

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Michael S. McManus  
Bankruptcy Judge  
Sacramento, California

January 5, 2015 at 10:00 a.m.

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1. 13-25330-A-12 PAUL MENNICK CLG-1 CURTIS FOSNAUGH VS.	MOTION FOR RELIEF FROM AUTOMATIC STAY 12-8-14 [126]
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**Tentative Ruling:** The motion will be granted.

The movant, Curtis Fosnaugh, seeks both retroactive and prospective relief from the automatic stay as to a state court litigation begun by the debtor before this bankruptcy case was filed and still pending in Tehama County Superior Court. On June 28, 2011, the movant filed a cross-claim for conversion against the debtor. The movant is seeking retroactive relief from stay for the prosecution of the cross-claim and is seeking prospective relief from stay to amend it.

The movant argues that relief from stay is warranted because the debtor filed this bankruptcy case in bad faith, as he did not list the movant as a creditor and did not notify the movant of the bankruptcy case until after the proof of claim deadline had passed. The movant also asserts discretionary abstention, mandatory abstention, and nondischargeability under 11 U.S.C. § 523(a)(3), seeking to continue prosecution of his cross-claim in the state court action.

11 U.S.C. § 523(a)(3) provides that:

"(a) A discharge under section 727, 1141, 1228 (a), 1228 (b), or 1328 (b) of this title does not discharge an individual debtor from any debt—

. . .

"(3) neither listed nor scheduled under section 521 (a)(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—

"(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

"(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request."

The debtor filed this chapter 12 case on April 18, 2013. The movant is not listed in the creditor address matrix and he is not listed in the debtor's schedules. Dockets 4 & 11. The deadline for filing nondischargeability

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complaints was August 5, 2013. Docket 12. The deadline for filing proofs of claim was on September 3, 2013. Docket 12.

On April 28, 2014, the court entered an order confirming the debtor's chapter 12 plan filed on April 2, 2014. Dockets 106 & 118. The plan does not provide for the movant's general unsecured claim.

The movant did not file a complaint under section 523 within the August 5, 2013 deadline or after that deadline. The movant did not file a proof of claim within the September 3, 2013 deadline or after that deadline. Even though the movant admittedly acquired actual knowledge of the bankruptcy case in January 2014, this did not permit him to timely file a proof of claim and timely file a complaint under section 523(a), given their respective deadlines of September 3, 2013 and August 5, 2013.

The movant's claims against the debtor in state court are based on the purported conversion of cattle, making his claims potentially actionable under the larceny portion of section 523(a)(4) and/or section 523(a)(6).

Under section 523(a)(4), larceny is a "'felonious taking of another's personal property with intent to convert it or deprive the owner of the same.'" In re Brown, 331 B.R. 243, 249 (Bankr. W.D. Va. 2005) (citing Johnson v. Davis (In re Davis), 262 B.R. 663, 672 (Bankr. E.D. Va. 2001)).

Section 523(a)(6) provides that an individual is not discharged "from any debt for willful and malicious injury by the debtor to another entity or to the property of another entity." The plaintiff must show that the injury was both willful and malicious. Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998); Baldwin v. Kilpatrick (In re Baldwin), 249 F.3d 912, 917 (9th Cir. 2001).

Thus, under section 523(a)(3), the movant's claim against the debtor are potentially nondischargeable under section 1228(a), which states:

"Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, other than payments to holders of allowed claims provided for under section 1222(b)(5) or 1222(b)(9) of this title, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan allowed under section 503 of this title or disallowed under section 502 of this title, except any debt—

"(1) provided for under section 1222(b)(5) or 1222(b)(9) of this title; or

"(2) of the kind specified in section 523(a) of this title."

While the bankruptcy court has exclusive jurisdiction to determine the non-dischargeability of debt under 11 U.S.C. § 523(a)(2), (4), and (6) (see Sasson v. Sokoloff (In re Sasson), 424 F.3d 864, 869 (9th Cir. 2005); Rein v. Providian Financial Corp., 270 F.3d 895, 904 (9th Cir. 2001)), it has concurrent jurisdiction with the state court to determine nondischargeability under section 523(a)(3). Accord Fidelity Nat'l Title Ins. Co. v. Franklin (In re

Franklin), 179 B.R. 913 (Bankr. E.D. Cal. 1995). This is so even though imbedded in every action under section 523(a)(3)(B) is a claim cognizable under sections 523(a)(2), (a)(4), and/or (a)(6). Basically, a debtor omitting a claim from the schedules forfeits the right to have the bankruptcy court determine dischargeability under these sections. Id.

2. 14-30833-A-11 SHASTA ENTERPRISES MOTION FOR  
DL-1 RELIEF FROM AUTOMATIC STAY  
REDDING BANK OF COMMERCE VS. 12-8-14 [67]

**Tentative Ruling:** The hearing on the motion will be continued.

The movant, Redding Bank of Commerce, seeks relief from stay as to 355 Hemsted Drive Redding, California.

Given that the court appointed a chapter 11 trustee in this case only on December 23, 2014, the court will continue the hearing on the motion to provide the trustee with time to evaluate and respond to the motion. Dockets 142 & 143.

3. 14-30833-A-11 SHASTA ENTERPRISES MOTION FOR  
DL-2 RELIEF FROM AUTOMATIC STAY  
REDDING BANK OF COMMERCE VS. 12-8-14 [75]

**Tentative Ruling:** The hearing on the motion will be continued.

The movant, Redding Bank of Commerce, seeks relief from stay as to 381, 391, 393 and 401 Hemsted Drive Redding, California.

Given that the court appointed a chapter 11 trustee in this case only on December 23, 2014, the court will continue the hearing on the motion to provide the trustee with time to evaluate and respond to the motion. Dockets 142 & 143.

4. 14-30833-A-11 SHASTA ENTERPRISES STATUS CONFERENCE  
10-31-14 [1]

**Tentative Ruling:** None.

5. 14-30833-A-11 SHASTA ENTERPRISES MOTION TO  
DL-5 ASSUME LEASE OR EXECUTORY CONTRACT  
AND FOR POST-PETITION BORROWING  
12-15-14 [97]

**Tentative Ruling:** None.

The hearing on this motion was continued from December 29, 2014, to give opportunity to the newly appointed chapter 11 trustee to examine the motion and determine whether the relief requested benefits the estate and the creditors. The court will rule on the motion subject to hearing from the trustee at the January 5, 2014 hearing.

**Tentative Ruling:** The objection will be sustained in part and overruled in part.

The debtor in possession objects to the proof of claim (claim 6-1) of Mahboob Tehranian, the former spouse of the debtor's principal, Hossein Bozorgzad. The proof of claim consists of a general unsecured claim for \$292,300 and a claim for \$1,106,000 secured by the debtor's Sycamore Terrace real property in Pleasanton, California.

The proof of claim is presumed to be prima facie valid. 11 U.S.C. § 502(a).

"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. It is strong enough to carry over a mere formal objection without more."

Wright v. Holm (In re Holm), 931 F.2d 620, 623 (9<sup>th</sup> Cir. 1991) (quoting 3 L. King, Collier on Bankruptcy § 502.02, at 502-22 (15th ed. 1991)).

The presumptive validity of the claim may be overcome by the objecting party only if it offers evidence of equally probative value in rebutting that offered by the proof of claim. Holm at 623; In re Allegheny International, Inc., 954 F.2d 167, 173-74 (3<sup>rd</sup> Cir. 1992). The burden then shifts back to the claimant to produce evidence meeting the objection and establishing the claim. In re Knize, 210 B.R. 773, 779 (Bankr. N.D. Ill. 1997).

The objection will be sustained to the extent the proof of claim asserts an unsecured claim against the debtor. The debt giving rise to the \$292,300 general unsecured claim was not incurred by the debtor. It was incurred by the debtor's principal, Hossein Bozorgzad, who is a separate and independent person from the debtor. The unsecured portion of the proof of claim was incurred in connection with Mr. Bozorgzad's divorce from Ms. Tehranian.

As to the \$1,106,000 secured portion of the proof of claim, the analysis is different. The debtor argues that none of the debt referenced by Ms. Tehranian pertains to the debtor. It contends that the debtor "has no connection with this debt, no lien has been applied against debtor and this should be removed from the claim." Docket 264 at 3.

However, this is not inconsistent with what Ms. Tehranian asserts in the proof of claim. She asserts that although the secured debt of the proof of claim was incurred by Mr. Bozorgzad and not the debtor, the debt was secured by property that Mr. Bozorgzad owned at the time of the parties' marital dissolution, namely, the debtor's sole real property that is part of this bankruptcy estate now.

As stated by the marital settlement agreement attached to the dissolution judgment appended to a pleading Ms. Tehranian's filed on October 10, 2014:

"Husband shall execute a Promissory Note and Deed of Trust on the 6056 Sycamore property in favor of Wife for the sum of \$1,050,000.00 representing security for the Husband's obligation to pay off the Homewood mortgage and the sum of \$600,000.00 representing Wife's receipt of the title ownership of Units #7 and #8 in Atwood Village. Wife shall not file or record the Note or Deed of Trust until January 2008. Husband agrees that during the 'hold' period on the Note and Deed of Trust, that he will not encumber the Sycamore Terrace property or otherwise reduce the equity in the property with any other loans without Wife's consent."

Docket 219 at 10-11, 21.

The court notes that the copy of the marital settlement agreement submitted by Ms. Tehranian was initialed and executed by both parties, including Mr. Bozorgzad. Docket 219 at 17-32, 32. The court takes judicial notice of the parties' marital settlement agreement. Fed. R. Evid. 201.

In addition, the subject proof of claim details that Mr. Bozorgzad failed to pay off the Homewood property mortgage and failed to transfer title ownership of Units #7 and #8 in the Atwood Village property, as required by the marital settlement agreement. Docket 219 at 9, 10, 19, 20; POC 6 at 3, 4.

Despite the foregoing, the objection says nothing about the note and deed of trust Mr. Bozorgzad executed to secure his obligations pertaining to the Homewood property mortgage and Units #7 and #8 in the Atwood Village property.

The releases of judgment liens attached by the debtor to this motion (Docket 267) are unrelated to the deed of trust on the debtor's real property contemplated by the marital settlement agreement. The judgment liens were based on judgments relating to Mr. Bozorgzad's failure to make child support payments, whereas the secured portion of Ms. Tehranian's proof of claim is based on a deed of trust, according to the marital settlement agreement.

Lastly, even if Ms. Tehranian's deed of trust on the Sycamore Terrace property was never recorded, this does not mean her claim is unsecured. A failure to record affects only the priority of the claim, it does not affect validity of the security interest.

The court will overrule the objection to the \$1,106,000 secured portion of the proof of claim. Even though the debtor is not the obligor, its property is subject to the claim.

7. 14-20348-A-11 JOE/CAROL MOBLEY  
CAH-7

MOTION TO  
APPROVE DISCLOSURE STATEMENT  
11-21-14 [118]

**Tentative Ruling:** The motion will be granted and the disclosure statement filed on November 21, 2014 (Docket 121) will be approved, as it contains adequate information and the detail necessary that will permit creditors to make an informed decision regarding the plan. See 11 U.S.C. § 1125(a).

**Tentative Ruling:** The motion will be granted in part.

The debtor in possession requests approval to employ Terri Davis as accountant for the estate, effective November 1, 2014. Terri Davis will assist the estate with: preparing tax returns, preparing monthly operating reports, assisting with accounting issues pertaining to the preparation of the debtor's disclosure statement and plan, assisting with the debtor's ongoing accounting needs, including bookkeeping, financial, and tax services. The proposed compensation is a flat fee of \$1,875 a month. The movant requests approval of payment of the compensation, without further order of the court.

11 U.S.C. § 1107(a) provides that a debtor in possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee."

This includes the trustee's right to employ professional persons under 11 U.S.C. § 327(a). This section states that, subject to court approval, a trustee may employ professionals to assist the trustee in the administration of the estate. Such professional must "not hold or represent an interest adverse to the estate, and [must be a] disinterested [person]." 11 U.S.C. § 327(a).

11 U.S.C. § 328(a) allows for such employment "on any reasonable terms and conditions . . . including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis."

The court concludes that the terms of employment and compensation are reasonable. The court notes that the debtor's prior accountant charged a monthly fee of \$4,067.40 for similar services. Terri Davis is a disinterested person within the meaning of 11 U.S.C. § 327(a) and does not hold an interest adverse to the estate. The employment will be approved.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses."

The court will approve the \$1,875 fixed monthly fee compensation arrangement for Terri Davis. The court concludes it is reasonable in light of the services for which Terri Davis has been retained and the debtor's needs at this time.

As the compensation arrangement is a fixed monthly fee for well defined services, the court is willing to allow Terri Davis to receive interim compensation for as long as six months without court order. The court will require that Terri Davis files an interim compensation motion at least once every six months, as well as a final compensation motion. As usual, such compensation motions shall include his time entries or a sufficiently detailed summary of his services rendered during the applicable period, to allow the court to assess whether his compensation terms are improvident in light of developments not capable of being anticipated at the time of the fixing of such terms. Pitrat v. Reimers (In re Reimers), 972 F.2d 1127, 1128 (9<sup>th</sup> Cir. 1992) (quoting In re Confections by Sandra, Inc., 83 B.R. 729, 731 (B.A.P. 9<sup>th</sup> Cir. 1987)). The motion will be granted in part.

9. 14-21673-A-12 GLORIA AVILA  
JPJ-1

MOTION TO  
DISMISS CASE  
10-21-14 [32]

**Tentative Ruling:** The motion will be granted and the case will be dismissed.

The chapter 12 trustee moves for dismissal because the debtor has failed to prosecute this case, causing unreasonable delay that is prejudicial to creditors.

The debtor opposes the motion, stating that she has filed an amended plan that is set for hearing on January 5, 2015.

11 U.S.C. § 1208(c) provides that "on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including - (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors."

The debtor has violated 11 U.S.C. § 1221, which mandates that "The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend such period if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable."

This case was filed on February 21, 2014. The debtor filed a plan in the case for the first time on May 31, 2014, 99 days after the petition date. And, on May 28, 2014, the court denied the debtor's request for extension of the 90-day period under section 1221. Dockets 16 & 20.

11 U.S.C. § 1221 unequivocally requires the filing of a plan within 90 days of the petition date. The failure to do so is cause for dismissal. The motion will be granted and the case will be dismissed.

10. 14-21673-A-12 GLORIA AVILA  
TOG-7

MOTION TO  
CONFIRM CHAPTER 12 PLAN  
11-12-14 [38]

**Tentative Ruling:** The motion will be denied.

The debtor is seeking confirmation of her chapter 12 plan filed on November 12, 2014. Docket 41.

The motion will be denied for several reasons. First, the plan provides that "[t]he stay imposed by ther [sic] plan shall extend to all partners of Debtors as long as the payments under the plan are current." Docket 41 at 8. The motion does not explain why such a provision is permissible and the court is unaware of any legal authority permitting chapter 12 relief to extend to "partners" of the debtor.

More, in describing her business in the motion's supporting declaration, the debtor makes no mention of her being involved in a partnership with anyone. The plan does not identify any partners of the debtor either.

Second, the motion will be denied also because the court is unconvinced that the plan is feasible. The court does not have sufficient evidence establishing the debtor's ability to generate the \$4,950 a month she is anticipating to generate. In her declaration, the debtor simply states that "I can gross at

least \$4,950 per month all year round." Docket 40 at 2.

However, there is no history given by the debtor of her performance during the last 10 months of her pending bankruptcy case. This case was filed on February 21, 2014.

Moreover, the debtor's declaration says that the debtor "can gross at least \$4,950 per month," and does not state that she has been actually generating at least \$4,950 a month. Docket 40 at 2. The debtor's opinion of her ability to generate at least \$4,950 per month should be substantiated with her financial history since the petition date.

Finally, as pointed out in the court's ruling on the trustee's motion to dismiss:

"The debtor has violated 11 U.S.C. § 1221, which mandates that 'The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend such period if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.'

"This case was filed on February 21, 2014. The debtor filed a plan in the case for the first time on May 31, 2014, 99 days after the petition date. And, on May 28, 2014, the court denied the debtor's request for extension of the 90-day period under section 1221. Dockets 16 & 20.

"11 U.S.C. § 1221 unequivocally requires the filing of a plan within 90 days of the petition date. The failure to do so is cause for dismissal."

The violation of 11 U.S.C. § 1221 is yet another reason for denying plan confirmation.

11. 14-31675-A-11 JSR PROPERTIES STATUS CONFERENCE  
11-26-14 [1]

**Tentative Ruling:** None.

12. 14-31675-A-11 JSR PROPERTIES MOTION TO  
DBJ-1 USE CASH COLLATERAL AND FOR  
ADEQUATE PROTECTION  
12-12-14 [12]

**Tentative Ruling:** The motion will be denied without prejudice.

The debtor seeks approval to use rent cash collateral of Redding Bank of Commerce, which holds a first deed of trust in the debtor's sole commercial real property.

Redding Bank of Commerce opposes the motion.

11 U.S.C. § 1107(a) provides that a debtor-in-possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee." This includes the trustee's rights under 11 U.S.C. § 363. 11 U.S.C. § 363(c)(2)(B), (c)(3), (e) provides that, when the secured claimants with interest in the cash collateral do not consent, after notice and a hearing, "the court . . . shall prohibit or condition such use [of cash collateral]



. . . as is necessary to provide adequate protection of such interest."

The debtor has not carried its burden of persuasion that the interests of the creditors in the cash collateral the debtor is seeking to use are adequately protected. The motion is short on information and evidence.

First, the motion makes virtually no effort to brief the standard for the allowance of use of cash collateral. While the motion mentions 11 U.S.C. § 363, it does not discuss the standard for allowance of use of cash collateral.

Second, while the motion says that the debtor needs the cash collateral to pay "ongoing maintenance and repair costs, utilities, and other expenses," this is not true. Docket 12 at 3. The commercial lease between the debtor and the sole lessee on the property states that the lessee must pay maintenance and repair expenses. Docket 15 at 11. The lease attached to the motion as Exhibit A appears to be a triple-net lease, requiring the lessee to pay maintenance, repairs, taxes, and insurance on the property. Docket 15.

More, there is nothing in the motion itemizing and describing the necessity for each of the debtor's expenses associated with the property. Although the Exhibit B attached to the motion lists amortization/loan fees, legal & accounting fees, insurance fees, and income tax expenses, none of those expenses have been itemized and explained in the motion. The supporting declaration of the debtor's president, Antonio Rodriguez, merely refers to Exhibit B. Dockets 14 at 2 & 15. Exhibit B lists the above expenses without any explanation about why they are necessary or how they relate to the property.

Specifically, the motion makes no effort to explain the nature and necessity for the \$2,500 expense labeled as "Admin. Costs." Docket 12 at 5.

Third, while the motion states that the debtor wants to make \$9,025.17 in monthly adequate protection payments to the bank, the court cannot tell whether this figure represents the monthly payment required by the debtor's pre-petition obligation to the bank.

Fourth, the court cannot determine whether the bank's interest in the cash collateral will be adequately protected.

For example, the court has no information about the value of the real property and about whether and to what extent there is equity in the property. The court then cannot tell whether and to what extent the bank's interest in the cash collateral is adequately protected.

Asking the court to look to the schedules is unhelpful. The schedules are not evidence. They are statements made the debtor out of court. Such statements are hearsay. While they can be admitted against the debtor, as an admission by a party opponent, they are inadmissible when proffered by the debtor. See Fed. R. Evid. 802, 801(d) (2) (A).

Given the foregoing, the motion will be denied.

13. 14-31675-A-11 JSR PROPERTIES MOTION TO  
DBJ-2 EMPLOY  
12-16-14 [23]

**Tentative Ruling:** The motion will be denied.

The debtor in possession requests authority to employ Douglas Jacobs as bankruptcy counsel for the bankruptcy estate of the debtor. The proposed compensation is based on an hourly fee arrangement. Mr. Jacobs will assist the debtor with the administration of the chapter 11 estate, including, without limitation, advising the debtor about rights and obligations; representing the debtor at hearings; negotiating with creditors; assisting with the preparation and prosecution of motions, reports, statements, and chapter 11 plan, as necessary to the administration of the estate; and addressing post-confirmation issues.

Creditor, Redding Bank of Commerce, holding the first deed of trust on the debtor's sole real property, opposes the employment.

The motion will be denied for substantially the same reasons outlined in the court's ruling denying the movant's employment motion in the related Shasta Enterprises bankruptcy case. Case No. 14-30833, Docket 124. The court incorporates its ruling in the Shasta Enterprises case here. Id.

*"Final Ruling: The motion will be denied.*

*"The debtor in possession requests authority to employ Douglas Jacobs as bankruptcy counsel for the bankruptcy estate of the debtor. The proposed compensation is based on an hourly fee arrangement. Mr. Jacobs will assist the debtor with the administration of the chapter 11 estate, including, without limitation, advising the debtor about rights and obligations; representing the debtor at hearings; negotiating with creditors; assisting with the preparation and prosecution of motions, reports, statements, and chapter 11 plan, as necessary to the administration of the estate; and addressing post-confirmation issues.*

*"Creditor, Redding Bank of Commerce, opposes the employment, contending that Mr. Jacobs is not eligible to represent the debtor because he also represents JSR Properties, an entity that filed its own chapter 11 case on November 26, 2014, and the debtor in this case is identified as an unsecured creditor in Schedule F of the JSR case, with JSR debtor owing \$438,000 to the debtor here.*

*"Mr. Jacobs has filed a reply, disputing an actual conflict of interest, arguing that there is only a potential conflict of interest and urging the court to exercise its discretion to allow his employment.*

*"11 U.S.C. § 1107(a) provides that a debtor in possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, '[s]ubject to any limitations on [that] trustee.' This includes the trustee's right to employ professional persons under 11 U.S.C. § 327(a). This section states that, subject to court approval, a trustee may employ professionals to assist the trustee in the administration of the estate.*

*"Such professional must 'not hold or represent an interest adverse to the estate, and [must be a] disinterested [person].' 11 U.S.C. § 327(a). 11 U.S.C. § 328(a) allows for such employment 'on any reasonable terms and conditions . . . including . . . on an hourly basis, on a fixed or percentage fee basis.'*

*"'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.'

"11 U.S.C. § 327(c).

"11 U.S.C. § 101(14) defines a disinterested person as 'a person that- (A) is not a creditor, an equity security holder, or an insider; (B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and (C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.'

"The court disagrees with Mr. Jacobs that his conflict is merely potential and disagrees that the only issue in his representation of the subject debtor as a creditor in the JSR bankruptcy will be the validity of the debt owed by JSR. Mr. Jacobs states in his reply to the opposition that: 'In this matter, a potential conflict could arise should the debtor in possession seek to collect the money owed from JSR Properties, and should JSR Properties dispute such obligation. Here, however, both this debtor and JSR Properties acknowledge the existence of the debt, the amount owed, and the obligation of JSR to repay Shasta. There is, at most, a "potential conflict."' Docket 108 at 2.

"Mr. Jacobs ignores other duties of his representation of both parties. The chapter 11 proceeding of JSR Properties, as is the instant bankruptcy proceeding, is an ongoing process that requires many steps ultimately resulting in some adjustment of the debtor-creditor relationship. Those steps are not limited to the validity of the debt.

"An attorney representing an unsecured creditor (especially one holding a claim of \$438,000) of a debtor during the pendency of a chapter 11 proceeding requires, at a minimum, a review of the debtor's disclosure statement and chapter 11 plan and decisions about whether to object to the disclosure statement, whether to object to plan confirmation (including raising absolute priority issues), and whether to vote to accept or reject the plan. The court is not persuaded that the conflict is merely potential, when the same attorney is the one who represents the debtor, prepares the disclosure statement, prepares the plan, makes decisions on the dividend to unsecured creditors, prosecutes a motion for the approval of the disclosure statement, solicits votes, and prosecutes a motion to obtain plan confirmation.

"Hence, Mr. Jacobs' duties in the Shasta Enterprises case and the JSR case will force him to make decisions in favor of one client but at the expense of the other client. The conflict is ongoing and actual.

"More, the court is troubled by two other issues. One is that Mr. Jacobs did not disclose his representation of JSR Properties. It was only after Redding Bank of Commerce raised the issue of his representation of JSR that Mr. Jacobs addressed it. This should have been addressed in the motion and not the reply to the opposition to the motion.

"Although this motion was filed on November 25, 2014 and the JSR chapter 11 case was filed one day later, on November 26, 2014, Mr. Jacobs obviously knew of his representation of JSR before he filed this motion. Case No. 14-31675-A-11, Docket 1. The court also notes that Mr. Jacobs' declaration in support of

this motion was executed on November 24, 2014. Docket 35. The declaration, however, states nothing about Mr. Jacobs representing JSR or about his imminent filing of JSR's bankruptcy case. It states only, in a conclusory fashion, that: 'I [Douglas Jacobs] do not hold or represent any interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the Debtor, or for any other reason, and I am a 'disinterested person' as defined by Bankruptcy Code § 101(14).' Docket 35 ¶ 7.

"Representing a debtor of the Shasta Enterprises estate owing \$438,000 to Shasta Enterprises clearly amounts to representation of an interest materially adverse to the Shasta Enterprises estate. This is especially true when the two estates are being administered by the debtors in possession themselves, as opposed to appointed trustees.

"Second, Mr. Jacobs' view that his conflict is merely potential indicates that he sees his duties with respect to the creditor-debtor relationship between the Shasta Enterprises estate and the JSR estate as merely passive. This is troubling because his duties as a chapter 11 debtor's counsel call for a proactive representation, encompassing here the collection of the debt owed to the Shasta Enterprises estate by JSR. By necessity, this includes making certain that the return to general unsecured creditors in the JSR case is maximized, which may require the eventual filing of a motion to convert to chapter 7.

"On the other hand, Mr. Jacobs' duties as counsel for the JSR estate would be to make certain that JSR obtains plan confirmation and emerges from its chapter 11 bankruptcy case with as little debt as possible. This would entail modifying the Shasta Enterprises estate's claim, paying it less than a 100% dividend. The JSR estate does not have the funds to confirm a 100% plan. This is evident from the face of JSR's bankruptcy petition, where JSR says that its assets have a value of between \$100,001 and \$500,000, whereas its debts are between \$1,000,001 and \$10 million. Case No. 14-31675-A-11, Docket 1.

"And, from JSR's cash collateral motion (filed on December 12, 2014 and set for hearing on January 5, 2015), it is evident that JSR will pay far less than 100% dividend, if any, to its general unsecured creditors, including the Shasta Enterprises estate. Case No. 14-31675-A-11, Docket 12. JSR generates only \$11,078.91 a month in income from the rental of its one commercial real property, yet JSR is seeking to pay \$9,025.17 as mere adequate protection payments to the creditor secured by the real property (holding a claim of \$2,768,130). Case No. 14-31675-A-11, Docket 12 at 5.

"Further, Mr. Jacobs' conflict is exacerbated also by the fact that JSR identifies Shasta Enterprises in the statement of financial affairs as an insider and discloses \$104,763 in payments JSR made to Shasta Enterprises in the one year period before the filing of JSR's case. Case No. 14-31675-A-11, Docket 1, Statement of Financial Affairs, item 3c. These are preferential transfers that, as part of Mr. Jacobs' duties as counsel for the JSR estate, he will have to at least evaluate recovering from the Shasta Enterprises estate.

"Thus, the creditor-debtor relationship between Shasta Enterprises and JSR flows both ways. The Shasta Enterprises estate is a creditor of the JSR estate and the JSR estate is a creditor of the Shasta Enterprises estate.

*"The foregoing demonstrates that the interests of the JSR estate are materially adverse to the Shasta Enterprises estate and the interests of the Shasta Enterprises estate are materially adverse to the JSR estate. These are actual and not just potential conflicts of interest.*

*"Next, the ownership and control lines of demarcation between the two entities are blurred already. Antonio Rodriguez (99% interest) and his wife Lorraine Rodriguez (1%) are the sole general partners of Shasta Enterprises, and Antonio Rodriguez is the president and 100% shareholder of JSR Properties.*

*"The common ownership and control of the entities heightens the risk that their creditor-debtor relationship may receive less than an arm's length treatment during the bankruptcy process. The court will not aggravate that risk by allowing the two debtors to employ identical bankruptcy counsel.*

*"Conversely, the common ownership and control of the entities is what requires the appointment of separate and independent counsel for each estate, to ensure that the estates are administered for the benefit of all creditors, and not just one or few creditors.*

*"As Mr. Jacobs is a professional that represents interests materially adverse to the Shasta Enterprises estate, i.e., the interests of the JSR estate, his employment as counsel for the debtor will be denied.*

*"Finally, aside from these issues, the court has not been persuaded that it should authorize the employment of two attorneys for the debtor. David Brady of Cowan & Brady also seeks approval of his employment as counsel for the debtor. This is an independent basis for denying the motion."*

In addition to the foregoing, even though the court has appointed a chapter 11 trustee in the Shasta Enterprises case and the Shasta Enterprises debtor is no longer a debtor in possession, the movant's continued representation of the Shasta Enterprises debtor is still problematic here because the Bankruptcy Code requires the Shasta Enterprises debtor to cooperate with the chapter 11 trustee in the administration of the Shasta Enterprises estate.

11 U.S.C. § 521(a)(3) prescribes that "(a) The debtor shall- . . . (3) if a trustee is serving in the case or an auditor is serving under section 586 (f) of title 28, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title."

In other words, the movant's continued representation of the Shasta Enterprises debtor still aligns Shasta Enterprises' interests adversely to the interests of the debtor in this case, even though Shasta Enterprises is no longer a debtor in possession. Accordingly, the movant's employment as counsel for the debtor in possession will be denied.

14. 14-31675-A-11 JSR PROPERTIES  
DL-1  
REDDING BANK OF COMMERCE VS.

MOTION FOR  
RELIEF FROM AUTOMATIC STAY  
12-22-14 [32]

**Tentative Ruling:** The motion will be dismissed as moot.

The movant, Redding Bank of Commerce, seeks relief from stay as to its collateral consisting of a commercial real property in Redding, California and personal property items located on the premises of the real property.

The motion will be dismissed as moot because the court is granting the movant's motion to dismiss the case. Dismissal of the case automatically dissolves the automatic stay. See 11 U.S.C. § 362(c) (2) (B).

The court notes that the movant is not seeking relief under 11 U.S.C. § 362(d) (4) and it is not seeking retroactive relief from stay.

15. 14-31675-A-11 JSR PROPERTIES MOTION TO  
DMB-1 EMPLOY  
12-16-14 [18]

**Tentative Ruling:** The motion will be denied.

The debtor in possession requests authority to employ David Brady of Cowan & Brady as counsel for the bankruptcy estate of the debtor.

As in the related motion for employment filed by Douglas Jacobs, also being heard on this calendar, opposition has been filed to this motion by Redding Bank of Commerce.

As this motion is identical to the employment motion by Mr. Jacobs and Mr. Brady is counsel for the Shasta Enterprises debtor, this motion will be denied for the reasons the court is denying the employment motion of Mr. Jacobs. The ruling on that motion is incorporated here by reference.

16. 14-31675-A-11 JSR PROPERTIES MOTION TO  
DL-2 DISMISS CASE  
12-29-14 [48]

**Tentative Ruling:** The motion will be granted and the case will be dismissed.

Creditor Redding Bank of Commerce moves for dismissal pursuant to 11 U.S.C. § 1112(b), arguing that the case was filed in bad faith and the debtor cannot confirm a plan within a reasonable time.

11 U.S.C. § 1112(b) (1) provides that "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."

For purposes of this subsection, without limitation, "'cause' includes- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b) (4) (A). The above instances of cause are not exhaustive. For instance, unreasonable delay that is prejudicial to creditors is also cause for purposes of 11 U.S.C. § 1112(b) (1). In re Colon Martinez, 472 B.R. 137, 144 (B.A.P. 1st Cir. 2012).

The debtor's business operation is to operate its sole commercial real property in Redding, California, generating average monthly gross income in the amount of \$11,078.91. Docket 12 at 5. Although the debtor has assigned a value of "unknown" in its Schedule A, the movant has proffered an appraisal dated October 14, 2014, just about one month prior to the filing of this case on November 26, 2014, giving the property an "as is" value of \$1,950,000. This valuation assigns a \$1,875,000 value for the real property and a \$75,000 value for the furnishings, freestanding equipment and personal property on the

premises. Dockets 36 at 4 & 46 at 2. The movant's valuation based on the sales comparison approach is between \$1.9 million and \$2 million. The movant's valuation based on the income capitalization approach is \$1,936,500. Docket 36 at 93.

The movant's claim totals approximately \$2,768,130.

This case has been pending for over one month. While the petition does not have the "single asset real estate" box checked, this is a single asset real estate case because the debtor's sole business is to operate its sole commercial real property in Redding, California. 11 U.S.C. § 101(51B) (defining "single asset real estate" as "real property constituting a single property or project . . . which generates substantially all of the gross income of a debtor"). This means that no later than February 24, 2015 (or 90 days after the petition date), the debtor must have:

"(A) . . . filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

"(B) . . . commenced monthly payments that—

"(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

"(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate."

11 U.S.C. § 362(d)(3).

Nevertheless, the court is denying employment of the debtor's proposed counsel and it is denying the debtor's motion to use cash collateral.

The employment denial calls into question the debtor's ability to file a plan - let alone a plan with a reasonable likelihood of rehabilitation - within the 90-day deadline of section 362(d)(3). And, without a cash collateral order, the debtor is unable to make the payments contemplated by section 362(d)(3)(B), as such payments are calling for only the "interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate."

The end of the 90-day period of 11 U.S.C. § 362(d)(3) is fast approaching, but the debtor is highly unlikely to be able to file a plan that has a reasonable possibility of being confirmed within a reasonable time and the debtor is not making any payments to the movant.

Yet, when the 90-day period of section 362(d)(3) ends, this court will be required to grant the movant's stay relief motion, which has been filed already. See 11 U.S.C. § 362(d)(3) (stating that "the court *shall* grant relief from stay"). The debtor's disregard for the issues of section 362(d)(3) qualifies as a continuing loss to the estate.

More, aside from the issues of section 362(d)(3), the debtor waited 16 days after the petition date to file its cash collateral motion and that motion is

being heard 40 days after the petition filing. The petition was filed on November 26, 2014, whereas the cash collateral motion was not filed until December 12, 2014 and it is not being heard until January 5, 2015. Docket 12.

The court is perplexed at how the debtor will reorganize without a cash collateral order, when the sole source of revenue for the debtor is the movant's cash collateral. The debtor can collect the rents, but it cannot utilize them.

And, although the debtor appears to have been collecting the rents from the property, that income has been obviously insufficient to service the movant's \$2,768,130 claim on the property. As of the petition date, the debtor was in default on the obligation owed to the movant. The court is unpersuaded then that this income will enable the debtor to reorganize the movant's \$2,768,130 claim against the property.

Even if the debtor strips down the claim to the value of the property, approximately \$1,950,000, the court is still unclear how the debtor will be able to reorganize that debt with the approximately \$11,000 in monthly income from the property.

More, stripping down the movant's claim would give the movant a ruling general unsecured claim that, combined with the absolute priority rule, would preclude the debtor from obtaining plan confirmation. Aside from what would be the movant's approximately \$768,130 unsecured claim, the debtor has listed another \$453,000 of general unsecured claims in Schedule F. Schedule E contains no debt. Docket 1.

The debtor's financial situation is exacerbated also by the fact that the first 36 months of the initial term under the lease agreement between the debtor and the lessee ends in approximately February 2015. Docket 36 at 117. At that point, the lessee will have the option under the agreement to terminate the lease on a 180-day notice. Id.

With or without the existing lessee, the court is not convinced that there is a reasonable likelihood of rehabilitation. The foregoing is cause for dismissal or conversion under section 1112(b)(1).

The court finds it unnecessary to address the bad faith issues raised by the motion.

Finally, as the debtor's real and personal property is overencumbered, and the \$104,763 in preferential transfers identified in the statement of financial affairs were made to Shasta Enterprises, which is in its own chapter 11 proceeding, dismissal would be in the best interest of the estate. The motion will be granted and the case will be dismissed.

17.	14-27083-A-11	RCK CONSERVATION CO-OP,	MOTION TO
	DBH-5	L.L.C.	EMPLOY
			12-9-14 [97]

**Tentative Ruling:** Because less than 28 days' notice of the hearing was given by the trustee, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the creditors, the debtor, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing



schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted.

The debtor in possession requests approval to employ R. Stephen Campbell as a real estate broker for the estate. Mr. Campbell will assist the estate with the locating and negotiation of leases for the debtor's real property. The proposed compensation for Mr. Campbell will be a flat fee of \$2,500. The fee is contingent on the court approving leases. Docket 100 at 2.

11 U.S.C. § 1107(a) provides that a debtor in possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee."

This includes the trustee's right to employ professional persons under 11 U.S.C. § 327(a). This section states that, subject to court approval, a trustee may employ professionals to assist the trustee in the administration of the estate. Such professional must "not hold or represent an interest adverse to the estate, and [must be a] disinterested [person]." 11 U.S.C. § 327(a).

11 U.S.C. § 328(a) allows for such employment "on any reasonable terms and conditions . . . including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis."

The court concludes that the terms of employment and compensation are reasonable. Mr. Campbell is a disinterested person within the meaning of 11 U.S.C. § 327(a) and does not hold an interest adverse to the estate. The employment will be approved.

18. 14-27083-A-11 RCK CONSERVATION CO-OP, MOTION TO  
DBH-6 L.L.C. USE CASH COLLATERAL  
12-12-14 [106]

**Tentative Ruling:** The motion will be granted in part.

The debtor seeks approval to use the cash collateral of Teresa Jones and Charles Hawley, who hold the first and seemingly the only deed of trust on the debtor's real property, consisting of two contiguous parcels, one in Butte County, California and the other in Yuba County, California.

Although the debtor's Schedule D lists two encumbrances against the property, one in favor of Teresa Jones and Charles Hawley and the other in favor of Paige Sharrer, the motion states that the debtor "is now informed and believes that Ms. Sharrer no longer seeks to claim an interest in the first lien." Docket 106 at 2.

11 U.S.C. § 1107(a) provides that a debtor-in-possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee." This includes the trustee's rights under 11 U.S.C. § 363. 11 U.S.C. § 363(c)(2)(B), (c)(3), (e) provides that, when the secured claimants with interest in the cash collateral do not consent, after notice and a hearing, "the court . . . shall prohibit or condition such use [of cash collateral]

. . . as is necessary to provide adequate protection of such interest."

The debtor claims that the existing cash collateral of Teresa Jones and Charles Hawley, since the July 8, 2014 petition filing, totals \$9,235,74. Docket 106 at 4.

The debtor is seeking to use \$5,882.27 a month from that cash collateral. The debtor expects the average monthly income "from rents and net profits" from the property to total \$7,756.90, consisting of \$6,833.33 in estimated lease revenue and \$923.57 "of estimated profits from other real property activities." Docket 106 at 4.

The \$5,882.27 in monthly expenses the debtor is seeking to pay include:

- \$3,039.82 as an adequate protection payment to Teresa Jones and Charles Hawley;
- \$110 for insurance;
- \$391.28 for real property taxes (total is \$4,695, paid twice annually);
- \$200 for repairs and maintenance of the property;
- \$859.17 for camping festival costs (such as permits, security, porta-potties, etc.);
- \$217 for United States Trustee fees;
- \$15 for bank service charges;
- \$400 for utilities;
- \$250 for vehicle expenses; and
- \$400 for feed, fertilizer, supplies.

Docket 106 at 4-5.

As the debtor expects to generate an average monthly income of \$7,756.90 from its operation of the property, including from the two leases the debtor expects to enter into, the court is satisfied that the expenses the debtor is seeking to pay will benefit the estate.

The cash collateral the debtor is seeking to use at this time totals \$9,235,74. According to the motion, the debtor is not holding additional cash collateral. As the debtor starts paying the proposed monthly expenses, the debtor expects to start generating income, even though it may not be on monthly or otherwise regular basis.

However, whether or not the court will have to approve the leases the debtor expects to enter into, the debtor is not authorized to use any cash collateral until at least one of the leases becomes effective. This way, the debtor should not use any cash collateral until it is clear that the leases will generate income for the estate. As the motion is not clear about the timing of the debtor's payment of the expenses or about the anticipated generation of revenue from the leases, the court will not speculate as to when the expenses have to be paid.

Further, as Teresa Jones and Charles Hawley will be receiving \$3,039.82 of the \$5,882.27 in monthly expenses the debtor is seeking to pay, the debtor must provide adequate protection for only \$2,842.45 of the monthly cash collateral it is seeking to use.

Although the motion lacks specificity about the nature of the adequate protection for the creditors' interest in that cash collateral, the motion states that the debtor holds \$13,900 in cash, representing capital contributions made by members of the debtor, since January 2014.

From January until June 2014, the debtor received \$10,900 in capital contributions from members, \$8,000 of which was paid as a retainer (earned or not earned) to the debtor's bankruptcy counsel. This left \$2,900 of capital contributions. From July through October 2014, the debtor received another \$9,000 in capital contributions from members. In November 2014, the debtor received an additional \$2,000 in capital contributions. Docket 106 at 3.

The \$13,900 in capital contributions held by the debtor can adequately protect the creditors' interest in the cash collateral the debtor is seeking to use to pay operating expenses.

Accordingly, the court will approve the debtor's use of the creditors' cash collateral, consistent with the budget proposed in the motion, on the following terms and conditions:

- the debtor must segregate and not spend its \$13,900 in capital contributions so they can adequately protect the creditors' interest in the cash collateral;
- the debtor may not use any cash collateral until at least one of the leases, from which the debtor anticipates generating revenue, becomes binding on all parties;
- the debtor may use the cash collateral for a period of three months, after which the debtor must return to this court to seek further use of cash collateral.

The motion will be granted in part.

19.	14-24689-A-11 CAH-4	ROY SMALLY AND VIVI MITCHELL-SMALLY	MOTION TO APPROVE DISCLOSURE STATEMENT 10-3-14 [62]
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**Final Ruling:** This motion has been voluntarily dismissed by the movant.  
Docket 82.