

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

April 12, 2017, at 10:00 a.m.

1.	<u>17-90213</u>-E-12	J & B DAIRY	MOTION TO USE CASH COLLATERAL
	PBG-1	Patrick Greenwell	O.S.T.
			4-6-17 [16]

*******MATTER TO BE HEARD IN COURTROOM #34, SACRAMENTO COURTHOUSE**

**APPEARANCE OF JOHN KNUTSON, BRENDA CALHOUN
KNUTSON, AND PATRICK GREENWELL REQUIRED FOR THE
APRIL 12, 2017 HEARING**

NO TELEPHONIC APPEARANCES PERMITTED

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)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 12 Trustee, parties requesting special notice, and Office of the United States Trustee on April 7, 2017. By the court's calculation, 5 days' notice was provided. The court specially set an initial hearing for 10:00 a.m. on April 12, 2017. Dckt. 24.

The Motion for Authority to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and 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 -----
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The Motion for Authority to Use Cash Collateral is XXXXX.

On March 17, 2017, J & B Dairy (“Debtor”) commenced this voluntary Chapter 12 Case. On April 6, 2017 (twenty days later), J & B Dairy, as the Debtor in Possession (“ΔIP”), filed a Motion for Authority to Use Cash Collateral. Motion, Dckt. 16. This is not the first, or even second, bankruptcy case filed by Debtor. The prior cases and their dispositions are summarized in the chart below:

Case		
17-90129 Chapter 12 Case Atty: Patrick Greenwell	Filed: February 23, 2017 Dismissed: March 15, 2017	
	Dismissed for failure to timely file schedules and statement of financial affairs. The documents were required to be filed by March 9, 2017. Entry of the order dismissing was delayed one week, with Debtor not filing a motion for extension of time to file documents under after the (delayed) order was entered.	
16-91096 Chapter 12 Case Atty: David Johnston	Filed: December 9, 2016 Dismissed: February 13, 2017	
	Dismissed for failure to timely file schedules and statement of financial affairs. Documents were originally due by December 23, 2016, with the court having entered an order to extend the filing deadline to January 13, 2017. 16-91096; Dckt. 20. The order dismissing the case was not entered until February 13, 2017.	
16-90923 Chapter 12 Case Atty David Johnston	Filed: October 7, 2016 Dismissed: December 7, 2016	
	Dismissed for failure to timely file schedules and statement of financial affairs. Documents were originally due by October 21, 2016, with the court having entered an order to extend the filing deadline to January November 14, 2016. 16-90923; Dckt. 14. The order dismissing the case was not entered until December 7, 2016.	

**SCHEDULES AND STATEMENT OF FINANCIAL AFFAIRS
FILED IN CURRENT CASE – 17-90213**

Debtor has filed its Schedules and Statement of Financial Affairs in the current Bankruptcy Case. The financial information provided in the Schedules, Dckt. 12, is summarized as follows:

A. Schedule A/B Real Property

1. Debtor owns no real property.

B. Schedule A/B Personal Property

1. Financial Institution Accounts.....\$ 225
2. Milk in Production.....\$ 12,500
3. Feed and Growing Feed.....\$225,000
4. Cows, Breeding Bulls, Calves, Heifers.....\$825,000
5. Equipment (one wheel loader).....\$ 80,000
6. Misc. Office Equipment.....\$ 3,500

C. Schedule D Secured Claims

1. Bank of Stockton (Feed, Cows, Cash).....(\$777,814)
 - a. Debtor's Statement of Collateral Value.....\$ 0.00
2. Bank of Stockton (Milking Cows, Breeding Bulls, Cows and Heifers).....(\$799,100)
 - a. Debtor's Statement of Collateral Value.....\$825,000
3. Bank of Stockton (Feed and Growing Feed)....(\$799,100)
 - a. Debtor's Statement of Collateral Value.....\$225,000

D. Schedule G Executory Contracts and Leases

1. Lease of 8667 Rodden Road Property, Milking Equipment, Milk Tanks, Refer Units, Milking Parlor, Etc
 - a. Lessor Teresina N. Silva

Debtor's Statement of Financial Affairs (Dckt. 12) includes the following information"

A. Part 1: Gross Revenues From Business

1. YTD (1/1-3/17 Filing).....\$ 65,536
2. 2016.....\$ 1,005,865
3. 2015.....\$ 2,337,436

B. Part 2: Payments Made Within 90 Days of Bankruptcy Case in excess of \$6,425 to any one person

1. No payments listed for rent.
2. Payments for 90 Days of Operation.....\$47,268.08

C. Part 2: Payments Made Withing One Year to Insiders

1. Payments Total.....\$59,372.78

D. Part 3, Question 17, Identify of Partners, Shareholders, Officers

1. John Knutson (General Partner)
2. Brenda Calhoun Knutson (General Partner)

A review of the Bankruptcy Petition filed by Debtor contains conflicting information. John Knutson, a General Partner, has stated under penalty of perjury in the Petition that Debtor's liabilities are \$0.00 to \$50,000, and Debtor's assets are \$0.00 to \$50,000. Dckt. 1 at 3.

REVIEW OF MOTION TO USE CASH COLLATERAL

Debtor's "Motion" to use cash collateral is a hybrid pleading consisting of the motion itself, which must contain the grounds stated with particularity upon which the relief is based (Fed. R. Bankr. P. 9013) and the points and authorities, which contains the citations, quotations, arguments, conjecture, and speculation advanced by counsel for the ΔIP. Motion, Dckt. 16. Under the Local Bankruptcy Rules, the motion must be a separate pleading from the points and authorities, which are separate pleadings from each declaration, which are separate pleadings from the exhibits (which may be combined into one document). L.B.R. 9004-1, Revised Guidelines For Preparation of Documents.

In light of the emergency nature of a cash collateral motion involving a dairy, the court will consider the "Mothorities," doing the work to identify and separate the grounds (which are being asserted subject to the certifications of Fed. R. Bankr. P. 9011) from the citations, quotations, speculation, and argument advanced in the Points and Authorities. Neither counsel nor the ΔIP should presume that the court would do this in future motions.

The grounds stated in the "Motion" are:

- A. "4. The Debtor is a California General Partnership with two General Partners, John Knutson and his wife Brenda Knutson. The Debtor's primary business involves a commercial dairy producing non GMO milk and eventually non GMO cheese."

- B. "5. Prior to filing this case, the Debtor has one secured lender with a lien on cash collateral. Specifically, Bank of Stockton holds two different Agricultural Loans made by J & B Dairy. . . The loans are evidenced by two different promissory notes. . . As security for the loan, J & B executed two Agricultural Security Agreements pledging their assets as well as commodities and cash proceeds from their sales.
- C. "6. Bank of Stockton has called their loans and initiated state court actions to recover their collateral. This would put J & B Dairy completely out of business. The Debtor has filed this case to restructure its debt and pursue a traditional chapter 12 reorganization plan by paying the liquidation value to its unsecured creditors and to service its debts to Bank of Stockton over time."
- D. "7. As a result of Bank of Stockton's collection activities, milk and cheese production are down. With the automatic stay in place and with the use of cash collateral, Debtor estimates, based upon decades of experience, that they can be back in good production in a matter of months. They also anticipate a positive cash flow in 2 - 3 months. See Budget submitted herewith as Exhibit "A"."
- E. "9. As set forth in the budget, incorporated herein and submitted as Exhibit 'A', the Debtor requires the use of cash collateral to fund all necessary operating expenses of the Debtor's business."
- F. "10. The Debtor will suffer immediate and irreparable harm if it is not authorized to use cash collateral to fund the expenses set forth in the Budget. Absent such authorization, the Debtor will not be able to maintain and protect the property."
- G. "11. The Bank of Stockton will also suffer immediate and irreparable harm if Debtor is not authorized to use cash collateral to fund expenses set forth in the Budget. The heard is not being adequately fed and milk production is down because of the Bank's actions. Use of cash collateral ensures adequate food for the heard and increased milk production."
- H. "22. The continued operation of the Debtor's business will preserv [sic] it going concern value, enable the Debtor to capitalize on that value through a reorganization strategy, and ultimately facilitate the Debtor's ability to confirm a Chapter 12 plan. If the Debtor is not allowed to use cash collateral, it will be unable to operate and potentially cause harm to the property."
- I. "23. The Debtor will use the cash collateral during the interim cash collateral period to feed and care for the heard, produce product for sale, utilities and otherwise maintain and protect the business."
- J. "25. If the Debtor cannot use cash collateral, it will be forced to cease operations. By contrast, granting authority will allow the Debtor to maintain operations and preserve

the going concern value of its business which will inure to the benefit of any secured creditors and all other creditors.”

Motion, Dckt. 16.

On Exhibit A (Dckt. 18) ΔIP lists the expenses for which the use of cash collateral is sought, but does not disclose any income information. The expense information (which the court treats as part of the grounds stated in the Motion for purposes of Fed. R. Bankr. P. 9013) is summarized as follows:

- A. Variable Expenses, including buying livestock, veterinary, and “other expenses” total monthly.....(\$52,978)
- B. Fixed Expenses (Insurance, Taxes, Accounting) total monthly.....(\$35,791)

There is no clear line item on Exhibit A stating the monthly cost for feed for the cattle. There is no clear line item for the cost of growing and maintaining feed for the cattle. Exhibit A does not include any compensation for the General Partners, whose extensive efforts would be required for any reorganization.

The specific expenses are:

	<u>Monthly</u>
VARIABLE EXPENSES	
Livestock Purchase	\$13,816.00
Breeding and Testing	\$466.00
Fertilizers and Chemicals	\$0.00
Fuel and Oil	\$1,491.00
Labor	\$16,026.00
Machine Hire and Outside Services	\$4,286.00
Repairs and Maintenance	\$2,050.00
Supplies	\$2,982.00
Utilities	\$3,168.00
Veterinary and Animal Care	\$2,078.00
Veterinary - BST	\$0.00
Veterinary - Pharmaceuticals	\$3,727.00
Other Expenses	<u>\$2,888.00</u>

Total Variable Expenses	\$52,978.00
FIXED EXPENSES	
Partners' Salaries and Personal Draws	\$0.00
Insurance - General	\$3,171.00
Rent	\$12,000.00
Taxes and Licenses	\$4,360.00
Legal and Accounting	\$600.00
Cow Lease	<u>\$15,660.00</u>
Total Fixed Expenses	35,791.00
INTEREST EXPENSES	
Unsecured Creditors	\$0.00
<u>Secured Creditors</u>	<u>\$4,186.00</u>
Total Interest Expenses	\$4,186.00
PRINCIPAL COSTS	
Unsecured Creditors	\$17,117.00
Secured Creditors	\$12,114.00
Total Principal Costs	\$29,231.00
TOTAL EXPENSES	\$122,186.00

John Knutson, one of the General Partners, has provided his declaration in support of the Motion. Dckt. 19. The testimony in his declaration includes the following:

- A. "2. I am sixty eight years old and have worked at, or owned, multiple dairies my entire adult life. I am knowledgeable and experienced about all aspects of dairy production and operation."
- B. "7. As a result of Bank of Stockton's collection activities, milk and cheese production are down. With the automatic stay in place and with the use of cash collateral, I

estimate, based upon decades of experience, that we can be back in good production in a matter of months. I also anticipate a positive cash flow in 2 - 3 months. See Budget submitted herewith as Exhibit "A".

- C. "9. As set forth in the budget, incorporated herein and submitted as Exhibit 'A', we require the use of cash collateral to fund all necessary operating expenses of our business."
- D. "10. J & B Dairy will suffer immediate and irreparable harm if it is not authorized to use cash collateral to fund the expenses set forth in the Budget. Absent such authorization, we will not be able to maintain and protect the property."

Declaration, Dckt. 19.

USE OF CASH COLLATERAL ISSUES TO BE ADDRESSED

Neither in the present Motion nor the Declaration does the DIP address how it will have operated, without the use of cash collateral, for the twenty-six (26) days from the March 17, 2017 filing to the April 12, 2017 hearing date set by the court for an initial hearing on the Motion to Use Cash Collateral. The present Motion does not seek any retroactive authorization to use cash collateral. The Statement of Financial Affairs states that no significant expenses have been paid in the ninety-days preceding the filing of this bankruptcy case.

In looking at the prior filed cases:

- A. In the prior case, 17-90129, Debtor was in that Chapter 12 case for twenty (20) days and did not seek authorization to use cash collateral.
- B. In the prior-prior case, 16-91096, Debtor was in that Chapter 12 case for forty-nine (49) days and did not seek authorization to use cash collateral.
- C. In the prior-prior-prior case, 16-90923, Debtor was in that Chapter 12 case for sixty-one (61) days and did not seek authorization to use cash collateral.

No explanation is provided as to how since October 7, 2016, when the first of the four recent bankruptcy cases was filed, Debtor has operated without using any cash collateral.

It also appears that Debtor has not paid any rent, for at least the 90 days prior to the commencement of this case (no payments to the named lessor stated on the Statement of Financial Affairs). No claim is listed for the Lessor on Schedule F. The Lessor, Teresina Silva, to whom the Debtor states that it has a lease (Schedule H) and owes \$12,000.00 a month in rent (Exhibit A) is not even listed on the Verification of Master Mailing List filed by Debtor (Dckt. 4), which has been signed by John Knutson.

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

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

The Motion for Authority to Use Cash Collateral filed by Debtor 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 **xxxxxx**.

2. [15-90358](#)-E-11 LAWRENCE/JUDITH SOUZA MOTION BY ANTHONY ASEBEDO TO
MHK-22 Anthony Asebedo WITHDRAW AS ATTORNEY
2-27-17 [[506](#)]

*****MATTER TO BE HEARD IN COURTROOM #34, SACRAMENTO COURTHOUSE

**APPEARANCE OF LAWRENCE SOUZA & JUDITH SOUZA,
ANTHONY ASEBEDO, AND DAVID MEEGAN REQUIRED FOR THE
APRIL 12, 2017 HEARING**

NO TELEPHONIC APPEARANCES PERMITTED

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)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on April 10, 2017. By the court's calculation, 2 days' notice was provided. The court specially set this matter for hearing on 2 days' notice. Dckt. 545.

The Motion to Withdraw as Attorney was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and 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 initial hearing on the Motion to Withdraw as Attorney having been conducted, the hearing is continued to 10:30 a.m. on May 4, 2017.

Meegan, Hanschu & Kassenbrock ("Movant"), attorney of record for Lawrence Souza and Judith Souza ("Debtor in Possession"), filed a Motion to Withdraw as Attorney as Debtor in Possession's counsel in the bankruptcy case. Movant states the following:

1. Movant has not received prompt or complete responses to communications with and requests for information from Debtor in Possession.
2. Movant and Debtor in Possession have differed about the strategy and conduct of the case to the point that routine tasks become unreasonably difficult.

DEBTOR IN POSSESSION'S OPPOSITION

Debtor in Possession filed an Opposition on March 21, 2017. Dckt. 514. Debtor in Possession argues that withdrawal should not be allowed because Movant has been involved in numerous transactions throughout this case, and any change in counsel at this time would incur more expenses for the Estate.

Debtor in Possession believes that communication was hindered because their primary contact with Movant was through paralegal Mary Gillis, who was replaced by Anastasia Hoang. Ms. Hoang, Debtor in Possession argues, then moved to Fitzgerald, Felderstein, Willoughby and Pazcuzzi, LLP, which represents David Flemmer as trustee in the Souza Propane, Inc. case. Debtor in Possession argues that there was a delay in communication while they determined if there was a conflict of interest from the transfer.

Debtor in Possession admits that they have differed with Movant about case strategy and state that they “need to assume a more global perspective than that required of [Movant].” Debtor in Possession states that they “are often personally involved in working with prospective buyers of real estate, realtors and property management to expedite and achieve the best results for the benefit of the estate, requiring . . . extra time and energy.”

If the Motion is granted, Debtor in Possession states that they will need more time to retain new counsel, and they “suggest moving any decision regarding this situation to the already scheduled Status Hearing on August 24, 2017, at 2:00 P.M.”

ORDER SPECIALLY SETTING AN INITIAL HEARING

The court issued an Order on April 10, 2017, specially setting an initial hearing on this matter. Dckt. 545. The court recognized that much has been accomplished in this case and determined that an initial hearing was necessary to understand why communication has failed between Debtor in Possession and their counsel.

The court ordered the personal, in-court appearances of Lawrence Souza, Judith Souza, Anthony Asebedo, and David Meegan.

APPLICABLE LAW

District Court Rule 182(d) governs the withdrawal of counsel. Local Bankr. R. 1001-1(C). The District Court Rule prohibits the withdrawal of counsel leaving a party *in propria persona* unless by motion noticed upon the client and all other parties who have appeared in the case. E.D. Cal. L.R. 182(d). The attorney must provide an affidavit stating the current or last known address or addresses of the client and

efforts made to notify the client of the motion to withdraw. *Id.* Leave to withdraw may be granted subject to such appropriate conditions as the Court deems fit. *Id.*

Withdrawal is only proper if the client's interest will not be unduly prejudiced or delayed. The court may consider the following factors to determine if withdrawal is appropriate: (1) the reasons why the withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the harm withdrawal might cause to the administration of justice; and (4) the degree to which withdrawal will delay the resolution of the case. *Williams v. Troehler*, No. 1:08cv01523 OWW GSA, 2010 U.S. Dist. LEXIS 69757 (E.D. Cal. June 23, 2010). FN.1.

FN.1. While the decision in *Williams v. Troehler* is a District Court case and concerns Eastern District Court Local Rule 182(d), the language in 182(d) is identical to Local Bankruptcy Rule 2017-1.

It is unethical for an attorney to abandon a client or withdraw at a critical point and thereby prejudice the client's case. *Ramirez v. Sturdevant*, 26 Cal. Rptr. 2d 554 (Cal. Ct. App. 1994). An attorney is prohibited from withdrawing until appropriate steps have been taken to avoid reasonably foreseeable prejudice to the rights of the client. *Id.* at 559.

The District Court Rules incorporate the relevant provisions of the Rules of Professional Conduct of the State Bar of California ("Rules of Professional Conduct"). E.D. Cal. L.R. 180(e).

Termination of the attorney-client relationship under the Rules of Professional Conduct is governed by Rule 3-700. Counsel may not seek to withdraw from employment until Counsel takes steps reasonably foreseeable to avoid prejudice to the rights of the client. Cal. R. Prof'l Conduct 3-700(A)(2). The Rules of Professional Conduct establish two categories for withdrawal of Counsel: either Mandatory Withdrawal or Permissive Withdrawal.

Mandatory Withdrawal is limited to situations where Counsel (1) knows or should know that the client's behavior is taken without probable cause and for the purpose of harassing or maliciously injuring any person and (2) knows or should know that continued employment will result in violation of the Rules of Professional Conduct or the California State Bar Act. Cal. R. Prof'l Conduct 3-700(B).

Permissive withdrawal is limited to certain situations, including the one relevant for this Motion:

(1) The client

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively.

Cal. R. Prof'l Conduct 3-700(C)(1)(d).

DISCUSSION

As a ground for the Motion to Withdraw as Attorney, Movant states that Debtor in Possession has not communicated and provided all information to Movant. Anthony Asebedo states in his declaration:

Over the course of the last several months, the Souzas have increasingly failed to respond to my requests for information and instructions necessary for administration of the chapter 11 case. My efforts to resolve this difficulty by way of repeated e-mail and telephone communications have not been productive. In addition, there have been disagreements between us in regard to the strategy and conduct of the chapter 11 case. These circumstances have caused the amount of attorney time to handle otherwise simple tasks to be unreasonably high and have rendered it unreasonably difficult for [Movant] to carry out its representation of the Souzas' bankruptcy estate.

. . . .

Despite its desire to withdraw as counsel, [Movant] continued to represent the Souzas after October 2015. I have been [Movant's] attorney responsible for providing the legal services to the estate, with the aim of moving the chapter 11 case to a satisfactory conclusion. But during the last several months, differences regarding the strategy for the chapter 11 case and the conduct of the case have continued to occur. Further, the Souzas have continued to fail to provide certain information I have requested a number of times, which failure has spanned a period of months.

Dckt. 508.

Movant does not discuss any prejudice his withdrawal as a counsel will or will not cause or harm it might or might not have on administration of justice. Movant pleads that it is unaware of any adversary proceeding "requiring . . . immediate attention." Dckt. 506. A review of the docket shows that there are no adversary proceedings associated with this bankruptcy case. Movant asserts that it will represent Debtor in Possession through the hearing on this Motion and the U.S. Trustee's motion to convert the case to Chapter 7.

Despite Debtor in Possession's argument that Movant should not be allowed to withdraw because it has been involved in numerous transactions, Debtor in Possession has not responded to why it has not provided information Movant. Movant cannot effectively provide legal representation if it has not been provided with all necessary information.

Under California Rule of Professional Conduct 3-700(C)(1)(d), Debtor in Possession's conduct, such as the lack of timely and full response to correspondence from the Movant is hindering Movant's ability to carry out its employment and duties effectively.

The court has continued the U.S. Trustee's Motion to Convert or Dismiss this case to 10:30 a.m. on May 4, 2017. At the initial hearing, **xxxxxx**.

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 Withdraw as Attorney filed by Debtor in Possession's Counsel 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 initial hearing on the Motion to Withdraw as Attorney is concluded, and the hearing on this Motion is continued to 10:30 a.m. on May 4, 2017.