United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
Courtroom 301 Calendar

Thursday, September 2, 2021 **Hearing Room 301**

10:00 AM
1: - **Chapter**

#0.00 **You will not be permitted to be physically present in the courtroom. All appearances for this calendar will be via Zoom and not via Court Call. All parties participating in these hearings may connect from the zoom link listed below. This service is free of charge. You may participate using a computer or telephone.**

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Docket 0

10:00 AM
CONT... **Chapter**

Tentative Ruling:

- NONE LISTED -

1:13-16084 Holly Elizabeth Winzenburg **Chapter 7**

#1.00 Evidentiary Hearing re: Order to show cause why Eric B. Gans should not be held in civil contempt for violations of the automatic stay and discharge injunction

fr. 5/20/21; 6/24/21

Docket 22
***** VACATED *** REASON: Per ruling on 8/5/21.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Holly Elizabeth Winzenburg — Represented By
Brett F Bodie
Ahren A Tiller

Trustee(s):

Diane C Weil (TR) — Pro Se

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1:09-26982 Tag Entertainment Corp. **Chapter 7**

#2.00 Trustee's Final Report and Applications for Compensation

Diane C. Weil, Chapter 7 Trustee

Levene, Neale, Bender, Yoo & Brill LLP, Attorneys for Chapter 7 Trustee

Van Dyke & Associates, APLC, Special Litigation Counsel to Chapter 7 Trustee

Focus Advisory Services LLC, Special Consultant to Chapter 7 Trustee

Hahn Fife & Company, LLP, Accountants for Chapter 7 Trustee

fr. 8/5/21; 8/26/21

Docket 287

Tentative Ruling:

Diane C. Weil, the chapter 7 trustee (the "Trustee") – approve fees of $60,825.82 (as reduced in agreement with the United States Trustee) and reimbursement of $1,803.31 in expenses.

Van Dyke & Associates, APLC ("Van Dyke"), special litigation counsel to the Trustee – based on the Court's previous orders approving interim compensation and reimbursement of expenses: (A) Van Dyke is authorized to receive $50,000.00 in fees, for the period between April 6, 2010 and December 9, 2011 [doc. 86]; (B) Van Dyke is authorized to receive $31,734.69 in fees and $14,205.51 for reimbursement of expenses, for the period between December 6, 2011 and February 5, 2014 [doc. 152]; and (C) Van Dyke is authorized to receive $50,000.00 in fees and $19,356.56 reimbursement of expenses, for the period between February 4, 2014 through August 8, 2014 [doc. 174]. At this time, the Court approves those fees, and that reimbursement of expenses, on a final basis. *See* calendar no. 3.

Based on the consensual reduction of fees sought, as set forth in the Stipulation between Van Dyke and the United States Trustee, the Court will approve additional

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CONT... Tag Entertainment Corp. **Chapter 7**

fees in the amount of $382,423.06, for the period between April 6, 2010 through the end of this case, on a final basis. *See* calendar no. 3.

Focus Advisory Services, LLC ("Focus"), special consultant to the Trustee – based on the Court's previous orders approving interim compensation: (A) Focus is authorized to receive $20,822.00 as a contigency fee, based on 20% for the first $250,000.00 in gross receipts, 15% for the next $250,000.00 in gross receipts and 10% for any further gross receipts [doc. 130]; and (B) Focus is authorized to receive $17,504.00 as a contingency fee [doc. 164]. At this time, the Court approves those fees on a final basis. The Court also will approve an additional contingency fee in the amount of $95,276.71, on a final basis.

Hahn Fife & Company, accountant to the Trustee – approve fees of $16,626.50 and $1,314.30 for reimbursement of expenses, on a final basis.

The Court will continue the hearing on the final fee application filed by Levene, Neale, Bender, Yoo & Brill LLP to **September 9, 2021 at 10:30 a.m.**

The Trustee must submit the order within seven (7) days

Party Information

Debtor(s):

Tag Entertainment Corp.	Represented By Jonathan David Leventhal

Trustee(s):

Diane C Weil (TR)	Represented By Lawrence A Diamant Diane Weil Edward M Wolkowitz Anthony A Friedman Lindsey L Smith

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James A Bush
Richard S Van Dyke

1:09-26982 Tag Entertainment Corp. **Chapter 7**

#3.00 Chapter 7 Trustee's Objection to Application for Payment of Final Fee and or Expenses (11 U.S.C. § 330) of Van Dyke & Associates, APLC, Special Litigation Counsel To Chapter 7 Trustee and Request to Disgorge Interim Fees and Costs Previously Paid

fr. 8/26/21

Docket 298

Tentative Ruling:

The Court will overrule the chapter 7 trustee's objection to the final fee application filed by her special litigation counsel.

I. BACKGROUND

On December 16, 2009, Tag Entertainment Corp. ("Debtor") filed a voluntary chapter 7 petition. Diane C. Weil was appointed as chapter 7 trustee (the "Trustee"). Van Dyke & Associates, APLC ("Van Dyke") was retained as the Trustee's special litigation counsel. Prior to that time, Van Dyke had represented creditors of Debtor and, in state court interpleader actions, was appointed as a disbursing agent for the proceeds of film distribution agreements with Debtor and its affiliates.

A. The Restitution Payment by Debtor's Founder

Prepetition, Debtor operated as an entertainment company which acquired and licensed movies and assisted with the production and distribution of films. Adversary Proceeding No. 1:10-ap-01342-VK (the "Trustee Action") [doc. 239], *Report and Recommendation to District for Withdrawal of Reference* (the "Report"), p. 6. As part of its business operations, Debtor entered into agreements with several limited partnerships; the limited partnerships would fund film production by "cold-calling" investors. *Id.*

Debtor's principal, Steven Kent Austin, participated and devised a scheme to defraud investors by informing potential investors that their money would fund the development, production, marketing and distribution of films. *Id.* However, upon receipt of the money by investors, Mr. Austin and other participants would take a large portion of the funds for personal use. *Id.*

In 2007, the United States charged Mr. Austin with mail fraud and filing a false tax return. *Id.* Mr. Austin pleaded guilty to both charges. *Id.* Under the plea agreement, Mr. Austin agreed to pay restitution to the victims. *Id.* On May 31, 2007, Mr. Austin made a restitution payment in the amount of $5,989,999.00 to the Clerk of Court for the United States District Court, Central District of California. *Id.* The restitution payment derived from the sale of Mr. Austin's personal residence in Malibu, California. *Id.*

B. The State Court Interpleader Actions

On April 18, 2008, Quantum Production Services, LLC and Quantum's president, Terry E. Kennedy (together, "Quantum"), obtained a judgment against Debtor in the amount of $3,090,962.80. Declaration of Richard S. Van Dyke ("Van Dyke Decl."), attached to the *Application for Order Approving Employment of Special Litigation Counsel for Diane C. Weil, Chapter 7 Trustee* (the "Application to Employ"), doc. 34, ¶ 9.

As a result of the judgment, Quantum sought collection from Twentieth Century Fox ("Fox") and Seven Arts Pictures ("Seven Arts"), which had entered into movie distribution agreements with Debtor and/or its affiliates. Declaration of Diane C. Weil ("Weil Decl."), attached to the *Motion of Diane C. Weil, Chapter 7 Trustee to Approve Compromise of Controversy with Quantum Production Services, LLC and Terry Kennedy* (the "Motion to Compromise"), doc. 36, ¶ 5. Van Dyke represented Quantum in obtaining a judgment against Debtor and with Quantum's related collection efforts. Van Dyke Decl., doc. 34, ¶ 9.

On July 17, 2008, Fox filed an interpleader action in the Superior Court of California, for the County of Los Angeles (the "State Court") against, among others, Tag Entertainment USA, Inc., Tag Entertainment, Inc. and Debtor (collectively, the "Tag

Entities"), as well as Quantum, among other defendants. Declaration of James A. Bush ("Bush Decl."), attached to the *Motion for Relief from the Automatic Stay under 11 U.S.C. § 362* (the "Stay Relief Motion"), doc. 13, p. 5. A related action, initiated by Seven Arts, was consolidated with Fox's interpleader action. Bush Decl., doc. 13, p. 7, ¶ 11. Both Fox and Seven Arts sought determinations regarding which interpleader defendants should receive the proceeds of the movie distribution agreements with the Tag Entities. Weil Decl., doc. 36, ¶ 5.

On April 1, 2009, the State Court entered a Stipulated Order, directing Fox to deposit $429,753.00 (the "Fund") in the State Court's registry. The Fund was obtained by Fox from a movie distribution agreement with Tag Entertainment USA, Inc. Stay Relief Motion, doc. 13, Exh. A, p. 14. This Stipulated Order provided for the State Court's distribution of the Fund among certain interpleader defendants.

On November 12, 2009, the State Court entered a Stipulated Order and Dismissal, directing Fox to deposit with Van Dyke additional funds received from its movie distribution agreements with Tag Entities. In accordance with this order, Van Dyke was to distribute additional funds to certain of the interpleader defendants, based on their respective percentage shares. Stay Relief Motion, doc. 13, Exh. A, pp. 29–32. In connection with movie distribution rights held by Seven Arts, a similar stipulated resolution of the Interpleader Action took place. Bush Decl., doc. 13, pp. 8-10, ¶¶ 11-19.

On February 4, 2010, to effectuate the settlement of the interpleader actions in State Court, Quantum filed the Stay Relief Motion [doc. 13]. On August 5, 2010, the Court entered an order granting the Stay Relief Motion [doc. 51].

C. The Application to Employ

On April 20, 2010, following Quantum's filing of the Stay Relief Motion, the Trustee filed the Application to Employ [doc. 34]. The Trustee sought to employ Van Dyke to pursue certain litigation claims concerning: (1) the recovery of monies allegedly derived from the Tag Entities' movie distribution rights; (2) approximately $6 million allegedly fraudulently transferred to Debtor's principal, Steven Kent Austin, and subsequently to the United States, via Mr. Austin's criminal restitution payment; and (3) the recovery of monies or other property held by third parties.

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In his declaration filed in support of the Application to Employ, Richard Van Dyke declared that:

> Other than as counsel for Quantum Production Services, LLC and Terry E. Kennedy in connection with their obtaining and enforcing a judgment against Debtor and in presenting a proof of claim in this matter on behalf of Quantum Production Services, LLC and Terry E. Kennedy, to which claim I understand Trustee does not contemplate objecting, none of [Van Dyke], Mr. Bush, nor I have any connection with Debtor or its former principal Steven Austin.
>
> None of [Van Dyke], Mr. Bush or I: (a) personally hold any interest adverse to the Estate in connection with the matters for which our employment is sought; and (2) have any connection with the Trustee, the Bankruptcy Judge in this case, or any person employed by the Office of the United States Trustee other than through our representation of clients in the normal course of our legal practice before the Bankruptcy Court.

Van Dyke Decl., doc. 34, ¶¶ 14–15. Mr. Van Dyke also declared that:

> Upon the Court's approval as special litigation counsel to the Trustee, it is anticipated that our work on matters pertaining to our client Quantum Production Services, LLC and/or Terry Kennedy will be concluded in favor of the litigation work we contemplate for the Trustee and the Estate. The attorney-client relationship will continue, however, as it pertains to the enforcement of Quantum/Kennedy's claim against Debtor and the Estate, for which proofs of claim have been filed in this matter.

Id., ¶ 10. In the Application to Employ and Richard Van Dyke's declaration, Van Dyke did not disclose that Van Dyke had been appointed as a disbursing agent in connection with the interpleader actions filed in State Court.

Attached to the Application to Employ is a copy of the attorney-client representation

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and fee agreement executed by the Trustee and Van Dyke (the "Engagement Agreement") [doc. 34, Exh. A]. The Engagement Agreement states: "Attorney and Client agree that Attorney is retained principally to pursue the Debtor's fraudulent conveyance claims for the benefit of Debtor estate against the Debtor's former CEO and related persons. ***The pursuit of said claims involves a substantial degree of risk of failure. . . .***"

In the Engagement Agreement, the Trustee and Van Dyke agreed to a hybrid-contingency fee arrangement, as set forth in pertinent part below:

> In light of the foregoing risk, complication and competition for limited assets, Attorney and client agree, subject to Bankruptcy Court approval, to a Hybrid Hourly and Contingency Fee Agreement as set forth herein:
>
> 1. Contingency Fee Based Upon Actual Recovery for the Debtor Estate up to the sum of $6,000,000 shall be equal to 20% of Gross Recovery, reduced by the sum of all hourly fees paid to attorney under paragraph 4(a), to arrive at a "Net Contingency Fee."
>
> 2. Contingency Fee Based Upon Actual Recovery for the Debtor Estate of sums in excess of $6,000,000 shall be 15% of Gross Recovery that exceeds $6,000,000, reduced by the sum of all hourly fees paid to Attorney under paragraph 4(a), to arrive at a "Net Contingency Fee."
>
> 3. ***If there is no recovery obtained by Attorney,*** Client's obligation to pay Attorneys Fees to Attorney will be limited to those hourly fees billed to client and approved by the Bankruptcy Court.

Id. at Section 4.b (emphasis added).

On June 10, 2010, the Court entered an order approving the Application to Employ [doc. 47].

D. The Motion to Compromise

On April 29, 2010, the Trustee filed the Motion to Compromise [doc. 36]. In the Motion to Compromise, the Trustee sought authorization to approve the settlement agreement (the "Agreement") reached with Quantum regarding the funds interplead by Fox and Seven Arts, as well as to resolve the Stay Relief Motion. The Agreement stated:

> All such claims were resolved at trial on December 2, 2009, by way of stipulation for judgment, which was entered by the court on January 12, 2010. Said judgment provides that ***counsel for Quantum/Kennedy shall be appointed Disbursing Agent for collection of all sums due and payable by Fox and Seven Arts*** to the Debtor and for disbursement of all collected sums to the interpleader defendants in accordance with the terms of the stipulated judgment.
> . . .

In accordance with the Agreement:

> The distribution proceeds now held by [Fox] and Seven Arts, including those sums which are now due . . . ***shall be paid 70% to the Disbursing Agent for the benefit of the interpleader defendants and 30% to the Trustee for the benefit of the estate's creditors***. . .
>
> Any and all liens held by the Disbursing Agent and/or Quantum or Kennedy in the distribution payments set forth above are ***assigned to the Trustee*** for the benefit of creditors.
> . . .
>
> On the filing thereof, ***Quantum shall have an approved and allowed unsecured claim in the bankruptcy case in the amount of its judgment plus interest*** to the date of the filing of the bankruptcy case less amounts received by Quantum as a result of its collection efforts.

Id., Exh. A, pp. 16–17 (emphasis added).

In her declaration filed in support of the Motion to Compromise, the Trustee acknowledged that "counsel of Quantum shall be appointed Disbursing Agent for collection of all sums due and payable by Fox and Seven [Arts] to the Debtor and for disbursement of all collected sums to the interpleader defendants." Weil Decl., doc. 36, ¶ 6. On September 10, 2010, the Court entered an order approving the Motion to Compromise [doc. 56] **[FN1]**.

E. The Trustee Litigation Against the United States of America

On August 11, 2010, following the Court's approval of the Application to Employ, the Trustee filed a complaint against the United States of America (the "United States"), initiating the Trustee Action. On July 22, 2011, the Trustee filed the operative amended complaint (the "Amended Complaint"). Trustee Action, doc. 27. In the Amended Complaint, the Trustee asserted that the restitution money paid by Mr. Austin to the United States was traceable to Debtor and could be recovered as a fraudulent transfer under 11 U.S.C. § 544(b) and California's Uniform Fraudulent Transfer Act.

In pertinent part, the Amended Complaint alleged:

> Steven Kent Austin ("Austin"), the defendant in the Federal Criminal Action, had been the principal of Debtor until his incarceration in connection with his guilty plea in the Federal Criminal Action. Among other things, Austin had been Debtor's Chief Executive Offer, Chairman of the Board, a director, and majority shareholder who, Plaintiff is informed and believes, directed the assets of Debtor according to his whim.
> . . .
>
> Austin and the United States have contended that the $6 million Deposit is the property of Austin, and they have sought to use the $6 million Deposit to make restitution to the victims of Austin's crimes or otherwise seek to exercise dominion and control over the $6 million Deposit.

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> Before the United States had any claim to the $6 million Deposit other than as a mere custodian thereof pursuant to 28 U.S.C. §§ 2041, et seq., the United States became aware of the claim that the $6 million Deposit did not belong to Austin and instead was the fruit of fraudulent transfers from Debtor to Austin. Such notice came no later than the notice to the United States of the filing of that civil suit filed in the Central District of California by Debtor's creditors Quantum Production Services, LLC and Terry E. Kennedy . . . as Case No. CV-5087 PSG (the "Federal Civil Action"), which suit sought recovery of the $6 million Deposit.

Id., ¶¶ 8–10.

Pretrial, the parties engaged in contentious litigation, including: (1) the United States filing three motions in the Trustee Action for summary judgment; and (2) the Trustee filing a motion for sanctions against, and disqualification of, the United States' counsel. Trustee Action, docs. 18, 40, 95 and 143.

On April 12, 2013, Van Dyke sent an 87-page memorandum to the Trustee and her bankruptcy counsel setting forth risks and obstacles in the Trustee Action and discussing whether the Trustee could succeed on the bankruptcy estates's fraudulent transfer claim against the United States [doc. 303, Exh. G]. In the memorandum, Van Dyke stated that "while discovery has not yielded the results that we would have hoped in the form of a complete financial history . . . and we are thus prevented from making a dollar-for-dollar analysis of fraudulent transfers, it appears there remains sufficient evidence to show by preponderance of evidence the fraudulent transfers occurred and can be collected from the United States." *Id.* at 87.

Between July 28, 2014 and August 4, 2014, the Court conducted a trial on the allegations raised in the Amended Complaint. On March 29, 2016, the Court filed the Report. Trustee Action, doc. 239. As set forth in the Report, the Court determined that, among other things, the Trustee did not meet her burden of proof in demonstrating that the United States received any funds that directly flowed from Debtor as to constitute a fraudulent transfer. Consequently, the Court recommended that the United States District Court enter judgment in favor of the United States.

On October 13, 2016, the United States District Court entered judgment in favor of the United States. Trustee Action, doc. 241. On October 14, 2016, the United States filed an application to the Clerk of Court for reimbursement of costs in the amount of $12,821.85, which subsequently was granted. On March 30, 2017, the Trustee Action was closed. *Id.*, doc. 245.

F. The Other Adversary Proceedings

On December 15, 2011, the Trustee filed three separate complaints, initiating adversary proceedings 1:11-ap-01662-VK (the "Second Adversary"); 1:11-ap-01164-VK (the "Third Adversary"); and 1:11-ap-01665 (the "Fourth Adversary").

On March 5, 2013, in connection with the Second Adversary, the Court entered an order granting summary judgment in favor of the defendant. Second Adversary, doc. 35. On January 26, 2017, the Court entered orders dismissing the Third Adversary and Fourth Adversary based on lack of prosecution by the Trustee. Third Adversary, doc. 111; Fourth Adversary, doc. 95.

In his Declaration, Richard Van Dyke represents that he and the Trustee discussed pursuing the Third Adversary and the Fourth Adversary, in light of the Report. In their business judgment, litigating these would not bring any monies into the estate, and they concurred that the Third Adversary and the Fourth Adversary should be dismissed. Declaration of Richard S. Van Dyke, doc. 303-1, ¶ 27.

G. Interim Payments to Van Dyke and the Final Fee Application

To date, Van Dyke has been awarded and paid $131,734.69 in interim fees and $33,562.07 in reimbursement of expenses, totaling $165,296.76. On March 22, 2012, the Court entered an order approving attorney's fees of Van Dyke in the amount of $50,000.00 [doc. 86]. On March 24, 2014, the Court entered an order approving attorney's fees of Van Dyke in the amount of $31,734.69 and reimbursement of $14,205.51 in expenses [doc. 152]. On December 11, 2014, the Court entered an order approving attorney's fees of Van Dyke in the amount of $50,000.00 and reimbursement of $19,356.56 in expenses [doc. 174]. For each of Van Dyke's related interim fee application, the Trustee submitted her declaration supporting the payment of the requested fees and reimbursement of expenses, on an interim basis [docs. 80, 143, 169].

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On April 26, 2021, Van Dyke filed an *Application for Payment of Final Fees and/or Expenses* (the "Final Fee Application") [doc. 276], seeking final approval of $599,157.75 in attorney's fees and $33,562.07 in expenses. On July 2, 2021, the Trustee filed the *Trustee's Final Report* (the "Final Report") [doc. 286]. In the Final Report, the Trustee lists Quantum as the largest unsecured creditor with an allowed claim in the amount of $3,387,901.60 and proposes payment to Quantum in the amount of $224,776.96. The Trustee also stated that she and the United States Trustee ("UST") intended to file objections to the Final Fee Application.

On July 21, 2021, the UST filed a *Stipulation Between U.S. Trustee and Van Dyke & Associates, APLC to a Reduction in Fees Requested in Final Fee Application* (the "Fee Stipulation") [doc. 296]. In the Fee Stipulation, based on the UST's position regarding fees charged for lumping, clerical services, vague entries and duplicative services, Van Dyke agreed to reduce its request for fees by $85,000.00, for final approval of $514,157.75 in fees and $33,562.07 in expenses.

On July 22, 2021, Van Dyke filed an *Objection to Trustee's Final Report* [doc. 297]. Van Dyke argues that the Final Fee Application should be approved given that: (1) the Trustee cannot object to Van Dyke's employment as special litigation counsel more than a decade after the fact; (2) through Van Dyke's collection efforts, the bankruptcy estate recovered over $320,000.00 in receipts under the terms of the Agreement; (3) Van Dyke was never compensated for its role as a state court appointed disbursing agent; (4) the Trustee has yet to pay the fees owed to Van Dyke under the Agreement; and (5) at the Trustee's direction, Van Dyke commenced four adversary proceedings, including against the United States, and performed under the terms of the Application to Employ.

On July 22, 2021, the Trustee filed an objection to the Final Fee Application (the "Objection") [doc. 298]. In the Objection, the Trustee requests that the Court deny the Final Fee Application and require that Van Dyke disgorge all interim fees and expenses previously paid.

According to the Trustee, "Van Dyke failed to disclose in the employment application that he was acting as a state court disbursing agent for the collection of all sums due and payable by [Fox] and [Seven Arts], to the Debtor and for disbursement of all

collected sums to secured creditors of the Debtor, including Van Dyke's client, Quantum." In addition, "Van Dyke failed to tell the Court that he was receiving compensation for acting as a disbursing agent on behalf of creditors of the Debtor." The Trustee contends that Van Dyke's failure to disclose its role as a disbursing agent in the Application to Employ constitutes sufficient grounds to deny approval of all fees and reimbursement of all expenses requested in the Final Fee Application and for the Court to require Van Dyke's disgorgement of all previously paid interim fees and reimbursement of expenses. The Trustee's position is that Van Dyke also did not disclose its role as a disbursing agent in the Stay Relief Motion.

The Trustee further argues that Van Dyke should not be compensated because, according to the Trustee, Van Dyke: (1) failed to prosecute the Trustee Action properly; (2) failed to notify the Trustee that the United States obtained an order assessing costs in the amount of $12,821.85 against the bankruptcy estate; and (3) the other adversary proceedings commenced by Van Dyke resulted in no recoveries for the benefit of the bankruptcy estate.

On August 19, 2021, Van Dyke filed a response to the Objection (the "Response") [doc. 303]. In the Response, Van Dyke argues that: (1) it disclosed its status as a state court disbursing agent in the Stay Relief Motion; (2) the Trustee had actual knowledge that Van Dyke was a disbursing agent prior to employing Van Dyke; (3) under the terms of the Agreement, the Trustee received over $300,000.00 in receipts; (4) the Trustee was aware of the risks in pursuing the Trustee Action against the United States; (5) following the Report, Van Dyke and the Trustee mutually agreed not to pursue the other pending adversary proceedings; and (6) given the proof of service, the Trustee received notice when judgment was entered in favor of the United States and when the United States sought court costs against the bankruptcy estate.

II. DISCUSSION

A. 11 U.S.C § 327

11 U.S.C. § 327 provides, in relevant part:

> (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants,

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> appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.
> . . .
>
> (c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.
> . . .
>
> (e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

11 U.S.C. § 327(a), (c) and (e). The purpose of § 327 "is to assure that a professional employed in the case will devote undivided loyalty to the client." *In re Wheatfield Business Park LLC*, 286 B.R. 412, 417–18 (Bankr. C.D. Cal. 2002).

For the employment of special counsel, § 327(e), unlike § 327(a), does not require disinterestedness. *In re Film Ventures Intern. Inc.*, 75 B.R. 250, 252 (B.A.P. 9th Cir. 1987); *see also Lennear v. Diamond Pet Food Processors of California, LLC*, 147 F. Supp. 3d 1037, 1051 (E.D. Cal. 2015) (attorneys employed as special counsel under § 327(e) are not subject to the disinterested standard under § 327(a)). "[Section] 327(e) only requires that the employment of an attorney be in the best interest of the estate and that the attorney not represent or hold an interest adverse to the debtor or the estate with respect to the matter on which the attorney is to be employed." *In re Song*, 2008 WL 6058782, at *7 (B.A.P. 9th Cir. Feb. 12, 2008).

An "adverse interest" means: "(1) possession or assertion of an economic interest that

would tend to lessen the value of the bankruptcy estate; or (2) possession or assertion of an economic interest that would create either an actual or potential dispute in which the estate is a rival claimant; or (3) possession of a predisposition under circumstances that create a bias against the estate." *In re AFI Holdings, Inc.*, 530 F.3d 832, 845 (9th Cir. 2008). "When counsel is only employed to perform limited services, then an interest 'adverse to the estate' means 'an adverse interest *relating to the services which are to be performed by that attorney*.'" *In re Sonya D. Intern., Inc.*, 484 B.R. 773, 780 (Bankr. C.D. Cal. 2012) (emphasis in original) (quoting *In re Fondiller*, 15 B.R. 890, 892 (B.A.P. 9th Cir. 1981); *see also Stoumbos v. Kilimnik*, 988 F.2d 949, 964 (9th Cir. 1993) ("where the trustee seeks to appoint counsel only as 'special counsel' for a specific matter, there need only be no conflict between the trustee and counsel's creditor client with respect to the specific matter itself").

B. 11 U.S.C § 328

Section 328(c), in relevant part, provides that "the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 . . . if, at any time during such professional person's employment . . . such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed." 11 U.S.C. § 328(c). If an attorney holds an undisclosed adverse interest, "the court is empowered to deny all compensation and reimbursement of expenses. *In re Coastal Equities, Inc.*, 39 B.R. 304, 308 (Bankr. S.D. Cal. 1984).

Bankruptcy courts have "broad and inherent authority to deny any and all compensation when an attorney fails to meet the requirements" of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. *In re Lewis*, 113 F.3d 1040, 1045 (9th Cir. 1997). "An attorney's failure to obey the disclosure and reporting requirements of the Bankruptcy Code and Rules gives the bankruptcy court the discretion to order disgorgement of attorney's fees." *Id.* "Even a negligent or inadvertent failure to disclose fully relevant information may result in a denial of all requested fees." *In re Park-Helena Corp.*, 63 F.3d 877, 882 (9th Cir. 1995).

C. Fed. R. Bankr. P. 2014

Rule 2014 of the Federal Rules of Bankruptcy Procedure provides the application procedure for the employment of professionals. Rule 2014 requires that an employment application disclose "to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." Fed. R. Bankr. P. 2014(a). The application also must include a verified statement by the proposed professional that makes these disclosures. *Id.*

A professional seeking employment under § 327 has an affirmative duty to disclose all facts and connections concerning the debtor:

> Professionals must disclose all connections with the debtor, creditors and parties in interest, no matter how irrelevant or trivial those connections may seem. The disclosure rules are not discretionary. The duty to disclose is not vitiated by negligent or inadvertent omissions. A court may sanction a professional for disclosure violations regardless of actual harm to the estate.

Mehdipour v. Marcus & Millichap (In re Mehdipour), 202 B.R. 474, 480 (B.A.P. 9th Cir. 1996).

"The disclosures must appear in the application and declaration required by [Fed. R. Bankr. P.] 2014(a). It is not sufficient that the information might be mined from petitions, schedules, section 341 meeting testimony or other sources." *In re B.E.S. Concrete Prod., Inc.*, 93 B.R. 228, 236–37 (Bankr. E.D. Cal. 1988). "[F]ailure to comply with the disclosure rules is a sanctionable violation, even if proper disclosure would have shown that the attorney had not actually violated any Bankruptcy Code provision or any Bankruptcy Rule." *Park-Helena Corp.*, 63 F.3d at 880.

D. Van Dyke's Role as a Disbursing Agent Does Not Represent an Adverse Interest Regarding its Employment as Special Counsel

Given that the Trustee sought to employ Van Dyke as her special litigation counsel, i.e., solely to pursue fraudulent transfer claims against the United States and potential claims against other defendants, § 327(e) is the applicable provision to determine

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whether Van Dyke was properly employed. *Song*, 2008 WL 6058782, at *8. Consequently, with respect to the limited purposes for which Van Dyke was employed as the Trustee's special counsel, Van Dyke may not have an adverse interest to the bankruptcy estate. *Sonya D. Intern.*, 484 B.R. at 780.

In *Fondiller*, the Bankruptcy Appellate Panel for the Ninth Circuit (the "BAP") affirmed the employment of a law firm as special counsel to investigate and recover allegedly fraudulent transfers of assets. Prepetition, the law firm had represented creditors. While continuing its relationship with creditors, proposed special counsel sought to represent the bankruptcy estate.

Interpreting § 327(e), the BAP reasoned there was no adverse interest; both the bankruptcy estate and creditors sought the same outcome, i.e., recovering assets for the benefit of creditors. *Fondiller*, 15 B.R. at 892 ("In the present case, the employment of [the firm] is limited to the search for, and attempted recovery, of specific assets allegedly concealed, and the investigation of certain alleged fraudulent conveyances. . . . [T]he interests of the estate and the firm's clients are identical with respect to the firm's duties as special counsel.").

Here, for the same reasons discussed in *Fondiller*, Van Dyke's role as a disbursing agent, pursuant to the stipulated resolution of the interpleader actions, does not constitute an "adverse interest" with respect to its role as special litigation counsel; with respect to the Trustee Action and the other adversary proceedings, the Trustee and creditors, including Quantum, sought the same outcome, *i.e.*, maximizing the value of the bankruptcy estate by recovering assets from the defendants. *See Film Ventures*, 75 B.R. at 252 (holding that special counsel's security interest in a film did not constitute adverse interest to bankruptcy estate; special counsel "shared Debtor's goal of protecting the estate's interest in the film").

Prior to employing Van Dyke as her special litigation counsel, the Trustee had entered into the Agreement with Quantum. Under the Agreement, Quantum has an allowed unsecured claim. Consequently, regarding the Trustee Action and the other adversary proceedings, the interests of Quantum and the Trustee are aligned: if money was recovered from the United States and/or other defendants for the bankruptcy estate, Van Dyke's continuing client, Quantum, would enhance the recovery on its unsecured claim.

Furthermore, if the Trustee Action was successful, Van Dyke would have been entitled to contingency fees. Van Dyke would have been entitled to 20% in gross recovery up to $6 million, reduced by hourly fees, and 15% in gross recovery over $6 million, reduced by hourly fees. If the bankruptcy estate recovered $6 million, Van Dyke would have been entitled to $1.2 million in fees, reduced by hourly fees paid. As such, Van Dyke was highly motivated to succeed in the Trustee Action.

In conclusion, Van Dyke's role as a disbursing agent did not constitute an adverse interest within the scope of its employment as special counsel to the Trustee. Van Dyke was employed for the limited purpose of pursuing litigation against the United States and other defendants, which would benefit the bankruptcy estate, as well as Quantum and Van Dyke, if the Trustee Action and other adversary proceedings had been successful.

E. Van Dyke's Compliance with Fed. R. Bankr. P. 2014(a)

In the Objection, as support for the Court's disallowance of all fees and expenses requested in the Final Fee Application and the disgorgement of all interim fees and reimbursement of expenses previously received by Van Dyke, the Trustee cites *Park-Helena Corp.*, 63 F.3d 877, and *In re Paris*, 568 B.R. 810 (Bankr. C.D. Cal. 2017).

In *Park-Helena Corp.,* the Ninth Circuit Court of Appeals affirmed the bankruptcy court's order denying the fee application filed by the debtor's general bankruptcy counsel. In violation of 11 U.S.C. § 329 and Fed. R. Bankr. P. 2014 and 2016, the debtor's bankruptcy counsel had misrepresented in its employment application that its prepetition retainer was paid by the debtor, when that retainer actually was paid by the debtor's president, out of his personal checking account. The bankruptcy court determined that this was a willful violation.

In *Paris*, the chapter 7 trustee's former special counsel, Bradley Spear ("Spear"), who had been employed to represent the estate in connection with a personal injury lawsuit, made contradictory representations in his employment application and his fee application. Those representations concerned Spear's entitlement to an attorney's lien on settlement proceeds received by the estate. Because of, among other things, Spear's misrepresentation in his employment application, the bankruptcy court denied

the attorney's fees requested in Spear's fee application and ordered the disgorgement of previously awarded fees.

As explained by the bankruptcy court in *Paris*, "Not only did Spear fail to disclose that he asserts a lien on any recovery in the PI Action, Spear declared under penalty of perjury that he **would not receive a lien** in 'property of the Debtor with respect to its representation.' Spear's statement was false. Like the counsel in *Park-Helena*, Spear knew all of the salient facts regarding the Retainer Agreement and his lien and, like that counsel, his decision to misrepresent that he had no lien was willful." *Paris*, 568 B.R. at 819-20 (emphais in original).

In the Application to Employ, Van Dyke did not discuss its role as a disbursing agent with respect to the interpleader actions. **[FN 2]** Van Dyke's insufficient disclosure in the Application to Employ gives the Court the *discretion* to order the disallowance and disgorgement of attorneys' fees. *See Mehdipour*, 202 B.R. at 481 (holding that, based on a real estate broker's failure to provide full disclosure regarding loans made to buyer of estate property, the bankruptcy court had discretion whether or not to allow compensation); and *Film Ventures*, 75 B.R. at 253 (despite special counsel's failure to disclose his lien on property of the estate in his employment application, the bankruptcy court acted within its discretion in awarding fees to special counsel; "The Bankruptcy Court was not *required* to deny the legal fees for the work actually performed.")(emphasis in original).

F. The Outcomes of the Adversary Proceedings Do Not Warrant Disallowance and Disgorgement of Van Dyke's Fees and Reimbursement of its Expenses

Because Van Dyke's representation resulted in no recoveries for the bankruptcy estate, the Trustee contends that the Fee Application should be denied, and the Court should compel Van Dyke to disgorge all previously paid interim fees and reimbursement of expenses. The Court finds the Trustee's arguments unpersuasive.

With respect to the adversary proceedings for which Van Dyke served as her special litigation counsel, the Trustee was, or should have been, aware of the risks. Van Dyke's engagement agreement specifically mentioned the risk of failure.

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Furthermore, the Trustee's engagement agreement with Van Dyke provided that Van Dyke would be compensated on an hourly basis (subject to Court approval), with a possible contingency *upside*. The Trustee could have decided not to engage special litigation counsel on an hourly basis, and insisted on *only* a contingency fee, or some other cap on allowed fees, absent successful outcomes.

An experienced chapter 7 trustee, such as the Trustee, with the assistance of bankruptcy counsel, would know that the fraudulent transfer litigation was going to be complicated and not guaranteed to succeed. Moreover, the Trustee Action was against a well-financed and well-represented defendant, *i.e.*, the United States. In that litigation, the United States had substantial incentives and ability to defend the position that it was not liable to turn over millions of dollars, which had been paid to the United States as criminal restitution, and which the United States then had distributed to defrauded investors.

Additionally, prior to the commencement of the trial, the Trustee could have instructed Van Dyke that engaging in further efforts to litigate the Trustee Action was not worth the expense to the bankruptcy estate. In its 87-page memorandum, Van Dyke cautioned the Trustee that it was unable to make "a dollar-for-dollar analysis of fraudulent transfers." Having seen the interim fee applications filed by Van Dyke, being aware of the aggregate funds then available in the estate and having seen that the United States was not going to settle or capitulate in the Trustee Action, the Trustee could have decided that it was too risky to go forward and stopped the litigation before, or prior to the end of, the multi-day trial.

Unfortunately for creditors, the Trustee did not prevail on sufficient issues in the Trustee Action for the Court to hold that the United States had received a fraudulent transfer. The fact that the Trustee Action, and the other adversary proceedings, did not generate a return to the bankruptcy estate does not mean that Van Dyke is not entitled to payment for the work that it did, with the Trustee's ongoing consent.

Given that Van Dyke, at the Trustee's direction, litigated the Trustee Action and commenced the other adversary proceedings, and the Trustee entered into an agreement with Van Dyke to provide for Van Dyke's receipt of hourly fees, with a contingency *upside*, the Court will not disallow Van Dyke's fees and preclude reimbursement of its expenses in the Fee Application, nor will the Court compel Van

Dyke's disgorgement of previously paid interim fees and reimbursement of expenses, simply because the Trustee did not prevail in the litigation.

Regarding the disclosure provided by Van Dyke in the Application to Employ, although the Trustee was aware of Van Dyke's role as a disbursing agent, and Van Dyke's role as a disbursing agent was disclosed in exhibits to the Stay Relief Motion, Van Dyke should have disclosed its role as a disbursing agent in the Application to Employ. By not doing so, Van Dyke's disclosure did not meet the requirements of Fed. R. Bankr. P. 2014(a).

However, keeping in mind that Van Dyke's role as a disbursing agent was not adverse to its role as the Trustee's special litigation counsel and that Van Dyke disclosed its position as disbursing agent to the Trustee (e.g., in the Stay Relief Motion, which preceded the filing of the Application to Employ), the Court will exercise its discretion and award to Van Dyke the requested fees and reimbursement of expenses set forth in the Final Fee Application, as significantly reduced in accordance with the Fee Stipulation. *Film Ventures*, 75 B.R. at 253 (because of special counsel's incomplete disclosure, he "ran the risk of not being compensated for his services," yet bankruptcy court "did not abuse its discretion in awarding the fees in question.")

III. CONCLUSION

The Court will overrule the Objection.

Van Dyke must submit the order within seven (7) days.

FOOTNOTES

FN 1. On August 14, 2019, the Trustee and Van Dyke entered into a stipulation to terminate Van Dyke's status as a disbursing agent with respect to the proceeds of distribution agreements with Fox, which were payable to Debtor [doc. 223].

FN 2. Contrary to the Trustee's assertion, Van Dyke's status as a disbursing agent is disclosed in the Stay Relief Motion. That motion included, as exhibits: (A) the State Court's Stipulated Order and Dismissal, entered November 16, 2009, which set forth

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Van Dyke's appointment and duties, as a disbursing agent; and (B) the reporter's transcript of proceedings on December 2, 2009, during which Richard Van Dyke discussed, and the State Court approved, Van Dyke's appointment as disbursing agent.

Party Information

Debtor(s):

Tag Entertainment Corp.	Represented By Jonathan David Leventhal

Trustee(s):

Diane C Weil (TR)	Represented By Lawrence A Diamant Diane Weil Edward M Wolkowitz Anthony A Friedman Lindsey L Smith James A Bush Richard S Van Dyke

United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
Courtroom 301 Calendar

Thursday, September 2, 2021 **Hearing Room 301**

1:30 PM

1:21-11098 John Carmen Esposito **Chapter 7**

Adv#: 1:21-01056 Goldman v. Esposito et al

#4.00 Emergency Motion of Plaintiff Chapter 7 Trustee for Preliminary Injunction

Docket 2

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

John Carmen Esposito	Pro Se

Defendant(s):

Laurina Rose Esposito	Pro Se
Women in Porsche Inc.	Pro Se
John Esposito Porsche Restorations	Pro Se

Movant(s):

Amy L. Goldman	Represented By Anthony A Friedman

Plaintiff(s):

Amy L. Goldman	Represented By Anthony A Friedman

Trustee(s):

Amy L Goldman (TR)	Represented By Anthony A Friedman