

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Michael S. McManus  
Bankruptcy Judge  
Sacramento, California

August 6, 2018 at 10:00 a.m.

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1. 17-26125-A-11 FIRST CAPITAL RETAIL, MOTION TO  
GEL-25 L.L.C. APPROVE COMPENSATION OF FINANCIAL  
ADVISOR  
7-9-18 [456]

**Tentative Ruling:** The motion will be granted in part.

Donald Stukes, financial advisor for the estate, has filed his first and final motion for approval of compensation.

Administrative expense creditor, Westfield, L.L.C., opposes the motion to the extent it seeks payment of the requested compensation, given that the estate is administratively insolvent at this time.

The requested compensation consists of \$12,848.75 in fees and \$0.00 in expenses. This motion covers the period from December 3, 2017 through April 12, 2018. The court approved the movant's employment as the estate's accountant on December 20, 2017. In performing its services, the movant charged an hourly rate of \$275.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses." The movant's services included, without limitation: facilitating communication between the debtor and DIP lenders, assisted the debtor in negotiations with the eventual purchaser of the debtor's assets, responded to questions about the debtor's assets, assisted the debtor with formulating the agreement with the buyer, assisted the debtor with closing the sale of its assets, and assisted the debtor with general financial analysis issues.

The court concludes that the compensation is for actual and necessary services rendered in the administration of this estate. The compensation will be approved.

The court will not permit payment of the compensation at this time, however, given that the estate is administratively insolvent and other administrative expense claimants have not been paid.

2. 17-26125-A-11 FIRST CAPITAL RETAIL, MOTION FOR  
GEL-27 L.L.C. ENTRY OF AN ORDER APPROVING  
RELEASE AGREEMENT  
O.S.T.  
7-26-18 [470]

**Tentative Ruling:** The motion will be granted in part.

August 6, 2018 at 10:00 a.m.

The debtor in possession, the buyer of the virtually all of the debtor's assets, 13th Floor/Pilot, L.L.C., and two of the debtor's former landlords, Arden Fair Associates, L.P. and Macerich Vintage Faire Limited Partnership, request approval of a settlement agreement resolving disputes concerning the assumption and assignment of two commercial leases formerly owned by the debtor, at the Arden Fair and Vintage Faire malls. Prior to the sale of the debtor's assets to Pilot, the landlords had filed unlawful detainer actions and obtained judgments for possession against the debtor. In addition, the settlement agreement resolves a dispute over alleged collusion and interference with contractual relationships involving the landlords and other prospective tenants.

The movants also seek waiver of the stay of Fed. R. Bankr. P. 6004(h).

Under the terms of the compromise, Vintage Faire and Pilot have agreed on a new lease of the Vintage Faire mall premises, formerly occupied by the debtor. As part of the agreement between Vintage Faire and Pilot, Pilot will pay \$83,133.83 to Vintage, which includes curing outstanding back rent through April 30, 2018 (\$51,653.99), paying rent for May 2018 (\$15,739.92), and paying rent for June 2018 (\$15,739.92). Vintage Faire will withdraw its proof of claim against the bankruptcy estate. The parties will work on concluding the pending unlawful detainer action brought by Vintage Faire, including dismissal of the pending forfeiture avoidance motion. The debtor and Pilot will remove all property from the Arden Fair premises. The parties will exchange mutual general releases as to any disputes involving the debtor's leases with the landlords, the premises the debtor had leased from the landlords, the unlawful detainer actions, the bankruptcy case, or the sale of the debtor's assets in the bankruptcy case. The releases do not cover disputes involving the new lease between Vintage Faire and Pilot.

11 U.S.C. § 1107(a) provides that a debtor-in-possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee." This includes the trustee's right to move for approval of a compromise or settlement. Hence, on a motion by a debtor-in-possession and after notice and a hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. In re A & C Properties, 784 F.2d 1377, 1381 (9<sup>th</sup> Cir. 1986). The court must consider and balance four factors: 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in the matter of collection; 3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and 4) the paramount interest of the creditors with a proper deference to their reasonable views. In re Woodson, 839 F.2d 610, 620 (9<sup>th</sup> Cir. 1988).

The court concludes that the Woodson factors balance in favor of approving the compromise. That is, given that all involved parties agree to the resolution of the disputes, given the need for finality of the debtor's disputes with its landlords, and given the inherent costs, risks, delay and inconvenience of further litigation, the settlement is equitable and fair.

Therefore, the court concludes the compromise to be in the best interests of the creditors and the estate. The court may give weight to the opinions of the trustee / debtor in possession, the parties, and their attorneys. In re Blair, 538 F.2d 849, 851 (9<sup>th</sup> Cir. 1976). Furthermore, the law favors compromise and not litigation for its own sake. Id. Accordingly, the motion will be granted.

The court is not convinced that the 14-day stay of Fed. R. Bankr. P. 6004(h) applies because the court is not authorizing use, sale, or lease of property by the bankruptcy estate. As such, there is no need to waive that stay.

3. 17-26125-A-11 FIRST CAPITAL RETAIL, MOTION TO  
18-2030 L.L.C. RBS-5 APPROVE COMPENSATION OF  
FIRST DATA MERCHANT SERVICES PLAINTIFF'S ATTORNEY  
L.L.C. V. MCA RECOVERY, L.L.C. ET AL 7-5-18 [61]

**Final Ruling:** At the request of the parties, the hearing is continued to August 20, 2018 at 10:00 a.m. Docket 87.

4. 17-26036-A-7 PAMELA FREDRICK ORDER TO  
17-2176 SHOW CAUSE  
FREDRICK V. UNITED STATES OF 7-6-18 [35]  
AMERICA DEPARTMENT OF EDUCATION

**Tentative Ruling:** The adversary proceeding will be dismissed.

The court issued this order to show cause because of the plaintiff's failure to prosecute this case. The plaintiff filed the original complaint on September 18, 2017. The plaintiff filed an amended complaint on November 9, 2017. One of the defendants, Navient Solutions, L.L.C. was dismissed. Docket 28.

At the last status conference hearing, on January 22, 2018, the court told the plaintiff to move forward with prosecution of the action.

The plaintiff stated at the January 22 conference that she had served the remaining defendant, the U.S. Department of Education, with the amended complaint and last-issued summons. The U.S. Department of Education had not answered. The court therefore directed the plaintiff to seek the default of the defendant and then obtain a default judgment. It has been over six months and the plaintiff has done nothing to further prosecute the action. Given this, the court will dismiss the claims against the U.S. Department of Education.

5. 16-21585-A-11 AIAD/HODA SAMUEL MOTION TO  
FWP-36 CONFIRM PLAN  
6-28-18 [1113]

**Final Ruling:** The court continues the hearing on the motion to confirm a plan to August 20, 2018 at 10:00 a.m. This is necessitated by the debtors' filing of motions to recuse Judge McManus and remove the trustee. The court will issue its decision on the recusal motion in the next few days. Thereafter, a hearing and briefing schedule will be set on the motion to remove the trustee.