

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

August 17, 2017, at 10:30 a.m.

1.	<u>17-23011</u>-C-13 DPC-2	MATTHEW/ARIANA VICKERS W. Steven Shumway	CONTINUED MOTION TO DISMISS CASE 6-6-17 [18]
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APPEARANCE OF MATTHEW VICKERS & ARIANA VICKERS,
CHAPTER 13 DEBTOR,
AND STEVEN SHUMWAY, DEBTOR'S COUNSEL,
REQUIRED AT THE AUGUST 17, 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.

Local Rule 9014-1(f)(1) Motion—Opposition Filed.

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 May 6, 2017. 28 days' notice is required. That requirement is met.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Motion to Dismiss is granted, and the case is dismissed.

The Chapter 13 Trustee seeks dismissal of Debtor's case based on the following:

A. Debtor failed to file all tax returns, specifically from years 2016, 2015 and 2014.

- B. Debtor has failed to provide all documentation to the Trustee, despite specific requests from the Trustee.

DEBTOR'S DECLARATION

Debtor responded that the 2014 and 2015 taxes have been filed and that the 2016 tax return will be filed before October 15, 2017. Debtor asserts that business documents have been provided to the Trustee.

JULY 26, 2017 HEARING

At the hearing, the Trustee confirmed that while some of the documents have been provided, many have not. Further, Debtor failed to appear at two First Meetings of Creditors. The continued Meeting (the third) was scheduled for August 24, 2017.

TRUSTEE'S SUPPLEMENT

The Trustee filed a Supplement on August 1, 2017. Dckt. 41. The Trustee reports that he has not been provided with the requested documents, and he says that there are additional grounds to dismiss now. First, Debtor has failed to appear at the Meeting of Creditors. Attendance is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay that is prejudicial to creditors and is cause to dismiss the case. 11 U.S.C. § 1307(c)(1).

Second, The Trustee argues that Debtor did not commence making plan payments and is \$5,460.00 delinquent in plan payments, which represents multiple months of the \$2,730.00 plan payment. 11 U.S.C. § 1307(c)(4) permits the dismissal or conversion of the case for failure to commence plan payments.

Finally, The Trustee argues that Debtor did not file a Plan or a Motion to Confirm a Plan following the court's denial of confirmation to Debtor's prior plan on July 11, 2017. A review of the docket shows that Debtor has not yet filed a new plan or a motion to confirm a plan. Debtor offers no explanation for the delay in setting a plan for confirmation. That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

RULING

This is Debtor's second recent bankruptcy case. The first was a Chapter 13 case filed on May 2, 2017, that was dismissed on January 25, 2017. Bankr. E.D. Cal. 13-35754. The current case was filed on May 2, 2017. The prior case was dismissed because of Debtor's default in plan payments and not filing a modified plan.

With the dismissal of this case, Debtor will have triggered the provisions of 11 U.S.C. § 362(c)(4), effectively squandering her rights under 11 U.S.C. § 362(a).

At the hearing, counsel for Debtor explained **XXXXXXXXXXXXXXXXXXXXXXXXXXXX**.

Cause exists to dismiss this case. The Motion is granted, and the case is dismissed.

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 Dismiss the Chapter 13 case filed by the Chapter 13 Trustee 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 to Dismiss is granted, and the case is dismissed.

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)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on August 3, 2017. By the court’s calculation, 14 days’ notice was provided. 14 days’ notice is required.

The Motion for Approval of Cash Collateral Stipulation was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 Approval of Cash Collateral Stipulation is denied without prejudice.

United Charter, LLC (“Debtor in Possession”) moves the court for an order approving a stipulation with East-West Bank (“Creditor”) (collectively, “the Parties”) to use cash collateral and grant a replacement lien in all post-petition rents, issues, and profits from Debtor in Possession’s real property.

REVIEW OF STIPULATION

The properties at issue in the Stipulation are part of an industrial complex covering more than 175,000 square feet and made up of eighteen contiguous parcels. The properties are identified commonly as: 1904, 1908, 1912, 1916, 1920, 1928, and 1936 Weber Avenue; 1881 E. Market Street; and 1523, 1531, 1555, and 1617 E. Main Street (“Properties”).

The Stipulation contains the following terms:

- A. Debtor in Possession is entitled to use cash collateral to pay actual and necessary operating expenses incurred after the petition date as set forth in an attached budget.
- B. All cash collateral shall be deposited into a segregated bank account.
- C. Debtor in Possession may pay other expenses outside of the ordinary course of business with Creditor's written approval, and remaining net cash collateral shall be paid monthly to Creditor.
- D. Debtor in Possession shall make monthly adequate protection payments to Creditor in the amount of net rents after payment of amounts set forth in the budget (approximately \$7,785.00 per month) no later than the fifteenth of each month, and such payment are retroactive to the petition date.
 - 1. Within five days of entry of an order approving the Stipulation, Debtor in Possession shall deliver an adequate protection payment in an amount sufficient to pay the accrued adequate protection payments from the petition date less the amount Debtor in Possession paid, with Creditor's prior consent, for the April 2017 delinquent property taxes.
- E. Creditor shall be granted a valid, duly-perfected, enforceable, and non-avoidable replacement lien and security interest of the same priority in all post-petition cash collateral.
- F. The post-petition liens in favor of Creditor shall secure repayment to Creditor of the difference between the actual amount of cash collateral spent by Debtor in Possession from and after the petition date and the cash collateral collected but not spent for the same time period.
- G. During the Stipulation's term, no priority claims or other claims for costs or expenses of administration that have been or may be incurred, shall have priority over or parity with either—
 - 1. Creditor's claim for repayment of Debtor in Possession's obligations under loan documents, or
 - 2. Creditor's security interest in and lien upon the Properties and their rents, and no costs or administrative expenses shall be imposed against Creditor, its claims, or the collateral.
- H. Nothing in the Stipulation shall constitute a waiver of rights for any appointed trustee to surcharge any of Creditor's collateral to recover trustee fees and expenses, and those fees and expenses shall not be subordinated to Creditor's replacement lien.

- I. Upon entry of an order by the court approving the Stipulation, Debtor in Possession's right to use cash collateral shall become effective as of the petition date and continue until the sooner of—
 - 1. August 31, 2017,
 - 2. A default, or
 - 3. Further court order.
- J. The Stipulation's term may be extended by written agreement by the Parties.

APPLICABLE LAW

Pursuant to 11 U.S.C. § 1101, a debtor in possession serves as the trustee in the Chapter 11 case when so qualified under 11 U.S.C. § 322. As a debtor in possession, the debtor in possession can use, sell, or lease property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease—

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Federal Rule of Bankruptcy Procedure 4001(b) provides the procedures in which a trustee or a debtor in possession may move the court for authorization to use cash collateral. In relevant part, Federal Rule of Bankruptcy Procedure 4001(b) states:

(b)(2) Hearing

The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

DISCUSSION

Debtor in Possession has argued that the use of cash collateral as proposed is in the best interest of estate and is in the ordinary course of business. The Stipulation requires Debtor in Possession to create a separate account in which Debtor in Possession shall deposit the rental income from the Properties, and the expenses will be deducted from that account. Debtor in Possession has referenced that the cash collateral will be used according to an attached budget, but no such budget has been provided for the court's review.

In the place of a budget, showing line-item expenses and specific dollar amounts, Debtor in Possession files a nine-page narrative stipulation. Dckt. 34. While the Motion contains a summary of terms, the challenge for the court is navigating a narrative stipulation of terms to tease out the cash collateral authorized to be used and the numerous terms that may, or may not, be consistent with the prosecution of a Chapter 11 case.

The first significant provision of the Stipulation is:

“Debtor shall be entitled to use the Cash Collateral and to pay certain of the Debtor’s actual and necessary operating expenses incurred after the Petition Date as set forth in Exhibit 1 (the “Budget”) through the term of this Stipulation.”

Stipulation, p.3:27–28, 4:1–2; Dckt. 34. No Exhibit 1 is attached to the copy of the Stipulation filed with the court.

“So long as this Stipulation is in effect, Debtor shall provide to Secured Creditor, at least 30 days prior to the expiration of any Budget, a succeeding Budget which succeeding Budget shall cover the three months following the period covered by the Budget then in effect.”

Id., p. 4:4–7. It appears that the Stipulation may provide for further use of cash collateral, without further approval from the court, with the current order being a pre-approval of whatever further uses are agreed to by the parties.

“From the Cash Collateral Account, the Debtor may pay those actual expenses set forth in the Budget which are incurred in the ordinary course of the Debtor’s business and which are consistent with the terms of this Stipulation. The remaining net Cash Collateral shall be paid to Secured Creditor on a monthly basis.”

Id., p. 4:12–15.

“Without the written consent of Secured Creditor, the total payments for monthly expenses shall not exceed ten percent (10.0%) of each line item contained in the Budget, or five percent (5.0%) of the aggregate of all line items included on the Budget in any one month. No other payments or expenditures shall be made except as the Secured Creditor may specifically authorize in writing, which shall not be unreasonably withheld, and the response to any such written request shall be provided in the most expeditious manner possible.”

Id., p. 4:16–21.

“In consideration for Secured Creditor’s consent to the use of Cash Collateral, Debtor shall remit to Secured Creditor monthly adequate protection payments (the “Adequate Protection Payments”) in the amount of the net rents after payment of the amounts set forth in the Budget (approximately \$7,785 per month) no later than the 15th of each month, such payments to be retroactive to the Petition Date.”

Id., p. 5:4–8.

By virtue of, among other things, the provisions of the Loan Documents, Secured Creditor asserts that it holds a valid, duly perfected, enforceable and non-avoidable most senior security interest in the Cash Collateral. As further partial adequate protection for the continued use by the Debtor of the Cash Collateral as provided for under this Stipulation, Secured Creditor shall be granted a valid, duly perfected, enforceable and non-avoidable replacement lien and security interest of the same priority in all post-petition Cash Collateral (collectively, the “Post-Petition Collateral”).

Id., p. 6:4–10. The first part of this paragraph appears to be a compromise, admission, or waiver of any rights or interests that the estate may have to question the existence, extent, or perfection of Creditor’s lien. That is not part of a mere “cash collateral stipulation” upon which the court may enter an order.

The second part of the paragraph is the commonly granted “same priority/extent/amount” for the cash collateral used by the Debtor in Possession. The first sentence effectively states that there shall be no issue as to what was the “priority/extent” of the asserted lien.

“During the term of this Stipulation, no priority claims or other claims for costs or expenses of administration which have been or may be incurred in this case, or any conversion of this case pursuant to Section 1112 of the Bankruptcy Code, or any other proceeding related hereto shall have priority over or parity with either (i) Secured Creditor’s claim for repayment of the Debtor’s obligations under the Loan Documents, or (ii) Secured Creditor’s security interest in and lien upon the Properties and Rents, and no such costs or expenses of administration shall be imposed against Secured Creditor, its claims or the Collateral.”

Id., p. 6:22–28. The “term of this Stipulation” is not a defined term in the Stipulation. Possibly it could mean only during the period of time in which the use of cash collateral is authorized. Thus, once the use of cash collateral is no longer authorized, then the above provision is deemed null and void.

Conversely, this provision can be interpreted to mean that Creditor’s lien rights (pre-petition and replacement) are elevated to not only lien rights but the highest priority. Further, that the rights of a trustee (including a debtor in possession) to assert a right to reimbursement pursuant to 11 U.S.C. § 506(c) for costs and expenses in preserving the value of Creditor’s collateral are forfeited.

The Stipulation goes further to provide that Debtor in Possession assigns to Creditor any transfers that may be avoided under the 11 U.S.C. § 544 “superpowers,” as well as 11 U.S.C. §§ 547 and 548, if the property transferred would have been subject to the lien of Creditor and deems such recovered transfer “cash collateral.” *Id.*, p. 7:9–14. This provision goes further, stating that such cash collateral determination is subject to “any rights of a trustee appointed in the Debtor’s Chapter 11 case or upon conversion of the Debtor’s case to Chapter 7.” The court is unsure of what this asserted limitation may be, and what “rights” of a “trustee” with respect to cash collateral may be subject to this “qualification.” *Id.*, Dckt. p. 7:14–15.

The use of cash collateral is conditioned on the court entering an order “approving the terms of the Stipulation,” not the court “authorizing the use of cash collateral subject to specified terms.” *Id.*, p. 8:21–24. This provision goes further, authorizing Debtor (not Debtor in Possession) and Creditor to bilaterally agree to extend the terms of the Stipulation (and all of the special terms therein), with no further approval of the court required.

Review of Operating Reports

This bankruptcy case was filed on April 7, 2017. On June 14, 2017, two monthly operating reports were filed. The first Monthly Operating Report is for April 2017. Dckt. 26. For April 2017, Debtor in Possession states receiving \$15,500 in revenues and spending \$15,605 in expenses. The largest expense in April 2017 was a \$15,980.00 payment for “Interest.”

The Monthly Operating Report for May 2017 (first full post-petition month) lists income of \$15,500.00. Dckt. 27. For expenses, the only significant expenditure was \$15,605.00 for “Interest.”

For the June 2017 Monthly Operating Report, Debtor in Possession states that the income from rent was \$15,400.00. Dckt. 31. In addition, Debtor in Possession reports receiving a \$3,000.00 “capital contribution.” For June, Debtor in Possession reports the only significant expense being \$2,136.00 in “capital expenditures.”

For the July 2017 Monthly Operating Report, Debtor in Possession states receiving only \$11,600.00 in rental income. Dckt. 36. However, Debtor in Possession states that there was also \$22,500.00 received in “capital contributions.” For expenses, Debtor in Possession lists the following:

Capital Expenditures.....	\$2,500
Principal Payment on Debt.....	\$3,500
Interest Paid.....	\$3,500

Utilities (Water Service).....	\$ 137
Sheriff's Fee.....	\$ 145
Insurance.....	\$2,171
Fencing.....	(no amount stated)

Review of Schedules and Statement of Financial Affairs

On Schedule A/B, Debtor lists owning eighteen identified parcels of real property. Dckt. 12. The aggregate value of the real property is stated to be \$7,855,018. However, \$7,500,000 of value is attributed to one property, described as:

“APN 153-040-03, 1881 E. Market St., Stockton, CA 95205. Together with assets 55.12 to 55.18, this property consists of 175,646 square feet of light industrial and office space in 11 buildings. as well as 4.350 s.f. of storage sheds on contiguous parcels totaling 12.8 acres.”

Id. at 8.

For personal property listed on Schedule A/B, Debtor lists having \$17,555.00 in a checking account and no other personal property assets. Debtor has no inventory. Debtor has no office furniture or equipment. Debtor has no machinery, equipment, or vehicles.

Debtor does list having a personal property asset of “unknown” value for a breach of lease action.

For co-debtors on the obligation owed to Creditor East-West Bank, Cind Zhang and Raymond Zhang, Inc. are listed on Schedule H. *Id.* at 14.

On the Statement of Financial Affairs, Debtor lists having income of \$327,667 for 2015 (average of \$27,305 per month), \$252,000.00 for 2016 (average of \$21,000 per month), and \$46,600 for January 1, 2017, through the April 7, 2017 filing (averaging \$15,333 for the first three months of 2017). *Id.* at 15.

For payments made to insiders within one year before the commencement of this case, Debtor reports making payments totaling \$344,409.47 to Raymond Zhang (identified as a “co-member”) for the stated reason of “Repayment of short-term loan and reimbursement of expenses.” *Id.* at 16. The payments, in unidentified amounts, were made on March 28, 2017 (approximately nine days before this case was filed), October 17, 2016 (six months before this case was filed), and August 5, 2016 (ten months before this case was filed). *Id.*

Denial of Motion Without Prejudice

Without being able to review the proposed use of cash collateral, the court cannot approve the Parties’ stipulation to use cash collateral.

Additionally, a review of the Monthly Operating Reports, Schedules, and Statement of Financial Affairs does not inspire the court with confidence that all is operating above-board in this case. Debtor in Possession appears to need large “capital contributions,” even though minimal expenses are shown. Debtor has stated under penalty of perjury that it has no personal property assets (other than the \$17,000 cash in the bank) with which to operate the numerous properties.

Debtor, on the eve of bankruptcy, made payments to insider Raymond Zhang, who has signed the bankruptcy documents as the managing member of Debtor.

As the court noted at the May 31, 2017 Status Conference, Debtor in Possession was misidentifying itself just as “Debtor,” not the fiduciary Debtor in Possession. Dckt. 25. This continues through to the Stipulation to use cash collateral. Debtor and Debtor in Possession are defined terms by Congress, and Debtor appears to be attempting to usurp the fiduciary Debtor in Possession.

The court cannot grant carte blanche authorization for Debtor in Possession to use whatever money it wants to. Nor will the court give creditor a replacement lien that is conditioned on Debtor in Possession having waived any objection to creditor’s lien. Further, the court will not authorize “Debtor” to agree with Creditor on whatever further use of cash collateral Debtor desires and can get Creditor to agree.

The Motion is denied without prejudice.

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 Approval of Cash Collateral Stipulation filed by Debtor in Possession 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 denied without prejudice.