

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

Honorable Fredrick E. Clement
Sacramento Federal Courthouse
501 I Street, 7th Floor
Courtroom 28, Department A
Sacramento, California

DAY: MONDAY
DATE: SEPTEMBER 26, 2022
CALENDAR: 1:30 P.M. CHAPTERS 9, 11 AND 12 CASES

RULINGS

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

"No Ruling" means the likely disposition of the matter will not be disclosed in advance of the hearing. The matter will be called; parties wishing to be heard should rise and be heard.

"Tentative Ruling" means the likely disposition, and the reasons therefor, are set forth herein. The matter will be called. Aggrieved parties or parties for whom written opposition was not required should rise and be heard. Parties favored by the tentative ruling need not appear. Non-appearing parties are advised that the court may adopt a ruling other than that set forth herein without further hearing or notice.

"Final Ruling" means that the matter will be resolved in the manner, and for the reasons, indicated below. The matter will not be called; parties and/or counsel need not appear and will not be heard on the matter.

CHANGES TO PREVIOUSLY PUBLISHED RULINGS

On occasion, the court will change its intended ruling on some of the matters to be called and will republish its rulings. The parties and counsel are advised to recheck the posted rulings after 3:00 p.m. on the next business day prior to the hearing. Any such changed ruling will be preceded by the following bold face text: **"[Since posting its original rulings, the court has changed its intended ruling on this matter]"**.

ERRORS IN RULINGS

Clerical errors of an insignificant nature, e.g., nomenclature ("2017 Honda Accord," rather than "2016 Honda Accord"), amounts, ("\$880," not "\$808"), may be corrected in (1) tentative rulings by appearance at the hearing; or (2) final rulings by appropriate ex parte application. Fed. R. Civ. P. 60(a) *incorporated by* Fed. R. Bankr. P. 9024. All other errors, including those occasioned by mistake, inadvertence, surprise, or excusable neglect, must be corrected by noticed motion. Fed. R. Bankr. P. 60(b), *incorporated by* Fed. R. Bankr. P. 9023.

1. [19-22025](#)-A-12 **IN RE: JEFFREY DYER AND JAN WING-DYER**
[BPC-3](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-12-2022 [\[344\]](#)

STEPHEN REYNOLDS/ATTY. FOR DBT.
VALERIE PEO/ATTY. FOR MV.
RABO AGRIFINANCE LLC VS.

Final Ruling

This motion is continued to November 21, 2022, at 1:30 as requested in Stipulation, ECF #355, and Notice of Continued Hearing, ECF No. 358. A civil minute order shall issue.

2. [22-20925](#)-A-12 **IN RE: JERRY WATKINS**
[WW-3](#)

OBJECTION TO CLAIM OF U.S. BANK, N.A., CLAIM NUMBER 2
8-22-2022 [\[81\]](#)

MARK WOLFF/ATTY. FOR DBT.
RESPONSIVE PLEADING

Final Ruling

Motion: Objection to Claim

Notice: LBR 3007-1(b)(1) - written opposition required

Disposition: Continued to November 21, 2022, at 1:30 p.m.

Order: Civil minute order

The debtor objects to the claim of U.S. Bank, Claim No. 2. U.S. Bank has responded to the objection, contending that its claim is properly filed. The response is not accompanied by supporting evidence in the form of a declaration and the exhibits filed in support of respondent's position are not authenticated. However, as the required notice under LBR 3007-1(b)(1) was not provided by the objecting debtor the court will continue this hearing to allow the respondent to correct the filing defects, and to allow the debtor and the chapter 12 trustee an opportunity to reply.

INSUFFICIENT NOTICE

(b) Amount of Notice.

1. Objections Set on 44 Days' Notice. Unless the objecting party elects to give the notice permitted by LBR 3007-1(b)(2), the objecting party shall file and serve the objection at least forty-four (44) days prior to the hearing date.

LBR 3007-1(b)(1).

The notice of hearing, ECF No. 82, provides that opposition, if any, shall be in writing and shall be served and filed with the court by the responding party at least fourteen (14) days preceding the date or continued date of the hearing. This is the notice required under LBR 3007-1(b)(1). LBR 3007-1(b)(1) also requires 44 days' notice of any objection requiring written opposition.

The movant has only provided 36 days' notice of the objection. See Proof of Service, ECF No. 86. The objection will be continued to allow the parties to augment the evidentiary record. Were the hearing on the objection not continued it would be overruled without prejudice for insufficient notice.

EXHIBITS

Exhibits.

- 2) *Exhibit Index.* Each exhibit document filed *shall have an index* at the start of the document that lists and identifies by exhibit number/letter each exhibit individually *and shall state the page number at which it is found within the exhibit document.*
- 3) *Numbering of Pages.* The exhibit document pages, including the index page, and any separator, cover, or divider sheets, *shall be consecutively numbered and shall state the exhibit number/letter on the first page of each exhibit.*

LBR 9004-2(d)(2), (3) (emphasis added).

The exhibits filed by the respondent are not referenced in an index by page number, nor are the exhibit pages numbered as required under LBR 9004-2(d)(2), (3). See *Exhibits*, ECF No. 96. The purpose of LBR 9004-2(d)(2), (3) is to ensure that the court and all interested parties can efficiently and accurately locate and review appropriate documents in support of a motion. This is particularly important where there are multiple documents submitted as exhibits. In the future, failure to follow local rules may result in denial of relief or other sanctions. LBR 1001-1(g).

DEBTOR REPLY

The debtor has filed a reply requesting a continuance until November 21, 2022. The court had intended to continue this hearing to an earlier date but will accede to the later request. The court reminds the debtor that confirmation of the Chapter 12 Plan in this case is required not later than December 12, 2022.

LIMITED NOTICING AND STANDARDIZED CERTIFICATE OF SERVICE

As of July 5, 2022, this court adopted Local Bankruptcy Rules 2002-3 (limiting notice for Rule 2002(a)(6) (motions for compensation), Rule 9036-1 (electronic service) and Rule 7005-1 (requiring attorneys and trustees to use a standardized Certificate of Service, EDC 7-005).

The form certificate of service is intended to allow parties to memorialize service efficiently and accurately, and to aid the court in ensuring sufficient service is achieved in each proceeding.

While its use is not yet mandatory Wolff & Wolff used Form EDC 7-005, in memorializing the service of documents in this motion and filed a Certificate of Service, ECF No. 86. That form was signed "Kathleen Marron" who apparently is a paraprofessional employed by that firm. The Certificate of Service represents a textbook example of the proper use of the new local rules and form Certificate of Service. Section 4 properly lists the documents served. ECF No. 86, p. 2. Section 6(B)(1) properly attaches the Clerk's Official Matrix of Registered Users of the Court's electronic-filing system. *Id.* at p. 4. Section 6(B)(2) is supported by a list of additional creditors. *Id.* at p. 5. Attachment 6(B)(3) properly lists creditors served under Rule 7004. The firm and Ms. Marron are to be commended on their precise and skillful application of the new local rules. The court appreciates counsel's voluntary use of Form EDC 7-005.

CIVIL MINUTE ORDER

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

IT IS ORDERED that the hearing on the objection is continued to November 21, 2022, at 1:30 p.m. No later than October 24, 2022, the respondent, U.S. Bank, N.A. shall file and serve any further evidence or argument in support of its position.

IT IS FURTHER ORDERED that not later than November 7, 2022, the debtor and the chapter 12 trustee may file any additional evidence or argument in support of their respective positions.

3. [22-20632](#)-A-11 **IN RE: SOUTHGATE TOWN AND TERRACE HOMES,**
INC.
[CAE-1](#)

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
3-16-2022 [[1](#)]

STEPHEN REYNOLDS/ATTY. FOR DBT.

No Ruling

4. [22-20632](#)-A-11 **IN RE: SOUTHGATE TOWN AND TERRACE HOMES,**
INC.
[RLC-11](#)

MOTION FOR COMPENSATION FOR MICHAEL THOMAS, SPECIAL
COUNSEL(S)
8-16-2022 [\[153\]](#)

STEPHEN REYNOLDS/ATTY. FOR DBT.
MICHAEL THOMAS/ATTY. FOR MV.

Final Ruling

Application: Allowance of First 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, Michael Thomas, special 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 \$3,234.00 and reimbursement of expenses in the amount of \$953.61.

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.

Michael Thomas'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 \$3,234.00 and reimbursement of expenses in the amount of \$953.61. 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.

5. [22-20632](#)-A-11 **IN RE: SOUTHGATE TOWN AND TERRACE HOMES, INC.**
[RLC-12](#)

MOTION FOR COMPENSATION FOR JORDAN MANAGEMENT COMPANY, OTHER PROFESSIONAL(S)
8-18-2022 [\[159\]](#)

STEPHEN REYNOLDS/ATTY. FOR DBT.

Final Ruling

Application: Allowance of First 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, Jordan Management Company has applied for an allowance of interim compensation and reimbursement of expenses. The application requests that the court allow compensation in the amount of \$20,592.00 and reimbursement of expenses in the amount of \$0.00.

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by an employed professional 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.

Jordan Management Company'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 \$20,592.00 and reimbursement of expenses in the amount of \$0.00. 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.

6. [22-20632](#)-A-11 **IN RE: SOUTHGATE TOWN AND TERRACE HOMES,**
INC.
[RLC-13](#)

MOTION FOR AN ORDER APPROVING DISCLOSURE STATEMENT
AND ESTABLISHING A CONFIRMATION HEARING FILED BY DEBTOR
SOUTHGATE TOWN AND TERRACE HOMES, INC.
8-18-2022 [\[163\]](#)

STEPHEN REYNOLDS/ATTY. FOR DBT.

Final Ruling

Notice of the hearing on approval of the disclosure statement must be served on all creditors. Fed. R. Bankr. P. 2002(b). The docket does not reflect a Certificate of Service. The motion will be denied. A civil minute order will issue.

7. [22-20632](#)-A-11 **IN RE: SOUTHGATE TOWN AND TERRACE HOMES,**
INC.
[RLC-14](#)

MOTION TO REJECT EXECUTORY CONTRACT WITH CALIFORNIA
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
8-22-2022 [\[168\]](#)

STEPHEN REYNOLDS/ATTY. FOR DBT.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Reject Executory Contract
Notice: Written opposition filed
Disposition: Denied
Order: Civil minute order

Debtor Southgate Town and Terrace Homes, Inc. ("Southgate") moves to reject an executory contract with the California Department of Housing and Community Development ("the Department"), a public agency.

FACTS

In 1992, Southgate borrowed \$2.1 million from the Department. The loan was memorialized in a promissory note and secured by a deed of trust Southgate's low income housing in Sacramento.

As a part of that process subjected itself to significant regulatory oversight by the Department. That oversight is memorialized in a Regulatory Agreement, dated December 22, 1992.

In 2022, the debtor filed a Chapter 11 case. A plan has not yet been confirmed. The debtor now moves to reject its loan with the Department, contending it remains executory.

LAW

Chapter 11 debtors may reject executory contracts. 11 U.S.C. § 365(a). The debtor must do so before plan confirmation. 11 U.S.C. § 365(d)(2).

Executory contract is not a defined term.

[16:135] "Executory Contract": Most courts adopt the so-called "Countryman" definition of "executory contract" (not defined by the Code) (see Countryman, "Executory Contracts in Bankruptcy: Part I," 57 Minn. L.Rev. 439, 460 (1973)):

An executory contract is one "on which performance remains due to some extent on both sides." In other words, a contract is executory "if the obligations of both parties are so unperformed that the failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other." [See *In re Robert L. Helms Const. & Develop. Co., Inc.* (9th Cir. 1998) 139 F3d 702, 705 & fn. 7 (en banc) (internal quotes omitted); *In re CFLC, Inc.* (9th Cir. 1996) 89 F3d 673, 677; *In re Qintex Entertainment, Inc.* (9th Cir. 1991) 950 F2d 1492, 1495—"we will only consider a contract executory if material unperformed obligations remain for both parties"].

[16:136] Question of federal law: Whether a contract is "executory" within the meaning of the Bankruptcy Code is determined under federal law. [*In re Qintex Entertainment, Inc.*, supra, 950 F2d at 1495; *In re Wegner* (9th Cir. 1988) 839 F2d 533, 536].

[16:137] Two-step analysis: The "Countryman" definition (§ 16:135) effectively calls for a case-by-case two-step analysis: [1] Bilateral unperformed obligations? The first issue is whether each party to the contract has any unperformed obligation at the time the bankruptcy is filed. [2] Nonperformance a material breach? Second, if both parties have unperformed obligations, it must be determined whether the failure of either to complete performance would constitute a material breach excusing performance by the other party under the contract.

[16:138] Unperformed obligation to pay money not enough: If the only unperformed contractual obligation is the debtor's obligation to pay money (e.g., a promissory note), the contract is not considered executory. [See H.R. No. 95-596, 95th Cong., 1st Sess., p. 347 (1977)] (In any event, there would be no benefit to the estate from the assumption of such a contract.)

[16:139] "Material" breach a question of nonbankruptcy law: While the executory nature of a contract in bankruptcy is a question of federal law (§ 16:136), whether the failure to complete performance of a contractual obligation would amount to a material breach, excusing performance by the other party, is an issue of nonbankruptcy (generally state) contract law. [In re Wegner, supra, 839 F2d at 536; see In re Aslan (9th Cir. 1990) 909 F2d 367, 369-370].

[16:140] Determined as of petition date: Whether a particular contract is executory is determined as of the petition date. [In re Coast Trading Co., Inc. (9th Cir. 1984) 744 F2d 686, 692; In re Penn Traffic Co. (2nd Cir. 2008) 524 F3d 373, 381]

March, Ahart & Shapiro, *California Practice Guide: Bankruptcy* § 16:135 et seq. (Rutter Group December 2021).

Qintex Entertainment, Inc. and *Wegner* remind us that an executory contract does not exist unless each side has one or more unperformed obligations. Southgate points to no such unperformed obligations by the Department; having reviewed the Regulatory Agreement, dated December 22, 1992, the court finds no such obligation on the Department's part. The contract is not executory.

The motion will be denied.

LIMITED NOTICING

Effective November 1, 2022, attorneys and trustee must use a mandatory form Certificate of Service, EDC 7-005. Though no required to do so at this time, the debtor has filed form EDC 7-005.

Counsel for the debtor is to be commended for his attempt to comply with soon to be effective local rules. But his current efforts would not comply with applicable local rules. The debtor filed ECF No. 172, which is comprised of (1) EDC 7-005 (mandatory Certificate of Service); and (2) the "Certificate of Service Declaration of Mailing" by "Attorney Services, LLC," a third party service company. First, as to EDC 7-005, the form does not memorialize proper service on all creditors. In the Certificate of Service, EDC 7-005, signed by Stephen M. Reynolds, Mr. Reynolds purports to have served "All creditors and parties in interest (Notice of Hearing only)" by U.S. Mails. See Certificate of Service § 6B(2) "Clerk's Matrix of Creditors." That paragraph requires Attachment 6B2, which is the list of persons served. In this case, that list (though not denominated "Attachment 6B2") apparently refers to the Certificate of Service signed by Attorney Services, LLC. Since Stephen Reynolds has no personal knowledge of Attorney Services, LLC's actions in mailing or not mailing documents, he may not sweat to what it did. Fed. R. Evid. 602.

Second, the Certificate of Service proof of service, ECF NO. 172, pp. 6-9, does not comply with the formatting provisions of LBR 7005-1, e.g., EDC 7-005.

Had this service occurred on or after November 1, 2022 (the effective date of the rule), this court would have denied the motion for non-compliance with LBR 7-005 and for insufficient evidence of service on all creditors.

CIVIL MINUTE ORDER

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

Southgate Town and Terrace Homes has been presented to the court. Having considered the motion together with papers filed in support and opposition, and having heard the arguments of counsel, if any,

IT IS ORDERED that the motion is denied.

8. [22-21692](#)-A-11 **IN RE: EVERGREEN ARBORISTS, INC.**
[CAE-1](#)

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
7-7-2022 [[1](#)]

GABRIEL LIBERMAN/ATTY. FOR DBT.

No Ruling

9. [22-21692](#)-A-11 **IN RE: EVERGREEN ARBORISTS, INC.**
[GEL-2](#)

CONTINUED MOTION TO USE CASH COLLATERAL
7-19-2022 [[27](#)]

GABRIEL LIBERMAN/ATTY. FOR DBT.
RESPONSIVE PLEADING

No Ruling