

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement  
Fresno Federal Courthouse  
510 19th Street, Second Floor  
Bakersfield, California

**PRE-HEARING DISPOSITIONS**

**DAY:** WEDNESDAY  
**DATE:** FEBRUARY 6, 2019  
**CALENDAR:** 10:30 A.M. CHAPTERS 11 AND 9 CASES

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

**No Ruling:** All parties will need to appear at the hearing unless otherwise ordered.

**Tentative Ruling:** If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

**Final Ruling:** Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

**Orders:** Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

1. [18-14414](#)-A-11     **IN RE: TITUS INDUSTRIAL, INC.**  
[LKW-4](#)

MOTION TO BORROW  
12-18-2018    [\[52\]](#)

TITUS INDUSTRIAL, INC./MV  
LEONARD WELSH

### **Final Ruling**

**Motion:** Retroactively Approve Borrowing

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Continued to February 27, 2019 at 1:30 p.m.

The debtor in possession (DIP) has moved for retroactive approval of borrowing \$20,000 from Roberta Hale in order to make payroll to its employees in November 2018 and cover other expenses incurred by the debtor in its operations.

The motion was set for hearing on the notice required by LBR 9014-1(f)(1). In the absence of opposition by the responding party, the rules of default apply. Fed. R. Bankr. P. 9014(c); Fed. R. Civ. P. 55, incorporated by Fed. R. Bankr. P. 7055. Upon default, a motion's well-pleaded facts are taken as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987). Additionally, failure to file written opposition not less than 14 days preceding the date, or continued date, of the hearing is deemed a waiver of opposition to the motion. LBR 9014-1(f)(1)(B); see *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The default of the responding party is entered, and the matter is resolved without oral argument.

### **LEGAL STANDARDS**

Section 364(b) of Title 11 provides that "The court, after notice and a hearing, may authorize the trustee [or debtor in possession via section 1107) to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense."

To obtain retroactive approval of borrowing, however, the DIP must satisfy a three-part test. The test includes a showing that: (1) the loan would have likely been authorized if a timely application had been made; (2) other creditors are not prejudiced by the transaction; and (3) the debtor and the creditor acted in good faith in connection with the transaction. *In re American Cooler Co.*, 125 F.2d 496 (2nd Cir. 1942).

"Pursuant to § 364(a), a debtor-in-possession may obtain without prior court authorization unsecured credit allowable under § 503(b)(1) as an administrative expense if the debt is incurred in the ordinary course of business. Where, however, a loan is made to a debtor-in-possession without court approval outside the ordinary course of business, the lender will only be given administrative expense priority if the equities in favor of so doing are

compelling." *Peninsula Nat'l Bank v. Allen Carpet Shops, Inc.* (*In re Allen Carpet Shops, Inc.*), 27 B.R. 354, 358 (Bankr. E.D.N.Y. 1983) (citing *Wolf v. Nazareth Fair Grounds & Farmers Mkt., Inc.*, 280 F.2d 891 (2nd Cir. 1960)).

## **ANALYSIS**

Here, the DIP seeks retroactive approval of its borrowing \$20,000 from Roberta Hale in order to make payroll to its employees in November 2018 and cover other expenses incurred by the debtor in its operations.

However, the motion papers say little or nothing about the requirements of the *American Cooler* decision. The court cannot approve retroactively borrowing without additional details:

(i) what are the amounts and nature of all the expenses covered the loan;

(ii) what were the DIP's other financial needs besides making payroll in November 2018;

(iii) what are the terms of the loan extended to the DIP;

(iv) what is the precise relationship between the DIP and Roberta Hale (e.g., ownership interest, sole, partial, etc.);

(v) have there been any other post-petition loans made to the DIP without prior court approval;

(vi) was the loan reduced to writing and, if not, why not; if the loan was reduced to writing, where is the writing;

(vii) any other facts that may be relevant to the *American Cooler* factors.

Given the above deficiencies, the court will continue the hearing on the motion to February 27, 2019 at 1:30 p.m. The DIP shall have until and including February 13 to file further pleadings in support of the motion, correcting the deficiencies.

2. [18-14414](#)-A-11     **IN RE: TITUS INDUSTRIAL, INC.**  
[LKW-5](#)

MOTION TO ASSUME LEASE OR EXECUTORY CONTRACT  
12-20-2018    [\[56\]](#)

TITUS INDUSTRIAL, INC./MV  
LEONARD WELSH

### **Final Ruling**

**Motion:** Assume Nonresidential Real Property Lease

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Continued to February 27, 2019 at 1:30 p.m.

The debtor in possession has moved to assume a lease of a nonresidential real property in Bakersfield, California.

The motion was set for hearing on the notice required by LBR 9014-1(f)(1). In the absence of opposition by the responding party, the rules of default apply. Fed. R. Bankr. P. 9014(c); Fed. R. Civ. P. 55, incorporated by Fed. R. Bankr. P. 7055. Upon default, a motion's well-pleaded facts are taken as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987). Additionally, failure to file written opposition not less than 14 days preceding the date, or continued date, of the hearing is deemed a waiver of opposition to the motion. LBR 9014-1(f)(1)(B); see *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The default of the responding party is entered, and the matter is resolved without oral argument.

### **LEGAL STANDARDS**

Section 365 of Title 11 gives the debtor in possession (DIP) limited options for its unexpired leases and executory contracts. 11 U.S.C. § 365(a), (f). The DIP has the option to assume, to assume and assign, or to reject. *Id.*; *In re Standor Jewelers West, Inc.*, 129 B.R. 200, 201 (B.A.P. 9th Cir. 1991). "By assumption, the trustee or DIP elects to be bound by the terms of the agreement so that the other party must continue to perform thereunder. The contract or lease remains in force . . . ." Kathleen P. March, Hon. Alan M. Ahart & Janet A. Shapiro, *Cal. Practice Guide: Bankruptcy* ¶ 16:2 (rev. 2011). Statutory conditions precedent must be satisfied before a court may approve an assumption of an unexpired lease. See 11 U.S.C. § 365(b). These conditions include curing defaults, compensating the lessor for actual pecuniary losses, and providing adequate assurance of that these conditions will be met. *Id.* § 365(b)(1), (2). The DIP must also provide adequate assurance of future performance under the lease. *Id.* § 365(b)(3).

An unexpired nonresidential real property lease "shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of- (i) the date that is 120 days after the date of the order for relief; or (ii) the

date of the entry of an order confirming a plan." 11 U.S.C. § 365(d)(4)(A).

In evaluating motions to assume or reject, the court applies the business judgment rule. See *In re Pomona Valley Med. Group*, 476 F.3d 665, 670 (9th Cir. 2007); *Durkin v. Benedor Corp. (In re G.I. Indus., Inc.)*, 204 F.3d 1276, 1282 (9th Cir. 2000); March, Ahart & Shapiro, *supra*, ¶¶ 16:1535-1536, 16:515 (rev. 2011). In applying the business judgment rule, the bankruptcy court gives the decision to assume or reject only a cursory review under the presumption that "the [DIP] acted prudently, on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the bankruptcy estate." *In re Pomona Valley*, 476 F.3d at 670.

#### **ANALYSIS**

This motion is timely. The case was filed on October 30, 2018 and the motion was filed on December 20, 2018, 51 days post-petition. No plan has been confirmed.

Here, the DIP seeks to assume a lease of a nonresidential real property in Bakersfield, California. The lease is attached as Exhibit A to the supporting declaration of Scott Hale. ECF Nos. 58 & 59. The lease is between the DIP, as lessee, and the Boone 1991 Living Trust, as lessor.

The motion states that § 365(b) is satisfied because there are no defaults under the lease to be assumed.

However, the motion papers say little or nothing about the DIP providing adequate assurance of future performance. And, the motion is not unequivocal about compensating the lessor for pecuniary losses. While the DIP may be current on lease payments to the lessor, non-monetary defaults may cause pecuniary losses to the lessor also. The motion should be clear and unequivocal on every one of the requirements under section 365(b)(1)(A)-(C).

Further, the motion says that the DIP can make the \$4,774 monthly lease payments to the lessor, but it does not say how or what facts support such a conclusion. The motion papers give no details about the DIP's ongoing finances. This worries the court particularly as the DIP has admitted to not being able to pay its employees in the accompanying motion to borrow. See ECF No. 52.

Given the above deficiencies, the court will continue the hearing on the motion to February 27, 2019 at 1:30 p.m. The DIP shall have until and including February 13 to file further pleadings in support of the motion, correcting the deficiencies.

The court construes the motion also as a request for extending the time for assumption of the lease. As such, the court will order the 120-day period of section 365(d)(4)(A)(i).

## CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

The debtor in possession's motion for assumption of the nonresidential real property lease has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the hearing on the motion is continued to February 27, 2019 at 1:30 p.m.

IT IS FURTHER ORDERED that the 120-day deadline under section 365(d)(4)(A)(i) for assumption of the lease is extended for 30 days, from February 27, 2019 until and including March 29, 2019.

3. [18-14414](#)-A-11     **IN RE: TITUS INDUSTRIAL, INC.**  
[LKW-6](#)

MOTION FOR COMPENSATION FOR LEONARD K. WELSH, DEBTORS  
ATTORNEY(S)  
1-8-2019    [[62](#)]

LEONARD WELSH

### Final Ruling

**Application:** Allowance of Interim Compensation and Expense Reimbursement

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Approved

**Order:** Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this application was required not less than 14 days before the hearing on the application. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

### COMPENSATION AND EXPENSES

In this Chapter 11 case, Leonard Welsh, counsel for the debtor in possession, has applied for an allowance of first interim compensation and reimbursement of expenses. The application requests that the court allow compensation in the amount of \$12,057.50 and reimbursement of expenses in the amount of \$525.74.

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by counsel for the debtor in possession in a Chapter 11 case and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. See *id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on an interim basis. Such amounts shall be perfected, and may be adjusted, by a final application for compensation and expenses, which shall be filed prior to case closure.

#### **CIVIL MINUTE ORDER**

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Leonard Welsh's application for allowance of interim compensation and reimbursement of expenses has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the application is approved on an interim basis. The court allows interim compensation in the amount of \$12,057.50 and reimbursement of expenses in the amount of \$525.74. The applicant is authorized to draw on any retainer held.

IT IS FURTHER ORDERED that the fees and costs are allowed pursuant to 11 U.S.C. § 331 as interim fees and costs, subject to final review and allowance pursuant to 11 U.S.C. § 330. Such allowed amounts shall be perfected, and may be adjusted, by a final application for allowance of compensation and reimbursement of expenses, which shall be filed prior to case closure.

IT IS FURTHER ORDERED that the debtor in possession is authorized to pay the fees allowed by this order from available funds only if the estate is administratively solvent and such payment will be consistent with the priorities of the Bankruptcy Code.

4. [18-14414](#)-A-11     **IN RE: TITUS INDUSTRIAL, INC.**  
[LKW-7](#)

MOTION TO EMPLOY ROBERT J. NORIEGA AS SPECIAL COUNSEL  
1-14-2019    [[69](#)]

TITUS INDUSTRIAL, INC./MV  
LEONARD WELSH

**Tentative Ruling**

**Application:** Employment of Special Counsel for Debtor in Possession

**Notice:** LBR 9014-1(f)(2); no written opposition required

**Disposition:** Approved

**Order:** Prepared by applicant

Unopposed applications are subject to the rules of default. Fed. R. Civ. P. 55, incorporated by Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Chapter 11 debtors in possession may employ special counsel who has represented them in the past, for a specified special purpose other than to represent them in conducting the bankruptcy case. See 11 U.S.C. § 327(e). Employment may be authorized if the applicant neither holds nor represents an interest adverse to the estate. *Id.* § 327(e). The applicant satisfies the requirements of § 327(e), and the court will approve the application.

The order shall contain the following provision: "Nothing contained herein shall be construed to approve any provision of any agreement between Young Wooldridge, Attorneys at Law and the debtor in possession for indemnification, arbitration, choice of venue, jurisdiction, jury waiver, limitation of damages, or similar provision." The order shall also state its effective date, which date shall be 30 days before the date the employment application was filed except that the effective date shall not precede the petition date.

5. [18-11651](#)-A-11     **IN RE: GREGORY TE VELDE**  
[MB-18](#)

CONTINUED MOTION FOR COMPENSATION BY THE LAW OFFICE OF  
MACCONAGHY & BARNIER, PLC CHAPTER 11 TRUSTEE(S)  
12-21-2018    [[1310](#)]

MICHAEL COLLINS  
ECF ORDER NO. 1402 CONTINUING TO 2/13/19

**Final Ruling**

Pursuant to Order, ECF #1402, the matter was continued to February 13, 2019, at 1:30 p.m. in Fresno.

6. [18-11651](#)-A-11     **IN RE: GREGORY TE VELDE**  
[MB-19](#)

CONTINUED MOTION FOR COMPENSATION FOR FRAZER, LLP,  
ACCOUNTANT(S)  
12-21-2018    [[1269](#)]

MICHAEL COLLINS  
ECF ORDER NO. 1402 CONTINUING TO 2/13/19

**Final Ruling**

Pursuant to Order, ECF #1402, the matter was continued to February 13, 2019, at 1:30 p.m. in Fresno.

7. [18-11651](#)-A-11     **IN RE: GREGORY TE VELDE**  
[MB-20](#)

MOTION TO SELL FREE AND CLEAR OF LIENS  
1-9-2019    [[1407](#)]

RANDY SUGARMAN/MV  
MICHAEL COLLINS  
JOHN MACCONAGHY/ATTY. FOR MV.  
RESPONSIVE PLEADING

**No Ruling**

8. [18-11651](#)-A-11     **IN RE: GREGORY TE VELDE**  
[MB-23](#)

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT  
AGREEMENT WITH OREGON DEPARTMENT OF AGRICULTURE  
1-22-2019    [[1474](#)]

RANDY SUGARMAN/MV  
MICHAEL COLLINS  
JOHN MACCONAGHY/ATTY. FOR MV.

**No Ruling**

9. [18-11651](#)-A-11     **IN RE: GREGORY TE VELDE**  
[WW-45](#)

CONTINUED MOTION TO EXPAND EMPLOYMENT OF SPECIAL COUNSEL  
12-17-2018    [[1245](#)]

RANDY SUGARMAN/MV  
MICHAEL COLLINS  
JOHN MACCONAGHY/ATTY. FOR MV.  
ECF ORDER NO. 1398 CONTINUING TO 2/13/19

**Final Ruling**

Pursuant to Order, ECF #1398, the matter was continued to February 13, 2019, at 1:30 p.m. in Fresno.

10. [18-11651](#)-A-11     **IN RE: GREGORY TE VELDE**  
[WW-46](#)

CONTINUED MOTION FOR COMPENSATION BY THE LAW OFFICE OF  
WALTER WILHELM LAW GROUP FOR RILEY C. WATER, SPECIAL  
COUNSEL(S)  
12-21-2018    [[1278](#)]

MICHAEL COLLINS  
ECF ORDER NO. 1402 CONTINUING TO 2/13/19

**Final Ruling**

Pursuant to Order, ECF #1402, the matter was continued to February 13, 2019, at 1:30 p.m. in Fresno.

11. [18-11651](#)-A-11     **IN RE: GREGORY TE VELDE**  
[WW-47](#)

CONTINUED MOTION FOR COMPENSATION BY THE LAW OFFICE OF  
COLLINS AND COLLINS, LLP FOR MICHAEL B. COLLINS, SPECIAL  
COUNSEL(S)  
12-21-2018    [[1274](#)]

MICHAEL COLLINS  
ECF ORDER NO. 1402 CONTINUING TO 2/13/19

**Final Ruling**

Pursuant to Order, ECF #1402, the matter was continued to February 13, 2019, at 1:30 p.m. in Fresno.

12. [18-11651](#)-A-11     **IN RE: GREGORY TE VELDE**  
[WW-48](#)

CONTINUED MOTION FOR COMPENSATION BY THE LAW OFFICE OF  
SCHWABE WILLIAMSON AND WYATT FOR ELIZABETH E. HOWARD,  
SPECIAL COUNSEL(S)  
12-21-2018    [[1288](#)]

MICHAEL COLLINS  
ECF ORDER NO. 1402 CONTINUING TO 2/13/19

**Final Ruling**

Pursuant to Order, ECF #1402, the matter was continued to February 13, 2019, at 1:30 p.m. in Fresno.

13. [18-11651](#)-A-11     **IN RE: GREGORY TE VELDE**  
[WW-49](#)

CONTINUED MOTION FOR COMPENSATION BY THE LAW OFFICE OF  
SAGASER, WATKINS AND WIELAND, PC FOR IAN B. WIELAND, SPECIAL  
COUNSEL(S)  
12-21-2018    [[1295](#)]

MICHAEL COLLINS  
ECF ORDER NO. 1402 CONTINUING TO 2/13/19

**Final Ruling**

Pursuant to Order, ECF #1402, the matter was continued to February 13, 2019, at 1:30 p.m. in Fresno.

14. [18-11651](#)-A-11     **IN RE: GREGORY TE VELDE**  
[WW-50](#)

CONTINUED MOTION FOR COMPENSATION FOR RANDY SUGARMAN,  
CHAPTER 11 TRUSTEE(S)  
12-21-2018    [[1302](#)]

RANDY SUGARMAN/MV  
MICHAEL COLLINS  
JOHN MACCONAGHY/ATTY. FOR MV.  
ECF ORDER NO. 1402 CONTINUING TO 2/13/19

**Final Ruling**

Pursuant to Order, ECF #1402, the matter was continued to February 13, 2019, at 1:30 p.m. in Fresno.

15. [18-14868](#)-A-11     **IN RE: 1 RED INVESTMENTS INC.**

STATUS CONFERENCE RE: CHAPTER 11 VOLUNTARY PETITION  
12-5-2018    [[1](#)]

PHILLIP GILLET  
1 RED INVESTMENTS INC./ATTY. FOR MV.  
CASE TRANSFERRED TO DEPARTMENT B

**Final Ruling**

The case transferred to Department B, the hearing is dropped from this calendar.

16. [18-14868](#)-A-11     **IN RE: 1 RED INVESTMENTS INC.**  
[LKW-1](#)

MOTION TO DISMISS CASE  
12-19-2018    [[32](#)]

DAN COOK, INC./MV  
PHILLIP GILLET  
LEONARD WELSH/ATTY. FOR MV.  
CASE TRANSFERRED TO DEPARTMENT B

**Final Ruling**

The case transferred to Department B, the hearing is dropped from this calendar.