UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

January 30, 2020 at 11:30 a.m.

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1. 17-22347-E-11 **UNITED CHARTER LLC** **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 4-7-17 [1]**

Debtor's Atty: Jeffrey J. Goodrich

Notes:
Continued from 10/24/19

Operating Reports filed: 11/8/19 [Aug, Sep, Oct]

[JJG-17] *Ex Parte* Joint Application of Debtor in Possession, East West Bank and Wayne Bier for Amended Order Authorizing Post-Petition Refinancing or, Alternative, for an Order Shortening Time for Hearing Thereon filed 11/15/29 [Dckt 481]; Amended Order filed 11/18/19 [Dckt 485]

[JJG-16] Amended Order filed 11/18/19 [Dckt 485]

Change in Designation of Counsel for Service [for Equity Interest Holder, Raymond Zhang] filed 12/5/19 [Dckt 486]

The Status Conference is xxxxxxxxxx

JANUARY 30, 2020 STATUS CONFERENCE

The Debtor in Possession filed a Status Conference Statement concerning the Refinance Escrow and Request for Dismissal of the case. Dckt. 490.

The Debtor in Possession reports that this case was on a "dual track" for resolution. The first track was to refinance the property of the Bankruptcy Estate and use the proceeds to pay creditors, thereby allowing the case to be dismissed.

The second track from Debtor in Possession's proposed Third Amended Plan, for which the

confirmation hearing is set for January 30, 2020.

The Debtor in Possession obtained court authorization to pursue the refinancing, with the loan escrow having closed on November 26, 2019. Attached to the Status Report is an Exhibit A, which is the loan escrow statement showing that East West Bank and Wayne Bier, holding claims secured by the property of the Bankruptcy Estate, that were paid out of the loan escrow. Dckt. 490 at 6 - 7.

The refinance having been completed, there is no reason for the Debtor in Possession to pursue a Chapter 11 Plan, with there being no pre-petition creditors and only administrative expenses (Debtor in Possession counsel and U.S. Trustee fees) left to be paid.

Exhibit B to the Status Report is stated to be a copy of the Debtor in Possession bank accounts statement for December 2019, showing a cash balance of $437,925. In addition, there is $250,000.00 of the loan proceeds being held in escrow to be disbursed to pay the U.S. Trustee fees.

Computation of U.S. Trustee Fees

In the Limited Response filed by the U.S. Trustee on December 31, 2020, the U.S. Trustee states that the quarterly fees owed by the Debtor in Possession were at least $36,876.50, and will be higher if the refinance was completed and claims paid. Dckt. 487.

With respect to the payment of the secured claims, Debtor in Possession argues that it was merely replacing one creditor for the other, and in the process, Debtor in Possession was able to get a discount on the secured claims of the pre-petition creditors for the obligation owed to the post-petition refinance lender.

Thus, the Debtor in Possession computes the U.S. Trustee fees to be only $4,875 or, if the court includes the secured claim paid through the refinance, $31,133.43.

Administrative Expenses

The Debtor in Possession says that the accountant for the Bankruptcy Estate is owed $3,000.00 based on a flat fee of $1,500 each for the state and federal tax returns prepared by the accountant.

The Debtor in Possession states further that Debtor in Possession counsel has agreed to accept an additional $175,000.00, when added to the $25,000.00, for payment of a total of $200,000.00 in fees and expenses for his services in representing the Debtor in Possession.

Dismissal of Case

Debtor in Possession then reports that it previously moved to dismiss this case, but the court denied it on "procedural grounds." FN. 1.

FN. 1. The court's review of the Civil Minutes on the hearing on the Motion to Dismiss discloses that Debtor in Possession counsel had merged a request to dismiss this case with the motion to borrow. Civil Minutes, Dckt. 471. Debtor in Possession is correct to the extent that it was "procedural" that the court

severed and dismissed the additional relief that was improperly combined with the motion to borrow - rather than dismissing the entire motion and having the Debtor in Possession lose the opportunity to proceed with the requested alternative track of borrowing.

In looking at the Motion for the substance and legal authority for granting the dismissal, there is none. Rather, the dismissal is requested as a tag along to the refinance, presented as if the refinance lender is demanding and ordering the court to dismiss the bankruptcy case on the terms as dictated by the lender. The request to dismiss buried in the Motion to Borrow had no substance for the court to rule on beyond the improper request being made by the Debtor in Possession.

In the Status Report, without Motion as required when relief is sought in the form of an order (Fed. R. Bankr. P. 9013), the Debtor in Possession says that it is renewing its request that the court order the case dismissed.

The Debtor in Possession then reports that it is required by prior order of this court that the case be dismissed no later than January 2020, or the Debtor in Possession will be deemed to have defaulted in the Loan Agreement.

The Amended Order, which was drafted by counsel for the Debtor in Possession does state:

> **IT IS FURTHER ORDERED** that if the Debtor shall have failed to have this Bankruptcy case dismissed by Order of this Court on or before January 31, 2020, such failure shall constitute an event of default under the Loan Agreement, the Deed of Trust and/or any related loan documents, and Grand Pacific shall thereafter be entitled to exercise all of its rights and remedies thereunder including, but not limited to, seeking judicial or non-judicial foreclosure of the Property.

Order, p. 3:19-23; Dckt. 485. The Amended Order is dated November 18, 2019.

In considering this dismiss or financially die provision inserted in the Order by counsel for the Debtor in Possession, one first reviews this court's ruling on the Motion and upon which the court's original (court drafted) order granting the motion was based:

> The approval of the propose financing to pay all claims in full is not an order reducing or limiting any such claims and **the court does not approve any conditions of the proposed financing that require the dismissal of this case.** These include the provisions of the proposed Loan Agreement paragraphs 3.1.1 (b) setting claim amounts and 3.2.1.(p) stating dismissal as a condition of the loan.

Civil Minutes, p. 6; Dckt. 471 (emphasis added). Notwithstanding this expressly ruling, counsel for the Debtor in Possession slipped such unapproved condition into the order and slid that past this judge (for whatever reason counsel for the Debtor in Possession wanted to create such a doomsday, financial death sentence provision for his client).

The Amended Order was entered pursuant to the Ex Parte Joint Application of the Debtor in Possession, East West Bank, and Wayne Bier. Dckt. 481. In reviewing the Ex Parte Joint Application, the court, there is not one word of the court imposing a "the case must be dismissed by January 31, 2020 or the Debtor in Possession will be in default and lose the property to foreclosure." From reading the face of the Joint Ex Parte Application, to which the potential refinance lender is not a party, there is not one word of relief stating that the court is to impose a dismiss or default

Attached improperly (under the Local Bankruptcy Rules) is a fifty-one (51) page Loan Agreement. Using the word search function and winding through the various pages of the Loan Agreement, the court finds Paragraph 5.17, which states and an event of default is if the bankruptcy case is not dismissed, with all applicable appeal periods having expired, by an unstated [blank] date in 2019.

No Declaration is offered by a Responsible Officer of the Debtor in Possession, but counsel for the Debtor in Possession provides his evidentiary testimony. Declaration, Dckt. 482. Counsel for the Debtor in Possession does not testify one breath about there being imposed a dismiss by January 30, 2020 or financially die provision in the amended order. The Declaration states that only after proof of the payment of all claims and administrative expenses in full, will the Debtor in Possession then subsequently request the court dismiss the Bankruptcy Case. Declaration, ¶ 8; Dckt. 482.

This last statement under penalty of perjury by counsel for the Debtor in Possession and the Debtor in Possession clearly understood that they had to get all claims paid and all allowed administrative expenses paid before the court could grant a motion to dismiss this case.

The court was clearly in error in relying on counsel for the Debtor in Possession, counsel for Wayne Bier, and counsel for East West Bank providing the court with an appropriate order. The court was clearly in error in expediting the signing of the order to allow the Debtor in Possession to proceed with the refinance track promptly. In retrospect, the court clearly needed to fly spec each pleading presented by counsel for the Debtor in Possession and the "Amended Order" that everyone said was fine and for the court to sign.

Administrative Expenses and Dismissal of Case

It is very, very curious that even though Debtor in Possession and Debtor in Possession counsel knew as of November 18, 2019, that they had gotten an order signed which put the Debtor in Possession and Bankruptcy Estate in risk of non-curable default and likely loss of the property securing the refinance loan, not one effort was made to file a motion to dismiss, or motion for allowance of fees for professionals employed by the Debtor in Possession. It is only when Status Report is filed on January 23, 2020 – sixty-six (66) days after getting the court to sign the financial doomsday order – does the Debtor in Possession make any reference to the necessity to have the case dismissed one day after the Status Conference.

As provided in 11 U.S.C. § 1112(b)(1) only on request of a party in interest (such required to be a motion, Fed. R. Bankr. P. 9013) and after notice and hearing, may the court either dismiss or convert a Chapter 11 case.

Further, that a professional employed to represent the fiduciary Debtor in Possession, such as Debtor in Possession counsel and Debtor in Possession accountant, can be allowed and paid professional fees and expenses only after having them approved by the court pursuant to 11 U.S.C. § 330.

On June 15, 2017, the court entered its order authorizing the employment of Jeffery Goodrich and his law firm as counsel for the Debtor in Possession. Order, Dckt. 28. The Order expressly states the statutory requirement that "No compensation is permitted except upon court order following application pursuant to 11 U.S.C. § 330(a).: Order, ¶ 2, *Id.*

On August 31, 2018, the court entered its order authorizing the employment of Patrick J. Quinn as the accountant for the Debtor in Possession. Dckt. 272. This order contains the statutory requirement that no compensation is permitted except upon application pursuant to 11 U.S.C. § 330.

No application for the court to fulfill its statutory obligation and for professionals to fulfill the statutory requirements that they seek and obtain approval of fees to be paid for services provided to the fiduciary Debtor in Possession.

It appears that counsel for the Debtor in Possession has made a gross mistake and forgotten that he has to file an application for the allowance of his fee and the fees for the accountant. Or, it may be that counsel is seeking to hardball the court and get to the court abdicate its duty and allow counsel to take whatever he wants in fees from the Debtor in Possession and Bankruptcy Estate.

It is inconceivable that having created the doomsday January 31, 2020 scenario that counsel would have mistakenly not filed the fee applications. Rather, it appears that he doomsday date was placed in the order rushed to the court, then let to tick away, only to be sprung on the court when there was not time for such an application to be filed.

The court does not and will not abdicate its obligation under the Bankruptcy Code to review and allow fees and expenses which are reasonable and necessary. Additionally, the court will not allow counsel for the Debtor in Possession to "amend" the Bankruptcy Code to do away with this statutory obligation and create a special, Goodrich only law, that allows counsel for this Debtor in Possession to be paid whatever he thinks he should be paid.

Dilemma Facing Bankruptcy Estate, Court, and Counsel for Debtor in Possession

The Debtor in Possession and counsel for the Debtor in Possession (apparently intentionally) have created a situation where if this case goes one tick past 11:59 and 59 seconds p.m. on January 31, 2020, then the Debtor in Possession will be in default on the refinance loan, the refinance will have a non-curable default which it can expeditiously proceed through a nonjudicial foreclosure sale to take the property from the Bankruptcy Estate and ultimately from the Debtor.

While this is not of financial consequence to the court, it is of serious financial consequence to the Debtor, Debtor in Possession, Responsible Representative of the Debtor in Possession, and counsel for the Debtor in Possession. They would all have to ultimately answer for the loss of an asset due to a non-cureable default condition they created and then knowingly allowed to be breached.

In the Status Report, Debtor in Possession and Debtor in Possession counsel offer no suggestions, other than the court violate the Bankruptcy Code, abdicate its responsibilities, and reward counsel for the Debtor in Possession for his misconduct. That will not occur.

One possible alternative could be:

1. The court orders that the case is dismissed, conditioned on:

A. $250,000.00 of loan proceeds in escrow and $250,000.00 of the cash held by the Debtor in Possession be immediately deposited with the Clerk of the Bankruptcy Court pending further order of the court.

B. The court retain and exercise post-dismissal jurisdiction over the Debtor, Debtor in Possession, counsel for the Debtor in Possession, accountant for the Debtor in Possession, and the $500,000.00 to fully adjudicate all fee and other administrative expense applications or motions, including the determination of U.S. Trustee fees due in this Chapter 11 case.

C. Only after the court has determined and allowed all of the administrative expenses and U.S. Trustee fees, and such order thereon are final and the full amounts paid as ordered by the court, will the remaining monies, if any, held by the Clerk of the Court shall be disbursed to the Debtor.

D. Applications or motions for professional fees shall be filed and served by February 21, 2020. If not timely filed, no fees or costs shall be allowed for the professional failing to file, or have filed for the professional by the Debtor in Possession, and the Debtor in Possession, Debtor, and any other person be barred from making payment of any amount to any such professional for fees or expenses relating to this bankruptcy case.

2. **17-22347-E-11 MET-2** **UNITED CHARTER LLC** **Jeffrey Goodrich** **CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY 5-16-19 [391]**

EAST WEST BANK VS.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on May 16, 2019. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Relief from the Automatic Stay is xxxxx.

Creditor East West Bank ("EWB" or "Movant") seeks relief from the automatic stay with respect to Debtor in Possession, United Charter LLC's (" ΔIP") real property located in Stockton, California, and identified as (1) 1904, 1908, 1912, 1916, 1920, 1928, 1936 Weber Avenue ("Parcel 1 Through 7"); 1881 E. Market Street (Parcel 11, B1 thru B15); 1617 (Parcel 12, A thru D), 1555 (Parcel 14 thru 16); 1531 (Parcel 17), 1523 E. Main Street (Parcel 18) (collectively, the "Property").

Movant has provided the Declaration of L. Kurth Demoss to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property. Dckt. 393. The Demoss Declaration presents testimony that there is a $783,312.79 arrearage on Movant's claim, with $338,655.87 as an advance for taxes. *Id.*, ¶ 7.

At filing Movant's claim was $4,522,031.36, which claim has grown to $5,214,465.67 as of April 30, 2019 due to interest and fees. *Id.,* ¶ 9. The total post-petition payments received from ΔIP in this case have been $262,035.66. *Id.,* ¶ 16.

The Demoss Declaration testifies that ΔIP's monthly expenses are $9,678.00, and monthly payments owing on the two claims secured by the Property would be $39,406.91 and $7,772.81 at 7.5 percent interest (the prime rate plus a 2 percent adjustment). *Id.*, ¶ 32.

Demoss testifies further that in his experience, banks typically lend at maximum 65 percent of the "as-is" value of the property securing such a loan. *Id.,* ¶ 35. Thus, assuming a value of $7.2 million, Demoss states the maximum loan would be near $4,680,000.00. *Id.*, ¶ 35.

ΔIP recently informed Movant it seeks to sell the Property by the end of the summer. *Id.*, ¶

46.

In the Motion, Movant states with particularity (FED. R. BANKR. P. 9013) the legal contention that there is cause for relief from stay pursuant to 11 U.S.C. § 362(d)(1) because of its legal conclusion that the claim is not adequately protected. Dckt. 391. Movant also argues relief should be granted pursuant to 11 U.S.C. § 362(d)(2) because there is no equity in the Property and the Property is not necessary for an effective reorganization. Movant also states it is seeking relief from the 14 day stay pursuant to Federal Rule of Bankruptcy Procedure 4001(a)(3).

The Motion fails to state grounds upon which relief may be granted, but instead instructs the attorney to read, analyze, and assemble for Movant the grounds from the "Notice of Hearing, this Motion, the Memorandum of Points and Authorities, the Declaration of L. Kurth DeMoss, the Exhibits to the Motion, and the pleadings on file herein, the records and files in this action, and upon such further oral and documentary evidence as may be presented." Though not permitted, Movant appeals to have issued itself authorization to slip in more evidence at the hearing.

In addition to exempting itself from Federal Rule of Bankruptcy Procedure that requires the grounds to be stated with particularity, Movant also exempts itself from Federal Rule of Bankruptcy Procedure 9013 and the pleading requirements of Local Bankruptcy Rules 9004-1, 9004-2, and 9014-1. These require that the motion, notice, points and authorities, each declaration and the exhibits (which may be combined into one exhibit document) be filed as separate pleadings (except in limited circumstances in which the motion and points and authorities may be combined into one document).

In its Memorandum of Points and Authorities lies the actual grounds forming the basis for relief. Those grounds are as follows:

1. ΔIP's equity position is eroding and has nearly disappeared, and EWB is not receiving adequate protection payments. Memorandum of Points and Authorities, Dckt. 395. at p. 6:22-25.

2. ΔIP has paid only $262,035.66 post-petition, with EWB's claim increasing significantly since the filing of this case on April 7, 2017. *Id*. at p. 7:1-18.

3. The Property is encumbered by liens totaling $6,256,704.72. *Id*. at p. 8:3. ΔIP asserted the Property's value was only $5,330,000.00; while creditor Wayne Bier asserts the value is $7.2 million, the ΔIP's valuation is likely the correct value. *Id*. at p. 8:4-9.

4. In the event the Property is valued at $7.2 million, ΔIP will not be able to confirm a Plan as the DIP simply cannot afford to pay the all of the secured claims and its regular operating expenses. *Id*. at p. 8:18-19.

5. The Property is not necessary for an effective reorganization because the timing and facts of the case are such that a successful reorganization of the DIP within a reasonable time is impossible. Doubts as to reorganization include the following:

i. This case has been pending for more than 2 years without a confirmed plan.

ii. A confirmable plan is likely months off as the Property would need to be valued first.

iii. ΔIP has inadequate capital to continue operations, demonstrated by ΔIP's failure to make regular post-petition and adequate protection payments, as well as ΔIP's history of not paying taxes.

iv. ΔIP's sole source of income is rents. While projected rents for March 2019 were $58,922.00, the actual rents were only $35,000.00–ΔIP has not explained this discrepancy. Additionally, there have been issues with pending leases, uncollected rent, and expiring leases.

v. A recent fire at the Property may have affected the Property value.

vi. Errors and misinformation in monthly operating reports and elsewhere indicate mismanagement, and there are no funds to pay a new property manager.

vii. Due to deferred maintenance and tenant turnover, it is likely that even if a plan is confirmed it will not be successful. *Id.*, at p. 8:21-13:27.

6. Waiver of the 14 day stay is warranted because ΔIP has no equity, is not reorganizing (as evident by the lack of plan), and is not paying any Cash Collateral payments. A new Notice of sale would allow 20 to 30 days before foreclosure for an appeal to be filed. *Id.*, at p. 14:2-5.

The relief requested in the Memorandum mirrors that in the Motion, except an additional request for attorney's fees and costs is dropped in to the Memorandum. *Id.,* at p. 14:18-20.

DEFAULT BY DEBTOR IN POSSESSION

The ΔIP has not filed any opposition to the Motion. The Declaration of Jeffrey Goodrich was filed "in support of opposition." Dckt. 412.

While filed in "support" of an opposition, there is no position asserted. There is no request that the Motion be denied asserted by ΔIP.

Furthermore, the Local Bankruptcy Rules do not permit a Declaration to filed as an opposition. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, exhibits, memoranda of points and authorities, other supporting documents, proofs of service,

and related pleadings shall be filed as separate documents." LOCAL BANKR. R. 9004-2(c)(1). Failure to comply is cause for an appropriate sanction. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

The Goodrich Declaration provides an overview of the case history and attempts to explain the delay in getting a plan confirmed. The Goodrich Declaration also admits no adequate protection payments have been made, but argues this is because ΔIP instead paid $45,000 for roofing repairs to EWB's collateral, over $80,000 of leasing commissions to increase EWB's cash collateral, over $87,000 in senior lien property taxes, and over $11,000 of storm drain fees that would have become a lien senior to EWB.

OPPOSITION OF CREDITOR WAYNE BIER

Creditor Wayne Bier holding a secured claim ("Bier") filed an Opposition on May 30, 2019. Dckt. 406. Bier asserts the Property has a value range of $7,230,000.00 - $7,730,000.00 as of an October 2018 appraisal. Bier argues the appraisal obtained by ΔIP valuing the Property at $5,330,000.00 was based on the value as of July 27, 2018, notwithstanding ΔIP's scheduled value of $7,855,018.99.

Bier does not explain how or why the court should find an appraisal, which is relied upon by Movant, obtained by the ΔIP and used in a motion to value the secured claim of Bier is not more credible and realistic than the value stuck in the schedules by the principal of the Debtor. $5,330.000.00 Appraisal Declaration, Dckt. 285.

Bier argues further a plan which re-writes the East West Bank obligation to term it out over time at an appropriate interest rate, amortized at an affordable monthly payment, and provide monthly payments to Bier could be confirmed in this case.

RAYMOND ZHANG EQUITY INTEREST HOLDER OPPOSITION

Raymond Zhang ("Zhang") has filed his personal Opposition, as an equity interest holder in the Debtor, on May 30, 2019. Dckt. 408. Mr. Zhang is also the responsible representative of the ΔIP, with the responsibilities of acting to make sure that the ΔIP fulfill its fiduciary duties in this Chapter 11 case (there having been no trustee appointed or requested to be appointed in this case).

Zhang eschews the $5,330,000 value that he, as the responsible representative of the ΔIP, has advanced (for which the Federal Rule of Bankruptcy Procedure 9011 certificates are made, for the ΔIP as the accurate value of the Property in seeking to set the value of Bier's secured claim at less than the full amount of the obligation. The Motion to Value, Dckt. 283, was filed on September 27, 2018, a mere eight months before the filing of the present Motion for Relief From the Stay. The ΔIP has not wavered from opposing Bier's $7,000,000.00 valuation of the Property.

Zhang, but not the ΔIP, argues further there is equity in the Property, which Property is necessary for this Chapter 11. Zhang, but not the ΔIP, argues that at the current rental rates, the ΔIP should be able to propose a plan that re-amortizes the EWB and Bier obligations at an appropriate interest rate with repayment in a reasonable period of time, and provide regular monthly payments on the claims while the property is marketed and sold to provide for the full payment of the claims in a relatively short period of time.

Conflicting Statements and Positions Asserted in Court

As noted above, the ΔIP has steered clear of asserting opposition to the Motion. It may well be that the ΔIP and Zhang have concocted a scheme for the ΔIP to continue to assert a value of $5,330,000 for the ΔIP's battles with Bier, but have Zhang "personally" state, while wearing his equity holder hat, that the property is worth substantially more than Zhang, when wearing his hat as the responsible representative of the ΔIP, certifies to the court is the actual value of the Property.

Or, it may be that Zhang is admitting that he knowingly provided an inaccurate value in seeking to value the Bier claim at a lower amount than the full amount of the claim. Or it may be for Zhang that the more "convenient truth" when opposing the motion for relief is to, "personally, not as a representative of the ΔIP as the fiduciary of the bankruptcy estate," adopt the higher value asserted by Bier and disputed by the ΔIP.

JUNE 13, 2019 HEARING

At the June 13, 2019 hearing, the court continued the hearing on the Motion for Relief from the Stay to afford Mr. Bier, the Debtor in Possession, and Mr. Zhang to get a plan and disclosure statement on file and this case moving forward, or in the alternative to market the Property before the Plan is confirmed. Civil Minutes, Dckt. 422.

The court addressed at the hearing the prosecution of this bankruptcy case over the past two and almost one-half years, and the lack of any Chapter 11 Plan. Given that this is really a three party dispute, with East West Bank having the senior lien on the Property at issue and Mr. Bier and Mr. Zhang being embroiled in a multi-year financial donnybrook, the only persons financially hurt by the delay have been Mr. Bier and Mr. Zhang. Neither Mr. Bier nor East West Bank sought the appointment of a trustee in this case.

The court has addressed in other ruling the failings of Mr. Zhang as the responsible representative of the Debtor in Possession (including making unauthorized payments of estate property to Mr. Bier and making additionally payments from purportedly non-bankruptcy estate monies, which may well have included monies paid from the Debtor to Mr. Zhang within the preference period) in this case. As came out in the four day evidentiary hearing on the Objection filed by the Debtor in Possession to Mr. Bier's claim, both sides have a view of the "truth" that is not consistent with federal law. As the court's findings showed, Mr. Bier's belief is that one can say whatever they want, with the federal court proceedings being merely an extensive of aggressive, no holds barred, over the top, business "negotiations." Mr. Zhang and the prebankruptcy counsel for the Debtor and Mr. Zhang demonstrated that they would say whatever they thought was in their favor, without regard to the truth, including counsel preparing a document containing knowingly false information for Mr. Bier that he knew Mr. Bier would use to obtain benefits and advantage from a foreign government.

Though having the advantage of hearing the court's findings more than a month ago and reading the tentative ruling below, Mr. Bier's counsel and the Debtor in Possession's counsel showed up with little more than "hope" that a plan would be prosecuted in this case. Though having more than a month since the court's ruling that the Debtor in Possession asserts "clarified" the claim so a plan could be proposed, nothing has been prepared. The court did not find persuasive Debtor in Possession's counsel's arguments that a plan could not be proposed providing for a sale of the property because the

property was not quite ready to sell because there was fire damage and repairs would have to be made. Such provisions for reorganizing the Debtor's business through the making of the repairs, addressing any insurance claims, providing for interim payments on the East West Bank claim, the marketing of the property, and sale within a commercially reasonable time could all be part of a bankruptcy plan of reorganization. That is where the reorganization is to occur, not in the twilight of post-filing and preconfirmation, with the plan only being the capstone for the reorganization that has occurred during the bankruptcy case.

Both Mr. Bier and the Debtor in Possession requested that in lieu of granting relief the court set deadlines for them to act in prosecuting a plan. Clearly, it is not a positive sign in a Chapter 11 case whether the court has to set deadlines for parties to act reasonably to comply with federal law and protect their financial interests.

Notwithstanding Mr. Bier, the Debtor in Possession and Mr. Zhang having had more than two years to get their finances together, East West Bank agreed (in light of the phrasing of the issues by the court) to a continuance for a reasonable time for Mr. Bier, the Debtor in Possession, and Mr. Zhang to "put up or shut up" (as the court phrased it, not counsel for East West Bank).

EWB'S SUPPLEMENTAL PLEADINGS

On August 6, 2019, EWB filed the Declaration of Mary Ellmang Tang and Exhibits thereto in support of the Motion. Dckts. 426, 427. The Tang Declaration provides testimony to authenticate correspondence between EWB and counsel for ΔIP.

Exhibit A (Dckt. 427) filed by EWB is a letter from EWB to ΔIP's counsel dated June 19, 2019. The letter makes numerous requests for information, broken up into the following categories:

1. Insurance Claim

This category requests information and evidence regarding the fire at the Property, including copies of insurance claims, estimates of repairs, and correspondence with the insurance company.

2. Tenant/Lease Issues

This category requests information and evidence regarding several new tenants at the Property, including LGN, Hotel Furniture Liquidators, White Glove, and Inland Express.

3. Financial Reporting Issues

This category requests information and clarification regarding financials provided, including Operating Reports and proposed cash collateral budgets.

4. Sale Issues

Id. This category requests information and evidence regarding the proposed sale of the Property, including a time line, broker, prerequisites to marketing the Property, estimates of repair costs from fire damage, and estimated sale price.

Exhibit B is a response letter from ΔIP's counsel dated July 1, 2019. The response provides answers to several of EWB's questions and references various exhibits.

Exhibit C is a follow up letter from EWB dated July 17, 2019. The follow-up letter reasserts questions posed in the June 19 letter which EWB believed need a response or supplemental information.

JOINT STATUS REPORT

The parties to this Matter filed a Joint Status Report on August 14, 2019. Dckt. 430. The parties report that Farmers' Insurance has paid the ΔIP $3,688,659.73 in insurance proceeds, and that the parties are working on an agreement to resolve this Matter.

AUGUST 15, 2019

At the August 15, 2019 hearing the court continued the hearing to allow the parties time to reach an agreement resolving the Matter.

APPLICABLE LAW

Standing

In adjudicating issues in federal court a party must have standing. As stated in the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings which address issues arising only under 11 U.S.C. Section 362(d). *Hamilton*, 2005 Bankr. LEXIS 3427 at *8-*9 (citing *Johnson v. Righetti* (*In re Johnson*), 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief.

A basic principal of American Jurisprudence is that the law does not condone the "officious intermeddler." One is not allowed to assert claims or rights in which he or she has no interest. In the federal courts, this is the Constitutional requirement of "standing."

> Article III of the Constitution confines federal courts to decisions of "Cases" or "Controversies." Standing to sue or defend is an aspect of the case-or-controversy requirement. (Citations omitted.) To qualify as a party with standing to litigate, a person must show, first and foremost, "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent.' (Citations omitted.)...Standing to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess 'a direct state in the outcome.' (Citations omitted.)

Arizonans for Official English v. Arizona, 520 U.S. 43, 64, 117 S.Ct. 1055 (1997).

Though neither party has identified the issue of standing, the court may raise it *sua sponte*, Rule 12(h)(3), Federal Rules of Civil Procedure. A person must have a legally protected interest, for which there is a direct stake in the outcome. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 117 S.Ct. 1055 (1997). The Supreme Court provided a detailed explanation of the Constitutional case in controversy requirement in *Northeastern Florida Chapter of Associated General Contractors of*

America v. City of Jacksonville Florida, 508 U.S. 656, 663, 113 S.Ct. 2297 (1993). The party seeking to invoke federal court jurisdiction must demonstrate (1) injury in fact, not merely conjectural or hypothetical injury, (2) a causal relationship between the injury and the challenged conduct, and (3) the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative, *Id*. In determining whether the plaintiff has the requisite standing and the court has jurisdiction, the court may consider extrinsic evidence. *Roverts v. Corrothers*, 812 F.2d, 1173, 1177 9th Cir. 1987).

The Ninth Circuit Court of Appeals addressed the issue of Constitutional standing and the self-imposed judicial restrain of prudential standing (whether the person asserting standing was within the "zone of interests") in *Motor Vehicle Casualty Co. V. Thorpe Insulation Company* (*In re Thorpe Insulation Company*), 671 F.3d 980 (9th Cir. 2012).

This followed the United States Supreme Court discussing the judicial restrain concept in *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004). "Prudential standing" is an additional judicial "self-restraint" by which a court, which otherwise has standing, chooses to not hear the matter because of the generalized interests which do not directly relate to the person seeking to utilize the federal courts to address his or her grievance. By its very nature, a request for the court to exercise "self restraint" and not hear a matter based on prudential standing admits that Article III case in controversy Constitutional standing and federal court jurisdiction exists. One of the principal areas in which federal courts have determined it prudent to not exercise jurisdiction has been in the realm of domestic relations, giving strong deference to state law. *Id.*, p. 12. In an earlier decision, *Warth v. Seldin*, 422 U.S. 490, 501 (1975), discussed the concept of prudential standing to be one in which the claims being asserted as personal to the plaintiff rests on legal rights of others.

Parties to the Contested Matter

The Motion for Relief From the Automatic Stay seeks relief of the automatic stay as it applies to property of the bankruptcy estate to allow Movant to foreclose on its collateral, which collateral is property of the bankruptcy estate. Motion, Dckt 391. In a Chapter 11 case when a trustee has not been appointed, it is the debtor in possession that shall have the powers of and perform all functions and duties of a bankruptcy trustee. 11 U.S.C. § 1107(a). Here, it is the ΔIP who is responsible for, and the obligation to, exercise the powers of a trustee to defend, to the extent a *bona fide* opposition exists, challenges to the rights and interests of the bankruptcy estate, which includes a creditor seeking relief from the stay to foreclose.

Neither Bier nor Zhang have sought to intervene in this contested matter as required by Federal Rule of Civil Procedure 24 and Federal Rule of Bankruptcy Procedure 7024 (which Federal Rule of Bankruptcy Procedure 9014 does not make automatically applicable in contested matters and for which relief must be requested).

While it is questionable whether Bier and Zhang are mere officious intermeddlers in the affairs of the ΔIP or would be allowed to intervene if they sought such relief, the court has considered their arguments notwithstanding the ΔIP having defaulted in this contested matter.

Cause Grounds for Relief From the Stay

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E*

Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.), 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay. A senior lienor is entitled to full satisfaction of its claim before any subordinate lienor may receive payment on its claim. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][d][i] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Therefore, a senior lienor may have an adequate equity cushion in the property for its claim, even though the total amount of liens may exceed a property's equity. *Id.*

As to 11 U.S.C. § 362(d)(2), a debtor has no equity in property when the liens against the property exceed the property's value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. 11 U.S.C. § 362(g)(2); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988).

DISCUSSION

Current Case Status

At the prior hearing the court granted a continuance to allow the parties to work out an agreement to resolve this Matter in light of the insurance proceeds received by ΔIP.

Disputed Value of the Property

EWB argues the Property is encumbered by liens totaling $6,256,704.72 which exceed the $5,330,000.00 value of the Property. Bier and Zhang (now individually as the equity interest holder, conflicting what he asserts as the responsible representative of the ΔIP) assert the Property has a value range of $7,230,000.00 - $7,730,000.00.

	EWB Value Analysis (based on value asserted by the ΔIP)	Bier and Zhang (individually) Analysis
Asserted Value	$5,330,000.00	$7,230,000.00
EWB Secured Claim	($5,214,465.67)	($5,214,465.67)

Bier Claim ,for which Bier has received payments of $185,843.92 which must be applied to this obligation. (The issue of post-petition interest has not been determined due to the ΔIP asserting that the value of the Property is only $5,330,000 and that Bier is not entitled to any interest because his claim is undersecured.)	($1,042,239.05)	($1,042,239.05)
Asserted Value in Excess of Liens	($926,704.72)	$973,295.28

Based on the ΔIP's appraisal information, EWB's secured claim all but exhausts the value of the property, there is no equity for the bankruptcy estate, and Bier is left out in the economic cold.

Bier and Zhang, who switches to Bier's value for this Motion, assert that not only is Bier fully secured, but there is almost another million dollars in equity for the bankruptcy estate (not taking into costs of sale). This is a $2,000,000 swing in value from that asserted by the ΔIP, and Zhang as the responsible representative just eight months ago - a 35.6% increase in value from that previously asserted (subject to the Fed. R. Bankr. P. 9011 certifications) by the ΔIP and Zhang as the responsible representative.

Bier then continues to argue that because there is a $2,000,000 equity cushion for EWB, it should not worry and Bier "believes" that the ΔIP can advance a Chapter 11 plan within a "reasonable period of time." Opposition, Dckt. 406.

The court has conducted a long, protracted evidentiary hearing on the ΔIP's Objection to Bier's claim in this case. The ΔIP asserted that Bier's claim should have been only ($580,000) or less. Bier asserted that it should be ($2,148,541.75) or more. The court determined the claim to be ($1,042.239.05), for which there are $185,843.92 in post-petition payments that must be applied to said obligation.

Clearly, both Bier and Zhang, as the responsible representative of the ΔIP, have been challenged when it has come to economic calculations.

For the Evidentiary Hearing, the court made very pointed comments about the credibility of both Bier and Zhang based upon the evidence presented - concluding that both where challenged when it came to giving credible, accurate testimony under penalty of perjury. Additionally, evidence was presented concerning Bier and the ΔIP's pre-petition counsel, Mr. Hu, intentionally creating a document they knew contained false information so Bier could use it to obtain a visa, based on the false information, from a foreign government.

Zhang, as the equity interest holder, contends that this Property is necessary for an "effective"

reorganization. Opposition, Dckt. 408. Without it, Zhang, as the equity interest holder, states that "without [the property] there is no hope of reorganization." *Id.* at p. 3:8-9.

Zhang, as the equity interest holder, argues that the ΔIP should be able to confirm a plan of reorganization within a "reasonable time." But no "reasonable time" period is stated.

With respect to Bier, he repeatedly testified as to his disdain for Zhang and Zhang's inability to properly run the property of the Estate prior to the bankruptcy case being filed. Further, though presented with multiple opportunities to foreclose, he never did, instead electing to let Zhang run the show.

If Bier is correct and the Property is worth more than $7,230,000.00, then he could foreclose (obtaining relief from the stay at the same time as EWB), pay off EWB from a quick sale, and then pocket all of the remaining proceeds from a sale, which amount would be well in excess of his claim as determined by the court. Assuming Bier is correct and he actually believes that the property is worth more, say $7,500,000.00, then his upside to brining this multi-year, no Chapter 11 plan case to a conclusion would be computed as follows:

Bier Asserted Value	$7,500,000.00
Estimated Costs of Sale at 5%	($375,000.00)
EWB Secured Claim (estimated higher due to delay in foreclosing and Bier selling the property)	($5,500,000.00)
Net Sales Proceeds for Bier	$1,625,000.00
Post-Petition Payments Received by Bier to be Applied to his Claim	$185,843.92
Economic Recovery for Bier Based on His ($1,042,239.05) Secured Claim	$1,810,843.92

If truly confident that the Property is worth more than $7,230,000.00, then Bier could foreclose and turn a quick $768,604.87 profit (an additional 74% more than he is actually owed). This 74% additional profit over his claim is without taking into account all of the rent revenues collected during the period in which the foreclosure is completed and the Property quickly sold.

The fact that Bier chooses not to foreclose but just delay EWB further puts into question whether he truly believes that such higher value exists. Given his clear disdain for Zhang and his repeated testimony in the evidentiary hearing that Zhang could not properly manage the Property, it would make little sense to leave such a "valuable" asset for Bier in the hands of someone Bier is convinced cannot manage it.

When Bier and Zhang, individually as an equity interest holder, assert that the ΔIP can

quickly and reasonably confirm a Chapter 11 Plan, they ignore the history in this case. The Debtor commenced this case on April 7, 2017. From that day through the June 13, 2019 hearing on this Motion, Zhang has been in control as the responsible representative of the ΔIP. Zhang, as the responsible representative, and the ΔIP have had two years, two months, and thirteen days to confirm a plan in this case. No plan has been confirmed.

The ΔIP filed a Chapter 11 Plan on February 22, 2018. Dckt. 166. Then on May 3, 2018, ΔIP filed the First Amended Plan and the Amended Disclosure Statement. Dckts. 232, 234. The court's order approving the Disclosure Statement was filed on May 10, 2018, Dckt. 237, and the confirmation hearing was set for July 19, 2019. *Id.*

The Confirmation Hearing was continued to August 30, 2018, with Bier opposing confirmation. Order, Dckt. 254. As noted in the Civil Minutes for the July 19, 2018 hearing, the ΔIP failed to file a declaration providing evidentiary support for confirmation of the First Amended Plan. Civil Minutes, Dckt. 255 at 2.

In a ΔIP Status Report filed on August 27, 2018, the ΔIP stated that the dispute with Bier continued and "regardless of the outcome of those negotiations, the ΔIP is not currently prepared to present evidence in support of confirmation." Status Report, p. 1:21-24; Dckt. 269.

The confirmation of the proposed First Amended Plan was denied. Civil Minutes, Dckt. 273. In the Civil Minutes, the court's finding include:

> DENIAL OF CONFIRMATION
>
> At the hearing, Debtor in Possession advised the court that it was not prepared to proceed with confirmation of this plan. As noted by the court, two weeks earlier Debtor in Possession represented that it anticipated confirmation and that the denial of appointment of special counsel was not of significant concern because the "plan administrator" could just hire counsel to assert the rights and interests of the estate. See Civil Minutes, Dckt. 267. Confirmation having been denied, the Debtor in Possession will need to proceed with promptly obtaining authorization of special counsel to protect the rights and interests of the bankruptcy estate.

Id. at 5. Though professing to be diligently prosecuting a plan in this case, when the day of the confirmation hearing came, the ΔIP folded its tent and walked away from its Chapter 11 plan.

In the ten months that have passed since the ΔIP walked away from its Chapter 11 plan, no new plan has been presented. There is no evidence presented that the ΔIP can, and would, diligently prosecute a plan in this case.

Failure of Bier to Propose a Plan

With no confidence in Zhang as the responsible representative of the ΔIP, Bier had a very cost effective option to foreclosing if he questioned the asserted $2,000,000.00+ in value asserted to exists above the EWB secured claim. He could have proposed a Chapter 11 plan, garnered the support of EWB, had a plan administrator appointed, the Property sold by the plan administrator, and EWB paid,

Bier paid in full, and the excess money to go to the other creditors.

But Bier has chosen to do nothing. No creditor's plan has been advanced by him.

Default of ΔIP

It is significant that the fiduciary responsible for the bankruptcy estate, the ΔIP who stands in the shoes of and exercises the powers of a trustee, offers no opposition to the Motion for Relief From the Stay (choosing merely to file a declaration of ΔIP's counsel, without any actual position asserted as to the Motion outside of the caption). The ΔIP indicates that it cannot proceed with a Chapter 11 plan. It also appears that the ΔIP has concluded that there is no value for the bankruptcy estate after paying EWB and Bier and has chosen to cut off further efforts by the ΔIP, as the fiduciary to the bankruptcy estate, to prolong the bankruptcy suffering.

Prosecution of Plan

The ΔIP is prosecuting a Chapter 11 Plan, with Approval of the Disclosure Statement being before the court on October 24, 2019. The Movant agreed to continue its hearing as the Parties work though the confirmation process.