

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Thomas C. Holman

Bankruptcy Judge

Sacramento, California

October 21, 2014 at 9:32 A.M.

1. 10-24351 -B-13 ROBERT/MICHELLE REID 12-2392 MBW-1 REID ET AL V. BANK OF AMERICA, N.A. ET AL	MOTION TO DETERMINE SUFFICIENCY OF REQUESTS FOR ADMISSION, REQUEST FOR PRODUCTION OF DOCUMENTS AND SPECIAL INTERROGATORIES OR IN THE ALTERNATIVE TO DEEM THEM ADMITTED AND/OR MOTION FOR SANCTIONS 9-9-14 [78]
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Tentative Ruling: The debtors' opposition is sustained in part. The motion is dismissed.

The motion is untimely. This motion concerns the plaintiff debtors' allegedly inadequate responses to discovery propounded on the debtors on April 15, 2014. The court issued a Scheduling Order in this adversary proceeding on January 23, 2013 (Dkt. 60), which established a close of non-expert and expert discovery of May 31, 2013. The Scheduling Order also states in relevant part:

ORDERED, that close of discovery means that all discovery in this adversary proceeding of the designated kinds shall be completed by the date set forth above. The word "completed" means that all discovery shall have been conducted such that any disputes relative to discovery shall have been resolved by appropriate order.

(Dkt. 60 at 3).

The discovery on which this motion is based was propounded more than ten months after the close of discovery in this adversary proceeding. This motion disputing the adequacy of the debtors' responses to those discovery requests was filed more than fifteen months after the close of discovery. It is untimely and therefore is dismissed.

The court notes that the debtors in their opposition expressed their opinion that discovery is likely to be reopened based on their filing of a second amended complaint (for which no apparent leave has been given). The court notes that pursuant to the Scheduling Order "[e]xcept for motions made and stipulations presented within thirty days after the date thereof based on conflicts created by the dates chosen by the court, requests for relief or modification of this scheduling order are not favored and will ordinarily be denied unless the requesting party makes a strong showing of diligence in complying with this scheduling order." (Dkt. 60 at 9).

The court will issue a minute order.

2. [14-20832](#)-B-7 LUELLA VAUGHN MOTION TO AMEND
[14-2194](#) 9-23-14 [[51](#)]
VAUGHN V. CITIMORTGAGE INC. ET
AL
ADV. CASED DISMISSED 9/11/14

Tentative Ruling: None.

3. [09-36633](#)-B-13 ROBERT/PAMALA PAULSON CONTINUED MOTION FOR ENTRY OF
[14-2149](#) RWF-5 DEFAULT JUDGMENT
PAULSON ET AL V. BANK OF 7-24-14 [[10](#)]
AMERICA, N.A.

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The motion is removed from the calendar. The plaintiffs withdrew the motion on October 15, 2014 (Dkt. 28).

4. [10-35308](#)-B-7 JEFFREY RICHARDSON MOTION TO AVOID LIEN OF HILCO
RAC-1 RECEIVABLES, LLC
9-16-14 [[28](#)]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A), subject to the provisions of 11 U.S.C. § 349. The judicial lien in favor of Hilco Receivables, LLC, recorded in the official records of Sacramento County, Book 20071129, Page 670, is avoided as against the real property located at 3645 Jonothan Way, North Highlands.

The subject real property has a value of \$126,500.00 as of the date of the petition. The unavoidable liens total \$109,932.00. The debtor claimed the property as exempt under California Code of Civil Procedure Section 703.140(b)(1), under which he exempted \$16,658.00. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the debtors' exemption of the real property and its fixing is avoided.

The court will issue a minute order.

5. [13-30216](#)-B-7 PANKEY & ASSOCIATES, MOTION FOR COMPENSATION FOR
DMW-5 INC. GABRIELSON & COMPANY,
ACCOUNTANT(S)
9-18-14 [[44](#)]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. The court's order entered July 15, 2014 (Dkt. 43) (the "Order") will be amended to specify an effective date of employment of June 17, 2014. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the court approves on a first and final basis compensation for the bankruptcy estate's accountant, Gabrielson & Company ("G&C"), in the amount of \$2518.50 in fees and \$100.02 in expenses, for a total award of \$2618.52, for services rendered and costs incurred during the period of June 17, 2014, through and including September 15, 2014, payable as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

On August 1, 2013, the debtors commenced the above-captioned bankruptcy case by filing a voluntary petition under chapter 7 (Dkt. 1). Pursuant to the Order, the court granted the trustee's request to employ G&C as accountant for the bankruptcy estate. The Order does not specify an effective date of employment, so G&C's employment was effective July 15, 2014. The application for an order authorizing G&C's employment was filed on June 20, 2014 (Dkt. 39). This department does not approve compensation for work prior to the effective date of a professional's employment. DeRonde v. Shirley (In re Shirley), 134 B.R. 930, 943-944 (B.A.P. 9th Cir. 1992). However, the court construes the present application as requesting an effective date in the order approving G&C's employment retroactive to June 17, 2014, the first date on which G&C rendered services to the trustee according to the attached billing records (Dkt. 46). The request for that effective date is granted. Due to the administrative requirements for obtaining court approval of professional employment, this department allows in an order approving a professional's employment an effective date that is not more than thirty (30) days prior to the filing date of the employment application without a detailed showing of compliance with the requirements of In re THC Financial Corp, 837 F.2d 389 (9th Cir. 1988) (extraordinary or exceptional circumstances to justify retroactive employment). In this case, the court grants an effective date of June 17, 2014, only three days before the date of the filing of the application.

In the absence of an objection from any party in interest, the court finds that, as set forth in the application, the approved fees and expenses are reasonable compensation for actual, necessary and beneficial services.

The trustee shall submit an amended form of employment order which is identical to the Order, but which shall in addition specify an effective date of employment of June 17, 2014. Upon entry of the amended employment order, the court will issue a minute order granting the motion as set forth above.

6. [11-48519](#)-B-7 VICTOR HANNAN
DL-7

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF DAHL LAW FOR
WALTER R. DAHL, DEBTOR'S
ATTORNEY(S)
9-11-14 [[231](#)]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the applicant's request for interim compensation in the amount of \$18,068.50 in fees and \$571.82 in costs for a total of \$18,640.32 for services rendered during the period October 1, 2012, through November 17, 2013. The court also approves on a final basis all fees and costs totaling \$37,905.19 for services rendered during the period December 8, 2011, to November 17, 2013. The approved fees and costs shall be paid, to the extent not already paid, as a chapter 11 administrative expense. Except as so ordered, the motion is denied.

The debtor commenced this case under chapter 11 on December 8, 2011. By order entered January 27, 2012, the court approved the employment of the applicant as counsel for the debtor-in-possession with an effective date of employment of December 8, 2011. By order entered November 12, 2012, the court approved the applicant's first interim application for approval of fees and costs in the amount of \$19,264.87 for services rendered during the period December 8, 2011 to September 30, 2012. The applicant now seeks approval of fees and costs totaling \$19,510.32 for services rendered during the period October 1, 2012, until the conversion of the case to chapter 7 on November 17, 2013.

Of the requested interim amount, the court disallows \$870.00 designated as an anticipated fee for the applicant's appearance on the application. Because this matter is unopposed and resolved without oral argument, that anticipated fee is not necessary. 11 U.S.C. § 330(a)(1). The court finds that the approved fees are reasonable compensation for actual, necessary and beneficial services. Id.

The court will issue a minute order.

7. [14-28423](#)-B-7 GEORGE ANDERSON
NRZ-1

CONTINUED MOTION TO COMPEL
ABANDONMENT
9-3-14 [[17](#)]

Tentative Ruling: The motion is granted in part and denied in part. Pursuant to 11 U.S.C. § 554(b), the debtor's interest in the business name "Toiyabe Motel" (Schedule B, line 35, Dkt. 15 at 4) is deemed abandoned by the estate. The debtor's request that the 120-day time period for the chapter 7 trustee to assume or reject the Foster Lease (as

that term is defined in the motion) is denied. Except as so ordered, the motion is denied.

With respect to the business name "Toiyabe Motel," the debtor alleges without dispute that it has a value of \$1.00, all of which has been claimed as exempt by the debtor on Schedule C. The court finds that the business name is of inconsequential value and benefit to the estate.

The debtor's request for acceleration of the 120-day period for the chapter 7 trustee to assume or reject the Foster Lease pursuant to 11 U.S.C. § 365(d)(4)(A)(i) is denied because the debtor cites no authority - and the court is aware of none - which allows for such relief. 11 U.S.C. § 364(d)(4)(B) refers only to an extension of the period, not an acceleration. Furthermore, this motion cannot be construed as a proceeding to require the trustee to act with respect to the lease under 11 U.S.C. § 365(d)(2) and Fed. R. Bankr. P. 6006(b) because this motion concerns an unexpired lease of nonresidential real property to which 11 U.S.C. § 365(d)(2) does not apply.

The court will issue a minute order.

8. [14-24824](#)-B-7 JOHN/JEANNETTE NOTMAN CONTINUED OBJECTION TO DEBTORS'
ADJ-2 CLAIM OF EXEMPTIONS
7-8-14 [[29](#)]
WITHDRAWN BY M.P.

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The objection is removed from the calendar. The trustee withdrew the objection on September 30, 2014 (Dkt. 91).

9. [14-21634](#)-B-7 NANCY RICK MOTION TO SELL
DNL-2 9-30-14 [[29](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. In this instance the court issues the following tentative ruling on the merits of the motion.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 363(b), the chapter 7 trustee is authorized to sell the debtor's interest in the real property located in Cass County, North Dakota (APN 31-0000-02707-010, 31-0000-02711-010, 31-0000-02738-000) in an "as-is, where-is" condition to Keith Bayley and Sylvia Bayley for \$80,000.00 on the terms set forth in the Sale Agreement filed as Exhibit "A" to the motion (Dkt. 32). The trustee is authorized to execute all documents necessary to effectuate the sale. The proceeds of the sale shall be administered for the benefit of the estate. Except as so ordered, the motion is denied.

The sale will be subject to overbidding on terms approved by the court at the hearing.

The trustee has made no request for a finding of good faith under 11 U.S.C. § 363(m), and the court makes no such finding.

The court will issue a minute order.

10. [13-20644](#)-B-7 PERRY YUEN
DNL-7

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF DESMOND, NOLAN,
LIVAICH & CUNNINGHAM TRUSTEE'S
ATTORNEY(S)
9-12-14 [[427](#)]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The application is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the application is approved on a first and final basis in the amount of \$35,597.50 in fees and \$309.99 in costs, for a total of \$35,907.49, for services rendered during the period July 30, 2013, through and including September 11, 2014. The approved fees and costs shall be paid as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

By order entered August 30, 2013, the court approved the trustee's employment of the applicant as counsel for the chapter 7 trustee, with an effective date of employment of July 30, 2013. The applicant now seeks approval of \$35,597.50 in fees and \$309.99 in costs, for a total of \$35,907.49, for services rendered during the period July 30, 2013, through and including September 11, 2014. 11 U.S.C. § 330(a)(1).

The court will issue a minute order.

11. [13-20644](#)-B-7 PERRY YUEN
ET-6

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF EASON &
TAMBORNINI, ALC FOR MATTHEW R.
EASON, DEBTOR'S ATTORNEY(S)
9-18-14 [[432](#)]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The application is dismissed without prejudice.

The application was not properly served. Fed. R. Bankr. P. 2002(a)(6) requires that notice of the hearing on an entity's request for compensation or reimbursement of expenses exceeding \$1,000.00 to be served on, inter alia, all creditors. The applicant's certificate of

service (Dkt. 436) does not show that the application was served on all creditors.

The court will issue a minute order.

12. [13-34046](#)-B-7 JASON/SHANNON WONG MOTION FOR COMPENSATION FOR
JB-3 GABRIELSON & COMPANY,
ACCOUNTANT(S)
9-15-14 [[95](#)]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted. Pursuant to 11 U.S.C. § 330 and Federal Rule of Bankruptcy Procedure 2016, the application is approved on a first and final basis in the amount of \$2,587.50 in fees and \$139.77 in expenses, for a total of \$2,727.27, for services rendered and costs incurred during the period of April 21, 2014, through and including August 3, 2014. The foregoing amount is payable to Gabrielson & Company ("G&C") as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

The debtors commenced the above-captioned case by filing a voluntary petition under chapter 7 on October 31, 2013 (Dkt. 1). By order entered May 9, 2014 (Dkt. 75), the court authorized the chapter 7 trustee to employ G&C as accountant for the bankruptcy estate, with an effective date of employment of April 21, 2014. G&C now seeks approval of compensation for services rendered and costs incurred during the period of April 21, 2014, through and including August 3, 2014. The court finds that the approved fees are reasonable compensation for actual, necessary services.

The court will issue a minute order.

13. [14-26746](#)-B-7 SCOTT/BONNIE HICKOK MOTION TO EMPLOY WEST AUCTIONS,
ASF-1 INC. AS AUCTIONEER(S)
9-16-14 [[19](#)]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 327(a) and Federal Rule of Bankruptcy Procedure 2014, the chapter 7 trustee's request to employ West Auctions, Inc. ("West") as auctioneer for the chapter 7 trustee is granted on the terms set forth in the application. West's fees and costs, if any, shall be paid only pursuant to application. 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016. Except as so ordered, the motion is denied.

The court finds that West is a disinterested person as that term is defined in 11 U.S.C. § 101(14).

The chapter 7 trustee shall submit an order approving employment of West

that conforms to the foregoing ruling.

14. [14-26746](#)-B-7 SCOTT/BONNIE HICKOK MOTION TO SELL
ASF-2 9-16-14 [[14](#)]

Tentative Ruling: This motion is unopposed. In this instance, the court issues the following tentative ruling.

The motion is granted in part. Pursuant to 11 U.S.C. § 363(b), the chapter 7 trustee is authorized to sell the personal property of the estate listed in the motion (the "Property") on an "as-is" basis at auction, through West Auctions, Inc. ("West"). The chapter 7 trustee is authorized, pursuant to 11 U.S.C. § 330(a), to pay West a commission of 12.00% of the gross proceeds of the sale, plus costs in the amount of \$370.00. The chapter 7 trustee is authorized to execute all documents necessary to complete the approved sale. Except as so ordered, the motion is denied.

The chapter 7 trustee has made no request for a finding of good faith under 11 U.S.C. § 363(m), and the court makes no such finding.

The court finds that the approved fees and costs are reasonable compensation for actual, necessary services.

The trustee's request that "if, in the exercise of the Trustee's business judgment, no reasonable bid is received, the Vehicle may be held for subsequent auction or private sale without additional notice" is denied. The court's jurisdiction only extends to approving actual sales, not any action that the trustee might deem reasonable and decide to take. The trustee misunderstands the meaning of the "business judgment" test. It does not mean that the trustee is authorized to take any unspecified action so long as the trustee has decided to do so exercising his business judgment. It means that the trustee may request authority to take one or more specific actions and his business judgment will be entitled to deference when the court assesses the trustee's specific request. "The court should not substitute its judgment for the trustee's but should determine only whether the trustee's judgment was reasonable and whether a sound business justification exists supporting the sale and its terms." 3 Collier on Bankruptcy ¶ 363.02[4] (16th ed. 2014) (emphasis added).

The chapter 7 trustee shall submit a proposed order that conforms to the foregoing ruling.

15. [13-29747](#)-B-13 YANETA LACEY MOTION FOR ENTRY OF DEFAULT
[13-2318](#) PGM-2 JUDGMENT
LACEY V. AUTOVILLE MOTORS 9-23-14 [[52](#)]

Tentative Ruling: The motion is continued to a final evidentiary "prove up" hearing on January 7, 2015, at 10:00 a.m. before the Honorable David E. Russell in courtroom 32. At the evidentiary hearing, evidence shall be taken on the issue of actual damages including, without limitation, attorney's fees, costs, emotional distress damages, and punitive damages,

under 11 U.S.C. § 362(k) for the defendant's willful violation of 11 U.S.C. § 362(a) which occurred between July 26, 2013, and October 31, 2013. In presenting evidence on actual damages, the parties should be mindful of the Ninth Circuit standards for proving actual damages under 11 U.S.C. § 362(k) including, inter alia, attorney's fees under Sternberg v. Johnston, 595 F.3d 937 (9th Cir. 2009), and emotional distress damages under Dawson v. Washington Mutual Bank, F.A. (In re Dawson), 390 F.3d 1139 (9th Cir. 2004). This is a core proceeding which the court may hear and determine pursuant to 28 U.S.C. § 157(b) (2) (G).

On or before December 31, 2014, each party shall lodge (not file) with the Courtroom Deputy, Ms. Sheryl Arnold, two identical, tabbed binders (or set of binders), each containing (i) a witness list (which includes a general summary of the testimony of each designated witness), (ii) one set of the party's exhibits, separated by numbered or lettered tabs and (iii) a separate index showing the number or letter assigned to each exhibit and a brief description of the corresponding document. The plaintiff's binder tabs shall be consecutively numbered, commencing at number 1. The defendant's binder tabs shall be consecutively lettered, commencing at letter A. On or before December 31, 2014, each party shall serve on the other party an identical copy of the party's lodged binder (or set of binders) by overnight delivery. The parties shall lodge and serve these binder(s) regardless of whether some or all of the contents have been filed in the past with this court. The lodged binder(s) shall be designated as Exhibits for Hearing on Plaintiff's Motion for Entry of Default Judgment. In addition to the tabs, the hearing exhibits in the lodged binder(s) shall be pre-marked on each document. Stickers for pre-marking may be obtained from Tabbies, [www.tabbies.com] - debtors' stock number 58093 and creditors' stock number 58094. All lodged binder(s) shall be accompanied by a cover letter addressed to the Courtroom Deputy stating that the binder(s) are lodged for chambers pursuant to Judge Holman's order. Each party shall bring to the hearing one additional and identical copy of the party's lodged binder(s) for use by the court - to remain at the witness stand during the receipt of testimony.

The court finds that the plaintiff has in her adversary complaint sufficient pled a cause of action for a willful violation of the automatic stay pursuant to 11 U.S.C. § 362(k)(1). "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." Fed. R. Bankr. P. 7008(a), incorporating Fed. R. Civ. P. 8(d); Geddes v. United Financial Group, 559 F.2d 557, 560 (9th Cir.1977). However, in this instance a "prove up" hearing is required to determine to what, if any, damages the plaintiff is entitled. The defendant may submit evidence in opposition to an award of damages. When default was entered against the defendant on September 2, 2014 (Dkt. 50), it lost the right to participate in this adversary proceeding except to seek relief from the default or to contest damages. In re Johnson, 2010 WL 9475505, slip op. at 2 (Bankr. E.D. Cal. 2010) ("A party who has appeared in an action, even though they have not filed a responsive pleading, is entitled to notice of the hearing and to address limited issues with respect to the application for entry of default judgment"); Geddes, 559 F.2d at 560 ("Appellees' defaults established their respective liabilities, but not the extent of the damages to the plaintiff class"); Fed. R. Civ. P. 8(b) (6).

The court will issue a minute order.

16. [13-34754](#)-B-11 CIELO VINEYARDS & MOTION TO SELL O.S.T.
SAC-8 WINERY, LLC 9-30-14 [[217](#)]

Tentative Ruling: This motion is filed under the procedures of LBR 9014-1(f)(3) (motions set on shortened time). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

17. [13-34754](#)-B-11 CIELO VINEYARDS & CONTINUED MOTION TO CONVERT
WSS-3 WINERY, LLC CASE FROM CHAPTER 11 TO CHAPTER
7
8-27-14 [[192](#)]

Tentative Ruling: None.

18. [14-22277](#)-B-7 CURTIS WAHL MOTION TO COMPEL ABANDONMENT
DBJ-2 9-24-14 [[26](#)]

Tentative Ruling: This motion is unopposed. In this instance, the court issues the following tentative ruling.

Pursuant to F.R.Bankr.P. 9006(c)(1), the court shortens the notice period required for this motion by one day to 27 days. Pursuant to 11 U.S.C. § 554(b), the motion is granted in part, and the estate's interest in the real property located at 2732 San Jose Street, Chico, California 95973 (APN 006-041-015) (the "Property") is deemed abandoned by the estate. Except as so ordered, the motion is denied.

The debtor alleges without dispute that the Property, after accounting for all encumbrances and claimed exemptions, has no equity available for distribution to creditors. The court finds that the debtor has satisfied his burden of establishing that the Property is of inconsequential value and benefit to the estate. In re Viet Vu, 245 B.R. 644, 647 (9th Cir. BAP 2000).

The court will issue a minute order.

19. [14-22099](#)-B-7 IMELDA CALVAN MOTION TO CONVERT CASE TO
SLH-2 CHAPTER 13
10-7-14 [[51](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.