceding the filing of this case, and Debtor has provided the Chapter 13 trustee with his Social Security number.

As noted, while attorney Bert Carter, Jr. makes factual assertions in the document titled Motion, there is no evidence submitted by attorney Bert Carter, Jr. to support such factual contentions.

In the document titled Motion, reference is made to Federal Rule of Civil Procedure 60(b) allowing for relief for mistake, inadvertence, surprise, or excusable neglect. It also references the requirement that one must show there being a sound defense or meritorious claim before vacating a prior order or judgment.

Attorney Bert Carter, Jr. and Debtor appear to ignore the meritorious claim or defense requirement. In the twelve pages of findings of fact and conclusions of law set forth in the Civil Minutes (Dckt. 144), the court addresses more than merely the failure of Debtor or his counsel to appear at the hearing, the monetary default, tax returns, pay advices, and Social Security number. These findings of fact and conclusions of law address gross deficiencies of any plan that Debtor was attempting to prosecute in this bankruptcy case. The court addressed the repeated, non-productive bankruptcy cases filed by Debtor, citing to this court's ruling in connection with a motion for relief. Civil Minutes, Dckt. 79.

In dismissing this bankruptcy case, the court's findings and conclusions include the following:

> **Decision**
>
> Debtor purports to have substantial real property, a Rolls Royce, and a Maserati, but has been repeatedly unable to prosecute bankruptcy cases. In this case, he fell six months behind in monthly payments, and then in one month produced the reduced amount, without explanation.
>
> Debtor does not appear to be able to prosecute this case in good faith, despite multiple attempts. While stating to the court that he desired legal representation, no attorney has been substituted into this case as Debtor's counsel. He continues to prosecute this case himself, with numerous deficiencies in his pleadings that prevent him from getting a plan confirmed.
>
> Though having past due property taxes on the Oakland Property, no provision is made to cure the arrearage. Though there is an arrearage on the Louisiana Property, no provision is made to cure the arrearage.
>
> On his Petition, Debtor states that he has also used the name James Larson in the past eight years. When checking the court's files for other cases by Byllie Williams, using his Social Security Number, the search does not disclose any other cases.

On his Petition, Debtor states that he has had three prior cases in the last eight years in the Northern District of California—4:16-bk-42054, 4:15-bk-42180, and 4:15-43169. The court discusses these cases in the Civil Minutes for the prior hearing on the Motion. Dckt. 26. After reviewing those cases and Debtor's conduct in this case, the court stated:

> "Though Debtor's efforts in this case appear questionable, the court will afford Debtor the opportunity to obtain the counsel which he said he desires. Because of the apparently high value vehicles which are in, or are purported to have transited through, the Debtor and the various bankruptcy estate, the court will consider whether dismissal or conversion is the proper relief to be granted pursuant to this Motion if the Debtor fails in the prosecution of this case in good faith."

Civil Minutes, p. 4, Dckt. 26.

Cause exists to dismiss this case. While Debtor has enjoyed the benefits of bankruptcy in multiple cases, in multiple districts, he has shown he cannot prosecute a case as required under the Bankruptcy Code. Though preparing an extensive legal and factual opposition (due to its length and detail, it could not have been prepared after Debtor learned of the tentative ruling posted the day before the February 13, 2018 hearing on the motion for relief), Debtor waited to file it until the day before the hearing, and then have in hand an extensive motion to vacate, with a legal points and authorities that would rival many attorneys. This appears to be a lying-in-wait strategy intended to delay prosecution of the case and deflect any judicial determination of the parties rights.

Civil Minutes, Dckt. 144 at 11–12. The document titled Motion does nothing to address how Debtor will now change his ways and prosecute a bankruptcy case in good faith.

APRIL 5, 2018 STATUS CONFERENCE

At the hearing, **xxxxxxxxxxxxxxxxxxxx**.