

**UNITED STATES BANKRUPTCY COURT**

Eastern District of California

Honorable Michael S. McManus  
Bankruptcy Judge  
Sacramento, California

**January 11, 2016 at 10:00 a.m.**

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1. 14-28600-A-7 RAYMOND/ROBERTA LICHTMAN ORDER TO  
14-2257 SHOW CAUSE  
LICHTMAN V. AMERICAN EDUCATION SVS. 12-15-15 [18]

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

This order to show cause was issued due to the plaintiff Raymond Lichtman's failure to prosecute the adversary proceeding. At the last status conference hearing, on September 16, 2015, the plaintiff appeared, representing that he would be requesting another summons in the case. See Docket 17. However, a review of the case docket reveals that the plaintiff has not yet requested another summons. This failure to prosecute the adversary proceeding is cause for dismissal.

2. 13-23517-A-7 TRACY GATEWAY, L.L.C. ORDER TO  
15-2065 APPEAR FOR EXAMINATION  
FUKUSHIMA V. APOLLO EQUITY, L.L.C. (APOLLO EQUITY, LLC)  
11-13-15 [36]

**Tentative Ruling:** None. A responsible individual for the judgment debtor, Appollo Equity, L.L.C., shall appear prior to the start of the 10:00 a.m. calendar to be sworn in for the examination.

3. 14-30833-A-11 SHASTA ENTERPRISES MOTION TO  
FWP-21 USE CASH COLLATERAL, FOR  
REPLACEMENT LIENS AND FOR  
ADEQUATE PROTECTION  
12-24-15 [426]

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

The chapter 11 trustee is seeking authorization to use the cash collateral of Redding Bank of Commerce and Joe Curto and Lavone Curto, as co-trustees of the Curto Family Trust, from January 1, 2016 through June 30, 2016, on substantially the same terms the estate has been using cash previously, since December 2014.

The one exception is the estate's previous \$20,000 adequate protection payments. Under the newly proposed budget, such payments are being decreased to \$5,000, to be made solely to the Curtos, assuming the sale of the 250 Hemsted property closes by no later than January 15, 2016. If escrow does not close on or before January 15, the estate will continue making the previous pro-rated \$20,000 adequate protection payments to RBC and the Curtos, "for January 2016 and each month thereafter that 250 Hemsted is property of the estate for the entire month." Docket 426 at 4.

**January 11, 2016 at 10:00 a.m.**

The estate requires the use of cash to continue the debtor's ownership and leasing of its real properties, given that rents are its only regular and material source of income. The cash collateral will be used to pay, among other things, "payroll expenses, yard maintenance and tools, office supplies, janitorial services and supplies, various outside services, taxes and license fees, insurance, utilities, other relevant and necessary expenses of the estate, and under appropriate circumstances, funding of tenant improvements for new leases that may be entered into during the Cash Collateral Period." Docket 426 at 5.

Given that the trustee is continuing to use cash collateral on substantially the same terms approved by the court previously, the motion will be granted. The court will approve cash collateral use through June 30, 2016.

4. 15-20034-A-11 C & N LANDSCAPE MOTION TO  
ET-5 MAINTENANCE, INC. SELL O.S.T.  
12-22-15 [109]

**Tentative Ruling:** The motion will be denied without prejudice.

The debtor in possession requests authority to sell "as is" and "where is" for \$218,000 plus sale costs the estate's interest in its personal property to EC3 Landscape, Inc.

The property includes inventory, machinery, furniture, fixtures, other equipment, leasehold improvements, transferable government licenses and permits, customer lists, fictitious business names, trade names and trademarks, logos, copyrights, patents, signs, advertising materials, telephone and fax numbers, web sites, URL names, email addresses, \$30,000 in receivables, vendor lists, goodwill, non-competition and franchise agreements, distribution rights, employee lists and information, software and customer deposits.

Excluded from the sale are receivables "less liabilities defined as working capital exceeding \$30,000," the "Debtor's personal vehicle used in the business," a log splitter and a trailer. Docket 109 at 2.

The movant also asks for waiver of the 14-day period of Fed. R. Bankr. P. 6004(h).

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 sell property of the estate pursuant to section 363. Section 363(b) allows, then, a debtor-in-possession to sell property of the estate, other than in the ordinary course of business. The sale must be fair, equitable, and in the best interest of the estate. Mozer v. Goldman (In re Mozer), 302 B.R. 892, 897 (C.D. Cal. 2003). Sale of property outside the ordinary course of business requires the estate to show good faith and valid business justification for the sale. 240 N. Brand Partners, Ltd. v. Colony GFP Partners, LP (In re 240 N. Brand Partners, Ltd.), 200 B.R. 653, 659 (B.A.P. 9<sup>th</sup> Cir. 1996). Good faith "encompasses fair value, and further speaks to the integrity of the transaction." Id.

The motion will be denied for several reasons.

First, the motion states that the debtor "is aware of a tax lien" which will be paid from escrow. Docket 109 at 4.

But, the motion does not indicate the nature or basis of the tax lien, the amount of the lien, whether the sales proceeds will be sufficient to pay it off, who holds the lien, or why such a lien is not listed in the debtor's Schedule D. Schedule D lists no tax liens. Docket 1. The court will not approve a sale that provides for the payment of an undisclosed lien.

Second, the motion does not identify the debtor's efforts, if any, to market the property items being sold. While a business broker was employed by the estate, the motion is devoid of information and evidence of marketing efforts.

Third, the motion does not address what, if any, tax consequences will result from the sale.

Fourth, the motion papers do not indicate whether there is any past or existing relationship among the debtor, the debtor's principals and employees, EC3 Landscape and EC3's principals and employees.

Fifth, the motion does not provide information about the value of the assets being sold or the reasonableness of the proposed purchased price.

Sixth, as the motion admits that the debtor has known for some months that it does not have the income to fund a plan of reorganization, there is no explanation of why this case has not been converted to chapter 7.

Lastly, the motion indicates that the "Debtor's personal vehicle used in the business," along with few other items, is not included in the subject sale. Yet, the motion does not explain why these items are excluded from the sale. More, the court questions the debtor's ownership of an unidentified "personal vehicle," as the debtor is a corporation.

5. 13-34541-A-11 6056 SYCAMORE TERRACE MOTION TO  
CAH-25 L.L.C. CONFIRM PLAN  
9-22-15 [325]

**Tentative Ruling:** The motion will be denied without prejudice.

The debtor in possession is asking the court to confirm its amended plan of reorganization filed on September 22, 2015. Docket 325.

OneWest Bank, as the holder of the second mortgage on the debtor's sole real property, securing a claim for approximately \$260,202, opposes the motion, contending that the value of the property has increased to \$2,480,000, thus providing equity for satisfaction of OneWest's claim. The first mortgage on the property is for approximately \$2,250,700 per Nationstar/JPMorgan Chase Bank's filed proof of claim. POC 2.

OneWest objects to confirmation, contending that the plan violates 11 U.S.C. §§ 1129(b)(2)(A)(iii) (the plan must be fair and equitable, providing the indubitable equivalent of the secured claim) and 1129(a)(7)(A)(ii) (hypothetical liquidation test).

The motion will be denied. The proposed plan treats the claim as a wholly unsecured claim in accordance with a June 12, 2014 court order stripping off the claim. Docket 325 at 7; Docket 148. The plan pays only a 9% dividend on account of OneWest's claim, along with all other general unsecured claims. Docket 325 at 11.

However, even though the court entered an order on June 12, 2014 stripping off OneWest's secured claim, that order was entered "only in connection with plan confirmation" and it relied on what is now a stale valuation of the property. Docket 133. The \$1,920,000 valuation of the debtor's property, based upon which the court stripped off OneWest's secured claim, was as of April 1, 2014, over 21 months ago. Docket 116.

*"Although the amount of a creditor's claim is fixed at the petition date, there is nothing to indicate that the value of the claim must also be determined at the petition date. Since modification of claims occurs only through debtors' plans, it is at confirmation that the bankruptcy court considers whether proposed modifications comply with requirements for confirmation. Thus, it may be entirely appropriate to value a claim at the time of plan confirmation. (Citations omitted).*

*"[E]ven though the bankruptcy court's rationale for valuing BAC's claim at confirmation was reasonable, the interpretation of § 1123(b)(5) as setting the determination of whether a claim is protected from modification at the date of confirmation is flawed. That approach improperly shifts the time for fixing a creditor's claim from the petition date to some future valuation date. It conflates the analysis of whether a creditor holds a claim with a determination of the value of that claim. The value of BAC's claim, whether it is secured or unsecured, is a distinct issue from whether BAC's claim is secured by the Debtors' principal residence."*

BAC Home Loans Servicing, LP v. Abdelgadir (In re Abdelgadir), 455 B.R. 896, 902 (B.A.P. 9<sup>th</sup> Cir. 2011) (distinguishing between the time for fixing the amount of a claim and the time for valuing a claim and holding, on the other hand, that the appropriate time for determining whether the property is the debtor's principal residence is the petition date); Benafel v. One West Bank (In re Benafel), 461 B.R. 581, 587 (B.A.P. 9<sup>th</sup> Cir. 2011) (citing Abdelgadir with approval and recognizing that valuing a claim at plan confirmation is correct); In re Gutierrez, 503 B.R. 458, 462-63 (Bankr. C.D. Cal. 2013); In re Schayes, 483 B.R. 209, 214-15 (Bankr. D. Ariz. 2012); see also Mariners Inv. Fund, LLC v. Delfierro (In re Delfierro), Case No. WW-11-1249-KiJuH, 2012 WL 1933316, at \*1 (B.A.P. 9<sup>th</sup> Cir. May 29, 2012); Wages v. J.P. Morgan Chase Bank, N.A. (In re Wages), Case No. ID-12-1397-JuKiKu, 2014 WL 1133924, at \*3 (B.A.P. 9<sup>th</sup> Cir. Mar. 7, 2014).

The court has evidence, in connection with confirmation of the subject plan, indicating that the property has a value of \$2,480,000, thus having equity for the full or substantial partial satisfaction of OneWest's claim. Docket 348 at 2-3. As such and given the subject plan's failure to take this updated evidence of value into account, the court cannot confirm the plan. Accordingly, the motion will be denied without prejudice.

6.	15-21575-A-11	BR ENTERPRISES, A	MOTION TO
	HLC-15	CALIFORNIA PARTNERSHIP	PAY
			12-14-15 [242]

**Final Ruling:** This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the creditors, the U.S. Trustee, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is

unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9<sup>th</sup> Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

On behalf of Broker Properties By Merit, the revested debtor is seeking approval on final basis of Merit's real estate broker's commission in the amount of \$8,137.50, pertaining to the sale of lots 36, 43 and 74 at the debtor's Sunset Hills subdivision. The lots were sold in the debtor's ordinary course of business and thus without court approval. The sales closed on or about June 2, 2015 (lot 74), June 30, 2015 (lot 36) and September 30, 2015 (lot 43), prior to the confirmation of the debtor's chapter 11 plan and revestment of the estate's property into the debtor.

The court approved Merit's employment as the estate's real estate broker on April 29, 2015. The requested compensation approval is based on a 5% real estate commission.

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." Merit's services included assisting the estate with the marketing and sale of the lots.

The court concludes that the compensation is for actual and necessary services rendered in the administration of the debtor's chapter 11 bankruptcy estate. The compensation will be approved on final basis.

7.	15-21575-A-11 HLC-16	BR ENTERPRISES, A CALIFORNIA PARTNERSHIP	MOTION TO APPROVE COMPENSATION OF DEBTOR'S ATTORNEY 12-14-15 [246]
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**Final Ruling:** This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9<sup>th</sup> Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

Hollister Law Corporation, counsel for the now former debtor in possession, has filed a second interim and final motion for approval of compensation. The requested second interim compensation consists of \$52,675 in fees and \$1,479.71 in expenses, for a total of \$54,154.71. The second interim services cover the period from July 1, 2015 through December 1, 2015. The court approved the movant's employment as the chapter 11 debtor's attorney on April 29, 2015. In performing services, the movant charged an hourly rate of \$350.

On August 11, 2015, the court approved the movant's first interim motion for compensation, consisting of \$49,805 in fees and \$1,291.71 in expenses, for a total of \$51,096.71, and covering the period from February 27, 2015 through

June 30, 2015. Docket 139.

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 during the second interim period included, without limitation:

- (1) preparing, filing and prosecuting sales motions,
- (2) negotiating with the Curto Family Trust, secured by one of the real properties sold by the debtor,
- (3) analyzing and objecting to proofs of claim,
- (4) defending an objection to the claim of the debtor's principal, Mr. Rodriguez,
- (5) preparing and prosecuting a request for extension of the plan confirmation exclusivity period,
- (6) responding to objections to the debtor's disclosure statement,
- (7) negotiating plan treatment of claims with the debtor's principal secured creditors,
- (8) extensive communications with the debtor about its plan confirmation options,
- (9) revising plan and disclosure statement during the progress of negotiations with creditors,
- (10) monitoring the related Shasta Enterprises bankruptcy case,
- (11) preparing and reviewing pleadings and documents, such as motions and reports,
- (12) attending court hearings, and
- (13) preparing and filing employment and compensation motions.

The court concludes that the compensation is for actual and necessary services rendered in the administration of the debtor's bankruptcy estate. The requested second interim compensation will be approved and all awarded interim compensation will be approved on final basis.

8.	15-21575-A-11 HLC-17	BR ENTERPRISES, A CALIFORNIA PARTNERSHIP	MOTION TO APPROVE COMPENSATION OF ACCOUNTANT 12-14-15 [251]
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**Final Ruling:** This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the creditors, the U.S. Trustee, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Further, because the court will not materially

alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9<sup>th</sup> Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

On behalf of Evanhoe Kellog & Company, accountant for the now former debtor in possession, the debtor has filed a first and final motion for approval of Evanhoe's compensation. The requested compensation consists of \$7,168.25 in fees and \$0.00 in expenses. This motion covers the period from February 27, 2015 through November 30, 2015. The court approved Evanhoe's employment as the estate's accountant to prepare tax returns on April 29, 2015. Docket 68. In performing its services, Evanhoe charged hourly rates of \$100 and \$225.

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." Evanhoe's services included the preparation of the debtor's 2014 tax returns.

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