

Electronically Filed On: August 18, 2020

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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:
AMERI-DREAM REALTY, LLC,

Debtor.

Case No. BK-S-15-10110-GS
Chapter 7

**TRUSTEE’S OBJECTION TO PROOF OF
CLAIM 824-1 PURSUANT TO 11 U.S.C. §
502(b)(1) AND FEDERAL RULE OF
BANKRUPTCY PROCEDURE 3007**

Date of Hearing: October 1, 2020
Time of Hearing: 9:30 a.m.
Place: Courtroom No. To Be Determined
Foley Federal Building
300 Las Vegas Blvd., S.
Las Vegas, NV 89101

Judge: Honorable Gary Spraker ¹

Shelley D. Krohn (the “Trustee”), the duly appointed Chapter 7 Trustee in the above-captioned bankruptcy case, by and through her counsel of record, Jacob L. Houmand, Esq. and Bradley G. Sims, Esq. of the Houmand Law Firm, Ltd., hereby submits the *Trustee’s Objection To Proof Of Claim 824-1 Pursuant To 11 U.S.C. § 502(B)(1) And Federal Rule Of Bankruptcy Procedure 3007* (the “Objection”).

¹ Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure will be referred to as “FRCP” and the Federal Rules of Bankruptcy Procedure will be referred to as “FRBP.” The Local Rules of Practice for the United States Bankruptcy Court for the District of Nevada shall be referred to as the “Local Rules”.

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1 The Objection is based on the following Memorandum of Points and Authorities and the
2 *Declaration of Shelley D. Krohn In Support of Trustee’s Objection To Proof Of Claim 824-1*
3 *Pursuant To 11 U.S.C. § 502(B)(1) And Federal Rule Of Bankruptcy Procedure 3007* (the
4 “Trustee Declaration”), which is filed separately and concurrently with this Court pursuant to
5 Local Rule 9014(c)(2). The Objection is also based on the pleadings and papers on file herein,
6 and any argument that may be entertained at the hearing on the Objection.²

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. INTRODUCTION**

9 This Objection relates to a claim that asserts priority under Section 507(a)(4) for unpaid
10 commissions for the sale of real estate. This claim is not entitled to priority pursuant to 11 U.S.C.
11 § 507(a)(4) as it does not relate to the “sale of goods or services” as required by statute. For this
12 reason, the Trustee seeks an order finding that this claim is not entitled to priority under Section
13 507(a)(4).

14 **II. JURISDICTION AND VENUE**

15 This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1134. This
16 is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Venue before this Court is appropriate
17 under 28 U.S.C. §§ 1408 and 1409. This matter constitutes a core proceeding under 28 U.S.C. §
18 157(b)(2). Pursuant to Local Rule 9014.2, if the Court determines that absent consent of the
19 parties the Court cannot enter final orders or judgment regarding the Objection consistent with
20 Article III of the United States Constitution, the Firm consents to entry of final orders and
21 judgment by this Court. The statutory basis for the relief sought herein are Section 502(b)(1) and
22 FRBP 3007.

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27 ² The Trustee also requests that the Court take judicial notice of all pleadings filed in the above-
28 referenced bankruptcy case, including adversary proceedings, pursuant to Federal Rule of
Evidence 201, incorporated by reference by FRBP 9017.

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III. STATEMENT OF FACTS

1
2 1. On January 9, 2015 (the “Petition Date”), the Debtor filed a voluntary bankruptcy
3 pursuant to Chapter 7 of Title 11 of the United States Code [ECF No. 1]³.

4 2. On January 9, 2015, Victoria L. Nelson (“Trustee Nelson”) was appointed as the
5 Chapter 7 Trustee in the Debtor’s bankruptcy case [ECF No. 4].

6 3. On January 28, 2015, the Court entered an *Amended Notice of Chapter 7*
7 *Bankruptcy Case* [ECF No. 12] that established May 14, 2015, as the deadline for creditors to file
8 proofs of claim.

9 4. On February 9, 2015, Trustee Nelson filed an *Application for Order Authorizing*
10 *Employment of the Garden City Group, LLC As Claims and Noticing Agent* [ECF No. 88].

11 5. On February 27, 2015, the Court entered an *Order Granting Application for Order*
12 *Authorizing Employment of the Garden City Group, LLC As Claims and Noticing Agent* [ECF No.
13 128].

14 6. Since its employment, GCG has been maintaining the Proofs of Claim that have
15 been submitted by creditors.

16 7. On January 13, 2018, Trustee Nelson died.

17 8. On January 19, 2018, the Trustee was appointed as the successor Chapter 7 Trustee
18 in the Debtor’s bankruptcy case.

19 9. On May 14, 2015, Kevin Chang filed a claim claiming priority under 11 U.S.C. §
20 507(a)(4) in the amount of \$3,450.00. A true and correct copy of Claim 824-1 is attached to the
21 Trustee Declaration as **Exhibit “1”**.

22 10. The Trustee now seeks an order finding that Claims 824-1 is not entitled to priority
23 under Section 507(a)(4), and reclassifying this claim as a general unsecured claim.

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25 ...

26 ...

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28 ³ All references to “ECF No.” are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court.

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IV. LEGAL ARGUMENT

A. The Standard For Disallowance of Proofs of Claim

Pursuant to section 502, a filed proof of claim is deemed allowed, unless a party in interest objects thereto. *See* 11 U.S.C. § 502(a). The United States Court of Appeals for the Ninth Circuit has described the obligations of a creditor in establishing their claim and the burdens relating to proofs of claim objections:

Inasmuch as Rule 3001(f) and section 502(a) provide that a claim or interest as to which proof is filed is "deemed allowed," the burden of initially going forward with the evidence as to the validity and the amount of the claim is that of the objector to that claim. In short, the allegations of the proof of claim are taken as true. **If those allegations set forth all the necessary facts to establish a claim and are not self-contradictory, they prima facie establish the claim.** Should objection be taken, the objector is then called upon to produce evidence and show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves. **But the ultimate burden of persuasion is always on the claimant.** Thus, it may be said that the proof of claim is some evidence as to its validity and amount.

Wright v. Holm (In re Holm), 931 F.2d 620, 623 (9th Cir. 1991) (quoting 3 L. King, COLLIER ON BANKRUPTCY § 502.02, at 502-22 (15th ed. 1991)) (emphasis removed) (emphasis added); *see also Lundell v. Anchor Constr. Specialists, Inc.*, 223 F.3d 1035, 1040 (9th Cir. 2000) (holding that the bankruptcy court correctly understood that the ultimate burden of persuasion was on the creditor); *Spencer v. Pugh (In re Pugh)*, 157 B.R. 898, 901 (B.A.P. 9th Cir. 1993) (holding claimant bears ultimate burden of persuasion as to validity and amount of the claim by a preponderance of the evidence). Accordingly, to be entitled to prima facie validity of a claim, a proof of claim must set forth all necessary facts to establish the claim. *Wright*, 931 F.2d at 623. Furthermore, the ultimate burden is always on the claimant, and a claim must be denied if the claimant cannot carry this burden after an objection showing facts tending to defeat the claim. *Id.* If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence. *See Lundell*, 223 F.3d at 1039 (citations omitted).

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1 In accordance with Section 502(b), the validity and amount of the claim shall be
2 determined as of the date of the filing of the bankruptcy petition. Section 502(b)(1) requires
3 disallowance of a claim if “such claim is unenforceable against the debtor and property of the
4 debtor, under any agreement or applicable law for a reason other than because such claim is
5 contingent or unmatured . . .” 11 U.S.C. § 502(b)(1). The “applicable law” referenced in Section
6 502(b)(1) includes bankruptcy law as well as other federal and state laws. A trustee is therefore
7 allowed to raise any federal or state law defenses to a claim. *See In re G.I. Indus., Inc.*, 204 F.3d
8 1276, 1281 (9th Cir. 2000) (stating that a claim cannot be allowed under Section 502(b)(1) if it is
9 unenforceable under nonbankruptcy law); *Johnson v. Righetti*, 756 F.2d 738, 741 (9th Cir. 1985)
10 (finding that the validity of the claim may be determined under state law); *In re Eastview Estates*
11 *II*, 713 F.2d 443, 447 (9th Cir. 1983) (applying California law).

12 **B. The Claim in Question is Not Entitled to Priority Under Section 507(a)(4)**

13 Section 507(a)(4) states:

14 (a) The following expenses and claims have priority in the
15 following order:

16 *****

17 (4) Fourth, allowed unsecured claims, but only to the extent
18 of \$10,000 for each individual or corporation, as the case
19 may be, earned within 180 days before the date of the filing
20 of the petition or the date of the cessation of the debtor’s
21 business, whichever occurs first, for—

22 (A) wages, salaries, or commissions, including
23 vacation, severance, and sick leave pay earned
24 by an individual; or

25 (B) sales commissions earned by an individual or by
26 a corporation with only 1 employee, acting as an
27 independent contractor in the sale of goods or
28 services for the debtor in the ordinary course of the
debtor’s business if, and only if, during the 12
months preceding that date, at least 75 percent of
the amount that the individual or corporation earned
by acting as an independent contractor in the sale of
goods or services was earned from the debtor.

1 Section 507(a)(4) gives priority in distribution to claims of employees of the debtor for
 2 prepetition wages, salaries and commissions under subsection (a)(4)(A), and claims of certain
 3 independent contractors for prepetition commissions earned from the debtor under subsection
 4 (a)(4)(B). 11 U.S.C. § 507(a)(4). Courts have held that priority status under Section 507(a)(4)(A)
 5 is accorded only to employees and that independent contractors must meet the requirements under
 6 Section 507(a)(4)(B) to receive a priority claim.

7 For an independent contractor commissions to qualify for the priority, “the independent
 8 contractor must have been acting as such for the debtor with regard to the sale of goods or
 9 services in the ordinary course of the debtor’s business. In addition, during the twelve months
 10 preceding the earlier of the date of the filing of the petition or the cessation of the debtor’s
 11 business, the independent contractor must have earned from the debtor at least 75 percent of the
 12 total amount earned by such independent contractor from the sale of goods or services.” 4 Collier
 13 On Bankruptcy ¶ 507.06[3][b] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed.).

14 Section 507(a)(4)(B)⁴ contemplates sales commissions earned by sales representatives of a
 15 debtor. *See In re W. Wayne Transp., Inc.*, No. 00–10028C–7G, 2001 WL 1699665, *2 (Bankr.
 16 M.D.N.C. Oct.5, 2001) (stating that the priority is for sales commissions earned from the sale of
 17 good or services “on behalf of a debtor”); Bankruptcy Reform Act of 1994, Pub.L. No. 103–394,
 18 sec. 207 (entitled “Priority for Independent Sales Representative”).

19 The term “goods” is not defined in the Bankruptcy Code. *See* 4 Collier On Bankruptcy, ¶
 20 503.16[1] (Alan N. Resnick & Henry J. Sommer eds, 16th ed.). However, the definition of
 21 “goods” used in the Uniform Commercial Code (“UCC”) has been adopted by most courts.
 22 Under Nevada Law, “[g]oods” means all things (including specially manufactured goods) which
 23 are movable at the time of identification to the contract for sale other than the money in which the
 24 price is to be paid, investment securities (Article 8) and things in action. ‘Goods’ also includes the
 25 unborn young of animals and growing crops and other identified things attached to realty as

26
 27 ⁴ The wage priority provision was previously found in § 507(a)(3). That subsection was
 28 renumbered as § 507(a)(4) in 2005. *See* Bankruptcy Abuse Prevention and Consumer Protection
 Act of 2005, Pub. L. No. 109–8, § 212.

1 described in the section on goods to be severed from realty. N.R.S. § 104.2107. Thus, it appears
2 that commission earned by the sale of real estate, not a good, would be excluded from
3 Section 507(a)(4)(B).

4 The claim in question originates from an independent contractor for commissions relating
5 to the sale of real estate. Pursuant to 11 U.S.C. § 507(a)(4), an independent contractor is entitled
6 to commissions *only* for the sale of goods or services. Because real estate is neither a good, nor a
7 service, the claims in question are not entitled to priority treatment under 11 U.S.C. § 507(a)(4).
8 Accordingly, this claim should be reclassified as a general unsecured claim.

9 **V. CONCLUSION**

10 For the foregoing reasons, the Trustee respectfully requests that the Court enter an order
11 (i) sustaining the Objection to claim number 824-1 and reclassify this claim as a general
12 unsecured claim; (ii) for such other and further relief as is just and proper.

13 Dated this 18th day of August, 2020

14 **HOUMAND LAW FIRM, LTD.**

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