

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

Honorable Fredrick E. Clement
Fresno Federal Courthouse
2500 Tulare Street, 5th Floor
Courtroom 11, Department A
Fresno, California

PRE-HEARING DISPOSITIONS

DAY: WEDNESDAY
DATE: AUGUST 19, 2015
CALENDAR: 1:30 P.M. CHAPTER 11 CASES

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

COURT'S ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 60(a), as incorporated by Federal Rules of Bankruptcy Procedure 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

1. [10-62315](#)-A-11 BEN ENNIS
LRP-53
DAVID STAPLETON/MV
RILEY WALTER/Atty. for dbt.
WILLIAM FREEMAN/Atty. for mv.

MOTION TO SELL
7-28-15 [[1967](#)]

Tentative Ruling

Motion: Sell Real Property and Personal Property and Assign Interest in Lease of land housing a cell tower

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

Disposition: Granted

Order: Prepared by moving party

Property: Morton Hill, Porterville, CA, consisting of 5 Assessor Parcel Numbers and Pioneer Water Company Share Nos. 3833 and 3940 (which were replaced by 64.5 shares of Pioneer Water Company Stock represented by Share No. 4122)

Lease: Lease housing cell tower

Buyer: Bronson Van Wyck, LLC

Sale Price: \$1,318,000.00

Sale Type: Private sale subject to overbid opportunity

Unopposed motions 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).

SALE

Section 363(b) (1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. § 363(b) (1); *see also In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). This provision applies by analogy to this post-confirmation sale.

Liquidation of estate assets is an appropriate restructuring purpose in a Chapter 11 reorganization case. *See, e.g.*, 11 U.S.C. § 1123(a) (5) (listing a sale of all or part of property of the estate as a means for implementing a Chapter 11 plan). As a result, the court will grant the motion. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.

The net proceeds of sale (after broker's commissions and closing costs) may be paid to the County of Tulare in accordance with its lien through escrow. The net proceeds of sale may be further paid to Watkins on account of his lien if he is not the successful bidder. Any remaining net proceeds not paid to the County of Tulare or to Watkins shall be disbursed to the plan administrator in this case. If Watkins is the successful bidder after credit bidding, his secured claim will be deemed to be satisfied in full.

COMMISSION

The proposed commission is 5% of the purchase price without a cooperating broker and 6% of the purchase price with a cooperating broker. The proposed buyer is represented by the same broker as the

seller, so it appears the commission for the proposed sale will be 5% unless an overbidder appears and wins the bid. The court approves the commission.

CREDIT BIDDING

Based on the facts presented in the motion, the court authorizes Keith Watkins to credit bid his secured claim. By analogy, § 363(k) is applicable.

Watkins's claim for purposes of credit bidding will be \$796,486.52. Under the settlement agreement between the relevant parties and approved by the court, Watkins had a secured claim of \$834,000, subject to adjustment for certain fees and costs incurred in farming and preserving Morton Hill and production revenue. Watkins has provided an accounting to the movant stating that the proceeds from the production from Morton Hill has been \$92,468.27. The fees and costs incurred by Watkins in farming and preserving Morton Hill are \$45,954.79 plus an estimated \$9000 from July 1, 2015 through August 19, 2015. Accordingly, Watkins's claim is reduced by \$37,513.48 from \$834,000.

GOOD FAITH BUYER

The court finds that the buyer is a good faith buyer for purposes of § 363(m). The plan administrator has no relationship with the proposed buyer. The parties to the sale have acted with all expected integrity in the course of the sale.

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| 2. | <u>15-12885</u> -A-11 ARS INVESTMENT GROUP,
HLF-2 LLC
ARS INVESTMENT GROUP, LLC/MV
JUSTIN HARRIS/Atty. for dbt.
RESPONSIVE PLEADING | MOTION TO SELL FREE AND CLEAR
OF LIENS
7-29-15 [<u>11</u>] |
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Tentative Ruling

Motion: Sell Property

Disposition: Denied without prejudice

Order: Civil minute order

INSUFFICIENT NOTICE

All creditors and parties in interest have not received sufficient notice. Notice of a proposed sale other than in the ordinary course of business must be noticed to all creditors and parties in interest in the debtor's bankruptcy case as required by Federal Rule of Bankruptcy Procedure 2002(a)(2). Several creditors or parties in interest have not received notice or have not received notice at the correct address.

For matters requiring notice to all creditors and parties in interest, the court prefers that a current copy of the ECF master mailing list, accessible through PACER, be attached to the certificate of service to indicate that notice has been transmitted to all creditors and parties in interest. The copy of the master mailing list should indicate a date near in time to the date of service of the notice. In addition,

governmental creditors must be noticed at the address provided on the Roster of Governmental Agencies, Form EDC 2-785, so the master address list and schedule of creditors must be completed using the correct addresses shown on such roster. See Fed. R. Bankr. P. 2002(j), 5003(e); LBR 2002-1.

INSUFFICIENT SERVICE

A motion to sell property free and clear of liens or interests is a contested matter. Fed. R. Bankr. P. 6004(c). As a contested matter, the motion must be served according to Rule 7004. Fed. R. Bankr. P. 9014(b); see also *Citicorp Mortgage, Inc. v. Brooks (In re Ex-Cel Concrete Company, Inc.)*, 178 B.R. 198, 202 (B.A.P. 9th Cir. 1995) (vacating order authorizing sale free and clear as void because of insufficient service under Rule 7004). Based on the court's review of the proof of service, the motion has not been served according to Rule 7004 on all relevant parties holding a lien or interest in the property to be sold. Fed. R. Bankr. P. 6004(c), 7004.

California TD Specialists is a party against whom § 363(f)(2) relief is sought. The "wherefore clause" specifically requests that the sale be free and clear of liens as to "CA TD Specialists" and others. But a review of the proof of service reveals that California TD Specialists has not been served. Service under Rule 7004(b)(3) (or Federal Rule of Civil Procedure 4(h)) is required for corporations and other business entities (other than FDIC-insured institutions) when a motion seeks to sell property free and clear of a lien or interest held by such corporation or other business entity. Fed. R. Bankr. P. 6004(c), 9014.

Further service on the Bovees may not be sufficient. An attorney is served, and it is unclear whether that attorney represents them in this particular proceeding. Service on an individual must be made according to Rule 7004(b)(1) or (8). If service is made on an attorney as an agent, caution is warranted. "An implied agency to receive service is not established by representing a client in an earlier action." *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 93-94 (B.A.P. 9th Cir. 2004) (citations omitted). No evidence has been presented in the proof of service that the attorney or law firm served has been authorized to accept service of process on the responding party in this bankruptcy case.

FUTURE § 363(f) MOTIONS

Any future § 363(f) motions by counsel for the debtor should ensure that service is made on § 363(f) respondents according to Rule 7004 of the Federal Rules of Bankruptcy Procedure. In addition, any § 363(f) motion that relies on consent under § 363(f)(2) should include a proper declaration containing evidence of such consent signed by the party whose lien or interest is to be affected by the relief requested.

3. [14-11595](#)-A-11 RAY FISHER PHARMACY, INC. PWC-5
RAY FISHER PHARMACY, INC./MV
MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH MCKESSON MEDICAL-SURGICAL MINNESOTA SUPPLY, INC.
7-29-15 [[213](#)]

ALAN KINDRED/Atty. for dbt.

No tentative ruling.

4. [14-11595](#)-A-11 RAY FISHER PHARMACY, INC. PWC-6
MOTION FOR COMPENSATION BY THE LAW OFFICE OF LEECH, TISHMAN, FUSCALDO AND LAMPL, LLC DEBTORS ATTORNEY(S)
7-29-15 [[216](#)]

ALAN KINDRED/Atty. for dbt.

Tentative Ruling

Application: Allowance of Interim Compensation and Expense Reimbursement

Notice: LBR 9014-1(f)(2); no 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). 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, Leech Tishman, counsel for the debtor in possession, has applied for an allowance of interim compensation and reimbursement of expenses. The application requests that the court allow compensation in the amount of \$155,082.25 and reimbursement of expenses in the amount of \$13,081.09.

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.

Leech Tishman'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 \$155,082.25 and reimbursement of expenses in the amount of \$13,081.09. 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.