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4 UNITED STATES BANKRUPTCY COURT
5 EASTER DISTRICT OF CALIFORNIA
6 FRESNO DIVISION

6 In re) Case No. 14-10695-B-11
7 Rosendo Jaime Perez and)
8 Maria Lucina Martinez De Jaime,) DC No. UST-1
9 Debtors.)
_____)

10 **MEMORANDUM DECISION REGARDING UNITED STATES**
11 **TRUSTEE'S MOTION TO DISMISS AND IMPOSE A**
12 **180-DAY BAR AGAINST REFILING**

12 Robin Tubesing, Esq., appeared on behalf of the movant, Tracy Hope Davis, Esq.,
13 United States Trustee.

14 Thomas O. Gillis, Esq., appeared on behalf of the debtors, Rosendo Jaime Perez and
15 Maria Lucina Martinez De Jaime.

16 The United States Trustee (the "UST") moves to dismiss this case pursuant to
17 11 U.S.C. § 1112(b)¹ (the "Motion"). This is the third chapter 11 case filed by
18 Rosendo Perez and Maria De Jaime (the "Debtors") within a period of 18 months
19 and the UST also asks the court to bar the Debtors from filing another case for 180
20 days. The Motion is based on numerous statutory grounds. For the reasons set forth
21 below the Motion will be granted, provided the Debtors shall first have fourteen
22 days to convert this case to either chapter 7 or chapter 13. Conversion may be
23 requested by ex parte application.

24 This memorandum decision contains the court's findings of fact and
25 conclusions of law required by Federal Rule of Civil Procedure 52(a), made
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27 ¹Unless otherwise indicated, all chapter, section and rule references are to the
28 Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9036, as enacted and promulgated *after* October 17, 2005, the
effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 applicable to this contested matter by Federal Rule of Bankruptcy Procedure 7052
2 and 9014(c). The court has jurisdiction over this matter pursuant to 28 U.S.C.
3 § 1334, 11 U.S.C. § 1112(b), and General Orders 182 and 330 of the U.S. District
4 Court for the Eastern District of California. This is a core proceeding as defined in
5 28 U.S.C. § 157(b)(2)(A).

6 **Discussion.**

7 Dismissal of a chapter 11 case is governed by § 1112(b) of the Bankruptcy
8 Code. It requires a noticed motion by a party in interest, here the UST, and a
9 hearing, which was held on April 24, 2014. On April 14, 2014, the Debtors’
10 counsel filed an untimely opposition without any supporting evidence.²

11 Section 1112(b) provides that the court shall convert or dismiss a chapter 11
12 case if it finds “cause” for dismissal, subject to two conditions applicable here.
13 First, to prevent dismissal after a showing of “cause,” the court must be able to find
14 and specially identify “unusual circumstances establishing that converting or
15 dismissing the case is not in the best interests of creditors and the estate”
16 1112(b)(2). Second, the debtor must establish that “there is a reasonable likelihood
17 that a plan will be confirmed within . . . a reasonable period of time.”
18 § 1112(b)(2)(A). If the cause for dismissal does not include substantial or
19 continuing loss to or diminution of the estate, the debtor must also establish that the
20 grounds for dismissal will be cured within a reasonable period of time fixed by the
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23 ²The Motion was filed on March 19, 2014. It was fully noticed pursuant to Local
24 Rule 9014-1(f)(1) and the Debtors’ opposition was due 14 days before the hearing. The
25 Debtors’ response was filed late. It consists of a three-page document which briefly rebuts
26 the points raised by the UST. It was not supported by any evidence as required by Local
27 Rule 9014-1(f)(1)(B). The Debtors did not file a separate statement of disputed material
28 facts as required by Local Rule 9014-1(f)(1)(B) so the right to an evidentiary hearing was
waived. The UST filed a reply on April 16 at which point the evidentiary record closed.
Local Rule 9014(f)(1)(C). Thereafter, the Debtors did file a surrebuttal on April 22, which
included exhibits and a declaration from the Debtors’ counsel, but which the court has not
considered.

1 court. § 1112(b)(2)(B).

2 Pursuant to § 1112(b)(4), the term “cause” for dismissal of a chapter 11 case
3 includes at least three grounds applicable here. The Debtors have three rental
4 properties from which they receive substantial income, yet they did not provide
5 proof of insurance for the properties when requested by the UST. Failure to
6 maintain appropriate insurance that poses a risk to the estate is a statutory ground
7 for dismissal. § 1112(b)(4)(C). The Debtors’ February monthly operating report
8 was not filed until April 3 - it was 20 days’ late. The inability to file timely monthly
9 operating reports is a statutory ground for dismissal. § 1112(b)(4)(F). The Debtors
10 could not, or simply did not, provide documents reasonably requested by the UST
11 and did not appear for their initial debtor interview. § 1112(b)(4)(H). The court
12 also notes from the UST’s report (docket no. 35) filed on March 25, 2014, after the
13 initial creditor meeting, that the Debtors had not yet opened the required debtor-in-
14 possession (“DIP”) bank account.

15 Finally, the court notes that this is the Debtors’ third attempt at reorganizing
16 through chapter 11 since August 2012. This petition, like the prior petition, was
17 filed as a skeletal petition without the required schedules and statement of financial
18 affairs. It was also filed without a complete and accurate master address list.³
19 Despite the fact that the Debtors have already been through the chapter 11 gauntlet
20 twice, they still were unprepared this third time to come to court with complete
21 schedules, timely operating reports, and the basic documents, such as insurance
22 policies and DIP bank account records, that they knew the UST would request. The
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24 ³The “skeletal” petition was filed with a master address list (“MAL”) and a statement
25 of the Debtors’ social security numbers on February 18, 2014. The same day the court
26 issued a Notice of Incomplete Filing to notify the Debtors that the schedules, statement of
27 financial affairs and related documents were due not later than March 4, unless the court
28 granted an extension of time. Those documents were not filed until March 9 and the
Debtors did not request an extension of time. The meeting of creditors was first held on
March 24 and continued to April 30. The Debtors filed an amended MAL and amended
schedules on April 8. Schedules B and C were amended again on April 21.

1 prior two cases were dismissed based on issues similar to those which plague the
2 current case.

3 The court has reviewed the docket of the prior two cases, and carefully
4 considered particularly the record of the second case, and the problems that arose
5 therein. The second case, number 12-19873-B-11, was filed on November 30,
6 2012, and was not dismissed until October 25, 2013. The Debtors enjoyed a
7 window of eleven months to confirm a chapter 11 plan which simply valued their
8 properties and restructured the resulting secured debts, but they were unable to do
9 so. The UST filed a motion to dismiss the first case and two motions to dismiss the
10 second case. The Debtors make no showing that this third case is fundamentally
11 any different than the prior two cases. The Debtors are trying to restructure the
12 debts secured by three rental properties, one of which, a duplex, also serves as the
13 Debtors' residence, but none of which appear to generate enough cash to service the
14 secured debt over a term of less than 30 years.⁴ Based on a review of the early
15 problems cited by the UST in this case, and consideration of the issues which
16 resulted in the unsuccessful prosecution of two prior cases, the court is not
17 persuaded that there is a reasonable likelihood the Debtors will be able to confirm a
18 plan in this case within a reasonable period of time.

19 **Conclusion.**

20 Based on the foregoing, the court finds and concludes that there is cause to
21 dismiss this case within the statutory definition in § 1112(b). The Debtors did not
22 timely respond to the Motion and did not support their response with admissible
23 evidence. The Debtors have not identified any unusual circumstances establishing
24 that this case is any different than the prior two failed chapter 11 cases, and that

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26 ⁴On April 7, 2014, the Debtors filed a proposed chapter 11 plan of reorganization
27 which proposes to "strip down" the claims secured by the three properties and then amortize
28 the "secured" portion of those claims over a period of 30 years with interest at the rate of
5.5%.

1 dismissal of this case is not in the best interest of creditors and the estate. Further,
2 they have not persuaded the court that they have a reasonable likelihood of
3 confirming a chapter 11 plan within a reasonable period of time. Accordingly, the
4 court has no discretion but to grant this Motion. However, the Debtors appear to be
5 eligible for relief under chapter 13 and the court does have the equitable power to
6 give the Debtors a reasonable opportunity to save their residence through a chapter
7 13 plan. Alternatively, the Debtors may conclude that it is in their best interest to
8 simply convert this case to chapter 7 and obtain a discharge of their debts. The
9 Debtors shall have 14 days to submit a request to convert this case to chapter 7 or
10 13. They may do so by ex parte application. If the case has not been converted to
11 chapter 7 or 13 within 14 days, the UST may submit an order of dismissal which
12 includes a 180-day bar against filing another chapter 11.

13 Dated: May 14, 2014

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15 /s/ W. Richard Lee
16 W. Richard Lee
17 United States Bankruptcy Judge
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