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14

8
9 **UNITED STATES BANKRUPTCY COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11 **RIVERSIDE DIVISION**

12 In re:

13 UST DEVELOPMENT INC.,

14 Debtor.

Case No. 6:10-bk-16297-CB

Chapter 11

Hon. Catherine Bauer

15 **UNITED STATES TRUSTEE'S**
16 **MOTION TO DISMISS;**
17 **MEMORANDUM OF POINTS AND**
18 **AUTHORITIES; DECLARATION**
19 **OF PHILIP V. GREEN IN SUPPORT**
20 **THEREOF**

21 Date: February 8, 2011

22 Time: 2:00 p.m.

23 Place: Courtroom 303

United States Bankruptcy Court

3420 Twelfth Street

Riverside, CA 92501-3819

24 **TO THE HONORABLE CATHERINE BAUER, UNITED STATES BANKRUPTCY**
25 **JUDGE, DEBTOR, AND ALL PARTIES-IN-INTEREST:**

26 Peter C. Anderson, the United States Trustee for Region 16 (the "U.S. Trustee") hereby
27 moves, pursuant to 11 U.S.C. § 1112(b) and Local Bankruptcy Rules ("LBR") 2015-2 and 9011-2,
28 to dismiss the Chapter 11 bankruptcy petition filed by UST Development Inc. (the "Debtor").

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **SUMMARY OF ARGUMENT**

4 The Debtor is a California corporation that has not been represented by counsel for the past
5 six months. It does not appear that the Debtor generates sufficient operating capital to retain
6 counsel. Dismissal is therefore warranted under Section 1112(b).¹ *See Rowland v. California*
7 *Men's Colony, Unit II Advisory Council*, 506 U.S. 194, 202 (1993) (“It has been the law for the
8 better of two centuries . . . that a corporation may appear in the federal courts only through licensed
9 counsel.”).

10 Moreover, since March 5, 2010, the Debtor has failed to file monthly operating reports and
11 pay quarterly fees. The Debtor’s consistent and continued lack of compliance shows a disregard for
12 its debtor-in-possession fiduciary obligations and establishes “cause” for dismissal. *See*
13 11 U.S.C. § 1112(b) (“cause” to dismiss may be established by a debtor’s failure to comply with
14 U.S. Trustee requirements).

15 **II.**

16 **STATEMENT OF FACTS**

17 **A. The Debtor’s Inability To Access Operating Capital**

18 1. The Debtor, a general contractor, filed a voluntary Chapter 11 petition on March 25,
19 2010, in an attempt to access funds it is owed for construction projections that are frozen by the
20 issuance of stop notices. *See Status Report*, Docket No. 56. It does not appear that the Debtor has
21 been able to access these funds as stay relief has been granted as to the Debtor’s personal property.²

27 ¹ Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11
28 U.S.C. §§ 101-1532, and the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

² Stay relief has been granted to several vehicles and equipment – virtually all of the assets listed on
Schedule B. *See* Docket Nos. 58, 59, 73, 86, 97, 104 (granting stay relief).

1 **B. The Debtor Is A Corporation And Lacks Counsel**

2 2. The Debtor's inability to obtain working capital has prevented it from retaining
3 counsel. The Debtor's original counsel withdrew on May 25, 2010. Declaration of Philip v. Green
4 ("Green Decl.") ¶ 5. The Debtor was briefly represented by additional counsel from June 30, 2010
5 to July 28, 2010, but that counsel withdrew. Green Decl. ¶ 5. The docket does not show any other
6 applications to employ counsel or any other document evidencing the Debtor's intent to employ
7 counsel. Green Decl. ¶ 5. Thus, since July 28, 2010, the Debtor, a California corporation, has
8 proceeded without representation. *See Corporate Resolution Authorizing the Filing*, Docket No. 3.

9 **C. The Debtor Has Failed To Timely File Monthly Operating Reports**

10 3. Debtors-in-possession are to submit a monthly operating report detailing all financial
11 activity every month. U.S. Trustee Guidelines³ and LBR 2015-2(a),(c). On January 4, 2010,
12 revised LBR 2015-2 became effective. That rule, as amended, requires debtors-in-possession to file
13 monthly operating reports with the court. The Debtor did not file with the Court or submit to the
14 U.S. Trustee, monthly operating reports for the months of March through December of 2010.
15 Green Decl. ¶ 7. The Debtor also did not submit any written documentation in lieu of the monthly
16 operating report explaining its failure to file these reports. Green Decl. ¶ 7.

17 **D. The Debtor Failed To Pay Their Quarter Fees**

18 4. Debtors-in-possession are required to pay a fee to the U.S. Trustee every calendar
19 quarter. 28 U.S.C. § 1930(a)(6); U.S. Trustee Guidelines. The Debtor owes at least the minimum
20 quarterly fees for the second, third and fourth quarters of 2010 in the aggregate amount of \$1,300.
21 Green Decl. ¶¶ 8-9, Exhibit 1.

22 **III.**

23 **JURISDICTION AND STANDING**

24 This Court has jurisdiction pursuant to 28 U.S.C Sections 157 and 1334. This matter is a
25 core proceeding within the meaning of 28 U.S.C. Section 157(b)(2)(A) and (O). Venue of these
26

27 ³ The U.S. Trustee has issued guidelines setting forth the monthly reporting requirements for chapter
28 11 debtors-in-possession. These guidelines are called the Notice of Financial Reporting Requirements for
Chapter 11 Debtors In Possession (the "U.S. Trustee Guidelines") and are distributed to all debtors-in-
possession and their counsel and are available on the U.S. Trustee's website at
<http://www.justice.gov/ust/r16/forms.htm>, last visited January 12, 2011.

1 proceedings and this Motion is proper in this District pursuant to 28 U.S.C. Sections 1408 and
2 1409.

3 The U.S. Trustee, pursuant to 11 U.S.C. Section 1112(b), is a recognized party-in-interest
4 with standing to request dismissal or conversion of a Chapter 11 case. *Johnston v. Jem*
5 *Development Co. (In re Johnston)*, 149 B.R. 158, 160 (B.A.P. 9th Cir. 1992).

6 **IV.**

7 **ARGUMENT**

8 **A. Standards Governing Conversion Or Dismissal For "Cause"**

9 Section 1112(b) of the Bankruptcy Code provides that a court must dismiss or convert a
10 case, whichever is in the best interests of creditors and the estate, if the movant establishes "cause"
11 and the debtor is unable to produce evidence of unusual circumstances demonstrating that
12 conversion or dismissal is not in the best interests of creditors or the estate.⁴ 11 U.S.C. §
13 1112(b)(1).

14 Section 1112(b)(4) defines "cause" to include without limitation:

- 15 (A) substantial or continuing loss to or diminution of the estate in the absence of a
16 reasonable likelihood of rehabilitation;
- 17 (E) unexcused failure to satisfy timely any filing or reporting requirement established by
18 Title 11 or by any rule applicable to a case under Chapter 11;
- 19 (F) unexcused failure to satisfy timely any filing or reporting requirement established by
20 this title or by any rule applicable to a [chapter 11] case . . .
- 21 (H) failure timely to provide information . . . requested by the United States trustee

22 11 U.S.C. § 1112(b)(4)(A), (E) (F) & (H).
23
24
25

26 ⁴ Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act
27 ("BAPCPA"), the decision to convert or dismiss a Chapter 11 case upon a showing of cause was
28 discretionary. BAPCPA circumscribed a bankruptcy court's discretion by replacing "may" with "shall" and
expressly mandating that the court dismiss or convert if the movant establishes cause. See 7 Alan N.
Resnick, *COLLIER ON BANKRUPTCY* ¶ 1112.04[1] (15th ed. rev. 2009). See also, *In re TCR of Denver,*
LLC, 338 B.R. 494 (Bankr. D. Colo. 2006)

1 **B. Because The Debtor Lacks Operating Capital, Stay Relief Has Been Granted To The**
2 **Debtor's Personal Property**

3 Diminution of a Chapter 11 estate need not be significant to warrant dismissal - all that is
4 necessary is that the estate suffers *some* diminution in value. *In re Kanterman*, 88 B.R. 26, 29
5 (S.D.N.Y. 1988). The pre-petition stop notices caused the Debtor to lose its primary source of
6 funding. There is simply no indication that the Debtor has the ability to generate income to
7 successfully perform a plan.⁵

8 **C. The Debtor Is A Corporation And Corporations May Not File a Petition Or Appear In**
9 **Federal Courts Without Counsel**

10 A chapter 11 debtor cannot appear or file a petition in federal courts without counsel. *See*
11 *Rowland v. California Men's Colony, Unit II Advisory Council*, 506 U.S. 194, 202 (1993) ("It has
12 been the law for the better of two centuries . . . that a corporation may appear in the federal courts
13 only through licensed counsel."); *United States v. High Country Broadcasting Co., Inc.*, 3 F.3d
14 1244, 1245 (9th Cir. 1993). Local Bankruptcy Rule 9011-2 expressly prohibits pro se entities from
15 appearing or filing petitions in bankruptcy cases in this district. LBR 9011-2 ("[a] corporation, a
16 partnership . . . or any unincorporated association . . . may not file a petition or otherwise appear
17 without counsel in any case or proceeding."). The Debtor is a California corporation and thus
18 cannot enjoy the protections of the bankruptcy code without legal representation.

19 **D. The Debtor's Failure to File Monthly Operating Reports Constitutes Cause To Dismiss**

20 Dismissal is warranted where a debtor-in-possession is oblivious to the fiduciary
21 responsibility imposed upon it in dealing with property of the estate. *See, e.g., In re Paul Kovas &*
22 *Co., Inc.*, 16 B.R. 203, 205 (Bankr. D. Conn. 1981). *In re Berryhill*, 127 B.R. 427, 433 (Bankr.
23 N.D. Ind. 1987) ("Neither the court nor creditors should have to coerce or implore a debtor in
24 possession into fulfilling the obligations imposed upon it.") LBR 2015-2(a), (c) and the U.S.
25 Trustee Guidelines require debtors-in-possession to file monthly operating reports. Compliance
26 with this obligation is no ministerial matter. *See In re Forster*, 162 B.R. 478, 482 (Bankr. N.D.
27 Ohio 1993). Given that monthly operating reports enable the Court and creditors to monitor debtor-

28
⁵ The Debtor has not filed a plan or disclosure statement.

1 in-possession post-petition activities, the filing of such reports is high on the list of fiduciary
2 responsibilities imposed on a debtor-in-possession. *Berryhill*, 127 B.R. 427, 433 (Bankr. N.D. Ind.
3 1991) (“[t]imely and accurate financial disclosure is the life blood of the Chapter 11 process.”).

4 In this matter, the Debtor failed to timely submit interim statements and operating reports to
5 the Court and the U.S. Trustee. The Debtor filed this case on March 5, 2010 and has failed to
6 submit a single operating report. Green Decl. ¶ 7. This failure, in and of itself, constitutes “cause”
7 to dismiss. *See In re A. Edward McClure*, 69 B.R. 282, 289 (Bankr. Ind. 1987).

8 **E. The Debtor’s Failure To Pay Quarterly Fees Constitute Cause To Dismiss**

9 Debtors and debtors-in-possession have a statutory obligation to pay quarterly fees to the
10 U.S. Trustee. 28 U.S.C § 1930(a)(6). The Code and case law are clear that the failure to pay
11 quarterly fees to the U.S. Trustee constitutes “cause” to dismiss or convert.
12 11 U.S.C. § 1112(b)(4)(K); *see, e.g., United States Trustee v. Celebrity Duplicating Services (In re*
13 *Celebrity Duplicating Services)*, 216 B.R. 942, 943 (C.D. Cal. 1997) (affirming bankruptcy court’s
14 dismissal of case based on failure to pay quarterly fees), *rev’d on other grounds*, 210 F.3d 995 (9th
15 Cir. 2000). Bankruptcy courts in the Central District of California, Riverside Division routinely
16 convert or dismiss cases for failure to pay quarterly fees. *See, e.g., In re SWM Management Corp.*,
17 Case No. 6:09-bk-26135 (Bankr. C.D. Cal. October 27, 2009).

18 The Debtor was made aware of the obligation to pay quarterly fees at the beginning of this
19 case. Green Decl. ¶ 4. Despite this knowledge, it failed to comply. Dismissal is therefore
20 mandated.

21 **V.**

22 **CONCLUSION**

23 For the reasons set forth above, the U.S. Trustee respectfully requests that the Court enter an
24 order dismissing this case and granting such other and further relief as may be just and equitable.

25
26 DATED: January 11, 2011

PETER C. ANDERSON
United States Trustee

27
28 By: /s/ Everett L. Green
Everett L. Green
Trial Attorney

DECLARATION OF PHILIP V. GREEN

I, Philip V. Green, declare:

1. I am employed as an Analyst by the U.S. Trustee¹ for the Central District of California, Riverside Field Office. I submit this declaration in support of the U.S. Trustee's Motion to Dismiss the Chapter 11 Petition filed by UST Development Inc., (the "Debtor"). I make this declaration of my own personal knowledge except where stated on information and belief and as to such matters, I believe them to be true. If called as a witness, I could and would testify to the information contained herein.

2. My responsibilities as an Analyst include the monitoring and review of Chapter 11 cases for compliance with the U.S. Trustee Guidelines and the Bankruptcy Code. As part of those duties, I review the documents filed in the bankruptcy case and conduct initial debtor interviews ("IDI") where I explain to debtors and their counsel the requirements imposed on debtors-in-possession by the U.S. Trustee and the Bankruptcy Code.

3. On or about April 23, 2010 and on December 14, 2010, I accessed the Court's docket located at ecf.casb.uscourts.gov and reviewed the Chapter 11 petition and schedules filed by the Debtor in this case.

4. On or about December 7, 2009, I contacted the Debtor's counsel Robert Uriate, via telephone to schedule a site-visit and conduct an IDI. As part of the IDI, I provided the Debtor and its counsel copies of the U.S. Trustee Chapter 11 Guidelines. I also explained the quarterly fee requirements and deadlines for payment of the quarterly fees.

A. The Debtor Does Not Have Counsel

5. The Debtor filed a corporate resolution indicating that it is a California corporation. Based on my review of the docket, the Debtor's original counsel withdrew on May 25, 2010. The Debtor was briefly represented by additional counsel from June 30, 2010 to July 28, 2010, but that counsel withdrew. As of January 12, 2011, the docket does not show any other applications to employ counsel or any other document evidencing the Debtor's intent to employ counsel.

¹ Capitalized terms used herein have the meanings ascribed to them in the Motion.

1 **B. Stay Relief Has Been Granted To The Debtor's Personal Property**

2 6. The docket indicates that relief from the automatic stay was granted on virtually all
3 of the assets listed on Schedule B. *See* Docket Nos. 58, 59, 73, 86, 97, 104. On March 30, 2010,
4 stay relief was granted as to First Sealord Surety Inc. to allow it to terminate the Debtor's bonded
5 contracts and arrange completion of the projects. On May 12, 2010, an order granting relief from
6 the automatic for the two 2008 Chevy pick-up trucks was entered. On July 26, 2010, stay relief was
7 granted so that an unlawful detainer action could proceed for property rented by the Debtor. The
8 Debtor owed in excess of \$8,312 in unpaid rent. *See Motion for Relief From Stay, Notice To Pay*
9 *Rent or Quit*, Docket No. 85.

10 **C. Monthly Operating Reports**

11 7. My review of the U.S. Trustee's files and records in this case, as well as the Court's
12 docket, evidence that the Debtor has not filed a monthly operating report for the months of March
13 through December of 2010. The Debtor has not submitted any written documentation in lieu of the
14 monthly operating reports or offered any explanation to the U.S. Trustee for its failure to file these
15 reports.

16 **D. Quarter Fees**

17 8. I am familiar with the U.S. Trustee Guidelines and office procedures regarding the
18 collection of quarterly fees. The U.S. Trustee Guidelines provide that chapter 11 debtors are required
19 to pay a quarterly fee to the U.S. Trustee every calendar quarter (including any fraction thereof), based
20 on disbursements made from the date the petition is filed until the date of an order for a final decree or
21 dismissing the case. Fees are due no later than one month following the quarterly reporting period.

22 9. On or about January 12, 2010, I accessed the U.S. Trustee's Quarterly Fee Information
23 and Collection System ("FICS") and reviewed the Debtor's account. FICS shows that the Debtor
24 owes quarterly fees in the aggregate amount of \$1,300 for the second, third and fourth quarters of
25 2010. A true and correct copy of the most recent FICS report is attached hereto as Exhibit 1.

26 I declare under penalty of perjury under the laws of the United States that the foregoing is
27 true and correct and that this declaration was executed on January 12, 2011 at Riverside, California.

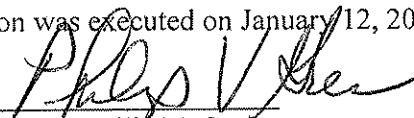
28

Philip V. Green

Exhibit 1



Chapter 11 Quarterly Fee Information and Collection System (FICS)

US Trustees, US Department of Justice

Session Timeout

Case #	Court #	Date Filed	Debtor
736-10-16297	10-16297-CB	03-05-10	UST DEVELOPMENT, INC.

- [Account](#)
- [Transactions](#)
- [Fees](#)
- [Interest](#)
- [Payments](#)
- [Disbursements](#)
- [Events](#)
- [Linked Cases](#)
- [Fee Review](#)
- [Statements](#)

Debtor

UST DEVELOPMENT, INC.

305 N. SACRAMENTO AVE.

ONTARIO, CA 91764

EIN:80-0177940

Debtor Type: CB

Last Updated: 10-29-10

Financial Summary

Billed to Date		1,300.00
Billed to Date Principal	1,300.00	
Billed to Date Interest	0.00	
Payments to Date:		0.00
Payments to Date Principal	0.00	
Payments to Date Interest	0.00	
Currently Not Collectible		0.00
Write Off Balance:		0.00
Current Balance Due:		1,300.00
Current Balance Principal Due:	1,300.00	
Current Balance Interest Due:	0.00	

Case Event Information

Conversion:

Dismissed by Court:

Order Confirming Plan:

Closed by Court Order:

Transferred Out:
Transferred In:

Bill To Location

UST DEVELOPMENT, INC.

305 N. SACRAMENTO AVE.

ONTARIO, CA 91764

Debtor's Attorney

ANDREW S. BISOM

695 TOWN CENTER DRIV

SUITE 700

COSTA MESA, CA 92626

Phone: (714)384-6440

Fax: (714)384-6441

Consolidation Information

Parent Case:

Date:

Type:

Staff

S1) ABRAM S. FEUERSTEIN

S2) PHILLIP GREEN

Trustee

Chapter Information

Current:11

Date: 03-05-10

Judge

CATHERINE E. BAUER

Account Actions

Retain this Account



Chapter 11 Quarterly Fee Information and Collection System (FICS)

US Trustees, US Department of Justice

Session Timeout

Case #	Court #	Date Filed	Debtor
736-10-16297	10-16297-CB	03-05-10	UST DEVELOPMENT, INC.

- [Account](#)
- [Transactions](#)
- [Fees](#)
- [Interest](#)
- [Payments](#)
- [Disbursements](#)
- [Events](#)
- [Linked Cases](#)
- [Fee Review](#)
- [Statements](#)

Trans Date	Quarter	Source	Batch	Batch Item	Deposit Date	Fee	Interest	Payment	Description	Entry Date
01-10-11	4/2010	QF				325.00			Quarter 4, 2010 Fee Due {Est. using prev qtr fee.} (8)	01-10-11
10-07-10	3/2010	QF				325.00			Quarter 3, 2010 Fee Due {Est. using prev qtr fee.} (8)	10-07-10
07-07-10	2/2010	QF				325.00			Quarter 2, 2010 Fee Due {Est. using prev qtr fee.} (8)	07-07-10
04-07-10	1/2010	QF				325.00			Quarter 1, 2010 Minimum Fee Due (9)	04-07-10

The Chapter 11 Quarterly Fee Information and Collection System (FICS) for the United States Trustee Program, U.S. Department of Justice. Limited Official Use Only.

NOTE: When using this form to indicate service of a proposed order, **DO NOT** list any person or entity in Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on the CM/ECF docket.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:
Office of the U.S. Trustee
3685 Main Street, Suite 300
Riverside, CA 92501

A true and correct copy of the foregoing document described as: UNITED STATES TRUSTEE'S MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF PHILLIP V. GREEN IN SUPPORT THEREOF will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner indicated below:

I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On January 14, 2011, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

Service information continued on attached page

II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL(indicate method for each person or entity served):

On January 14, 2011, I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

UST Development, Inc.
305 N. Sacramento Ave
Ontario, CA 91764

Service information continued on attached page

III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (indicate method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on January 14, 2011, I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on the judge will be completed no later than 24 hours after the document is filed.

Honorable Catherine E Bauer, bin outside Courtroom 303, Riverside Division

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

1-14-11

Date

Bonita DeGrave

Type Name

/s/ Bonita DeGrave

Signature

• **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (“NEF”)**

-
- Andrew S Bisom abisom@bisomlaw.com
- Rebecca A Caley rcaley@caleylaw.com
- Donald T Dunning ddunning@dunningLaw.com
- Ziad Elrawashdeh ziadrawa@gmail.com
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