

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Sacramento, California

February 11, 2014 at 1:30 p.m.

1. [14-20110](#)-E-13 WILLIAM LEDDINGTON MOTION FOR RELIEF FROM
MMW-1 Pro Se AUTOMATIC STAY
1-17-14 [9]
METRO CAPITAL FUND LLC VS.

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Non-filing Co-Debtor, Chapter 13 Trustee, and Office of the United States Trustee on January 17, 2014. By the court's calculation, 25 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, 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 offers 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 court's tentative decision is to deny the Motion for Relief from the Automatic Stay as Moot. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Metro Capital Fund LLC ("Metro") seeks relief from the automatic stay with respect to the real property commonly known as 8385 Canyon Oak Drive, Citrus Heights, California. The moving party has provided the Declaration of Chris Williams to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Motion states with particularity (Fed. R. Bankr. P. 9013) the following grounds and relief requested.

February 11, 2014 at 1:30 p.m.

- A. Metro Capital Fund, LLC ("Metro") is a creditor asserting a claim in this case.
- B. On or about June 22, 2007, William Leddington, the "Debtor," and another person who is not a debtor in this case obtained a revolving line of credit from Residential Capital Mortgage Income Fund, LLC ("ResCap"). A copy of the Note for that transaction is presented as Exhibit A. Dckt. 13.
- C. The obligation evidenced by the Note is secured by a Deed of Trust recorded against real property commonly known as 8385 Canyon Oak Drive, Citrus Heights, California. A copy of the Deed of Trust is presented as Exhibit B. *Id.*
- D. On or about January 18, 2013 ResCap assigned the Note and Deed of Trust to Metro. Copies of the Assignment of the Deed of Trust and Allonge are presented as Exhibit C. *Id.*
- E. Debtor has defaulted on the payments due on the Note in May 2012 and in July 2013 the note matured. The principal and interest amount of the debt secured by the Deed of Trust, computed as of October 7, 2014, is (\$176,717.32).
- F. Debtor has failed to file his Schedules and Chapter 13 Plan.
- G. An (unnamed attorney) purported to represent the Debtor has advised Metro that the Debtor intends to surrender the Canyon Oaks Property to the creditors with secured claims.
- H. Metro is informed and believes that the Canyon Oaks Property has a value of \$302,500.00. Further, Metro is informed and believes that there is a debt of an unidentified creditor in the amount of (\$188,616.00) which is secured by a senior deed of trust against the Canyon Oaks Property. Therefore, after allowing for Metro's (\$176,717.32) claim (principal and interest), there is a negative (\$62,833.32) equity in the Property for the Debtor or estate.
- I. Continuation of the automatic stay will "work real and irreparable harm to Metro," and the stay should be terminated because,
 - 1. Debtor has no equity in the Property; and
 - 2. Therefore, Metro is not adequately protected.
- J. Metro does not have adequate protection and the passage of time will result in irreparable injury to Metro's equity position "as interest and other expenses on the Property continue to accrue."
- K. If Metro is not allowed to foreclose on its Deed of Trust Metro will suffer irreparable harm.

Motion, Dckt. 9. While stating the legal conclusions that Metro is not adequately protected, the Motion does not state with particularity the grounds upon which Metro has come to that legal conclusion. It is well established that merely because there is no equity in the property is not grounds for the court to find that there is a lack of adequate protection sufficient to terminate the automatic stay. *United Savings Association of Texas v. Timbers of Inwood Forest, LTD.*, 484 U.S. 365 (1988).

The evidence provided in support of this Motion centers on the Williams Declaration. Dckt. 11. Williams testifies that the loan matured on July 1, 2013, and that Debtor has not made any payments on the loan since before May 1, 2013, with a total of \$177,167.32 in past due. Williams authenticates the Note and Deed of Trust, and testifies to the assignment to Metro. At this point, the Declaration begins to fall apart as to Williams personal knowledge of what he is "testifying to under penalty of perjury." He "testifies" that a "First Deed of Trust in favor of Ocwen Loan Servicing, LLC" secures an obligation...of \$188,16.00." The Declaration fails to provide any basis for this statement, not even a statement that notice of the amount asserted by the senior lien holder had been provided to Metro.

This statement in the Declaration further undercuts Williams statements. It has been repeatedly represented in this court that loan servicing companies, including Ocwen Loan Servicing, LLC are not creditors (as that term is defined by 11 U.S.C. § 101(10)), but are mere loan servicing agents with no ownership of or in the secured claim. To state that the First Deed of Trust is "in favor of Ocwen Loan Servicing, LLC" indicates that (1) that Williams has no knowledge of who is the creditor with a claim secured by the senior deed of trust and (2) the debt secured by that senior debt of trust.

The Declaration also states that an unidentified attorney has notified Metro that the Debtor intends to surrender the Property. The Declaration then makes reference to Exhibit D as being the copy of the letter upon which the allegation in the Motion to the statement attributed to the unidentified attorney and the testimony as to the statement attributed to the unidentified attorney are based. Exhibit D is a copy of a letter from Ursula Barrios, who is identified as an attorney with Granite Law. The California State Bar website does list a Ursula Barrios as an attorney licensed to practice of law, but does not identify her as being associated with "Granite Law" or at the address stated on the letter.

The problem the court has with the pleading and testimony practices with respect to the allegation of surrender is that it is done in a manner so as to appear the Motion and Declaration carefully skirt any specific statement or testimony, and the "evidence" is buried in the exhibits. Such practices could be an attempt to create an illusion that such grounds exist, when none due, and an effort to create "plausible deniability" if challenged. (Timothy Silverman and other attorneys from this firm have appeared many times before this court, and the court is confident that such improper practices are not at work in this Contested Matter. However, the court applies the rules of procedure and evidence, as well as the standards of practice, to be selectively applies based on the court's objective opinion of the quality of counsel.)

The Debtor has not yet filed his Schedules. Metro does not have the benefit of Schedule D to substantiate the "information and belief" as to the senior secured claim. Metro does not have the benefit of Schedule A for the "information and belief" allegation as to the value of the Canyon Oaks Property. The court does not find credible Williams unsupported "testimony" that the Property has a value of \$302,500.00. There is no showing of any basis for Williams to provide his testimony as to the value of the Property. He is not an owner and has not been qualified as an expert. Fed. R. Evid. 601, 602, 701, 702. It could well be that Williams is intentionally providing this faux testimony in an attempt to mislead and defraud the court. Since the basis for a person to testify as to the value of property is so basic, the court could well conclude that he and his counsel intended to provide such false testimony. Though the court will treat this testimony under penalty of perjury as merely a "mistake" this time, Williams and counsel can be assured that if it occurs again, the court will address such improper testimony and the procurement of such improper testimony. FN.1.

FN.1. This court has addressed on many occasions that attempting to testify under penalty of perjury, but qualified that such truthful testimony is only on "information and belief" is improper and renders the testimony to not be credible. Counsel can find such ruling by using any of the common internet search engines and using search terms such as "Sargis Tentative 28 U.S.C. 1746." It should also be noted that such interpretation and enforcement of 28 U.S.C. § 1746 is not unique to Department E in the Eastern District of California, with other judges sanctioning counsel for providing such improper declarations.

DISCUSSION

Based on the above findings of fact, it does not appear that grounds exist pursuant to 11 U.S.C. § 362(d)(1) or (d)(2) on which the court can grant the motion. The movant's information sheet, filed with the motion, indicates that movant seeks relief for cause, inadequate protection, and lack of equity. As noted above, it does not appear that the Debtor has missed any post-petition payments as of yet. Additionally, movant fails to make any argument, or to state any facts, to support the request for relief from stay based on inadequate protection. Therefore, relief from stay pursuant to 11 U.S.C. § 362(d)(1) cannot be granted. Similarly, because movant failed to provide admissible evidence establishing lack of equity in the property for the estate, relief cannot be granted pursuant to 11 U.S.C. § 362(d)(2).

DISMISSAL OF CASE - RENDERING THE MOTION MOOT

Though the court cannot deny the Motion, the Debtor has bailed out this creditor. On February 7, 2014, the court entered its order dismissing the bankruptcy case for the Debtor's failure to file the basic pleadings necessary to prosecute a Chapter 13 case (Schedules, Statement of Financial Affairs, Chapter 13 Plan). This renders the Motion moot.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, the bankruptcy case having been dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the motion is denied without prejudice as Moot.

2. 13-36126-E-13 SALVADOR CORTEZ MOTION FOR RELIEF FROM
MRB-1 Pro Se AUTOMATIC STAY
1-10-14 [[11](#)]
BUTTE VISTA DEVELOPMENT,
L.P. VS.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) and the Chapter 13 Trustee on January 10, 2014. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

Final Ruling: 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Relief from the Automatic Stay is granted. No appearance required.

Butte Vista Development, L.P. seeks relief from the automatic stay with respect to the real property commonly known as 436 Cuppelo Drive, Williams, California. The moving party has provided the Declaration of Michael R. Barrette to introduce evidence which establishes that the Debtor is no longer the owner of the property, movant having purchased the property at a pre-petition Trustee's Sale on September 26, 2013. Debtors are tenants at sufferance, and movant commenced an unlawful detainer action in Colusa County Superior Court and received a Writ of Possession on December 16, 2013.

The Chapter 13 Trustee filed a non-opposition on January 24, 2014.

Movant has provided an authenticated copy of the recorded Trustee's Deed Upon Sale to substantiate its claim of ownership and a copy of the Notice to Vacate issued by the Colusa County Sheriff's Office. Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor has no equity, it is the burden of the debtor to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). Based on the Debtor's failure to oppose the motion, together with the evidence submitted, the court determines that the property is not necessary to an effective reorganization.

The court shall issue a minute order terminating and vacating the automatic stay to allow Butte Vista Development, L.P., and its agents, representatives and successors, to exercise its rights to obtain possession and control of the real property commonly known as 436 Cuppelo Drive, Williams, California, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

The moving party has alleged adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3).

No other or additional relief is granted by the court.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Butte Vista Development, L.P. and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 436 Cuppelo Drive, Williams.

IT IS FURTHER ORDERED that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause.

No other or additional relief is granted.

3. [14-20187-E-13](#) JOANNA FRITTER
HSM-1 Gary H. Gale

MOTION FOR RELIEF FROM
AUTOMATIC STAY
1-14-14 [[9](#)]

EL DORADO SAVINGS BANK VS.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on January 14, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Relief from the Automatic Stay is continued to April 8, 2014, pursuant to court order, Dckt. 34. No appearance at the February 11, 2014 hearing is required.

El Dorado Savings Bank seeks relief from the automatic stay with respect to the real property commonly known as 6243 Drop Off Road, Pollock Pines, California. On February 3, 2014, the court issued an order to continue the hearing on the motion until April 8, 2014 at 1:30 p.m., Dckt. 34, pursuant to a stipulation entered into between El Dorado Savings Bank and the Debtor.

4. [13-91588](#)-E-12 MARY JO MEIRINHO
EDC-1 Scott A. CoBen

CONTINUED MOTION TO DISMISS
CASE
12-3-13 [[61](#)]

CONT. FROM 1-30-14, 12-19-13

Local Rule 9014-1(f)(2) Motion - Continued Hearing.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 12 Trustee, parties requesting special notice, and Office of the United States Trustee on December 3, 2013. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

No Tentative Ruling: The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, 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 offers 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 court's tentative decision is to xxxx the Motion to Dismiss. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

PRIOR HEARING

Kay Vlach, Trustee of the Vlach Family Trust, dated March 1, 1995, ("Creditor") moves for an order dismissing Debtor's chapter 12 case on the grounds that the proposed Chapter 12 plan is not feasible and cannot be confirmed; the proposed plan is not proposed in good faith; Debtor will not be able to propose a confirmable plan in light of their liabilities and limited disposable income; and Debtor has failed to confirm a plan within 45 days of the filing of the plan as required by 11 U.S.C. § 1224.

Pursuant to 11 U.S.C. § 1224, a party in interest may object to the confirmation of the plan. Except for cause the hearing shall be concluded not later than 45 days after the filing of the plan.

This bankruptcy case was filed on August 29, 2013. The proposed plan was filed on September 12, 2013. The hearing for confirmation was held on December 19, 2013. The court denied the motion and the Chapter 12 Plan was not confirmed based on several deficiencies with the proposed plan. The Debtor-in-Possessions' plan provided for payments to begin immediately to creditors with secured claims, but the payments to creditors with unsecured

claims do not start until after five years, which is a treatment that is not permitted by the Bankruptcy Code and in violation of 11 U.S.C. § 1222(c).

Furthermore, the plan did not appear feasible given Debtor's stipulation regarding the claim of Union Bank, which provided that payments for the on-going mortgage as well as catch-up payments for the arrears be included in the plan. The stipulation further stated that Trustee is to start disbursement on this claim to the creditor in December 2013. These terms were in contradiction to those proposed in the plan; additionally, the plan did not appear to be properly funded, and also did not provide for the arrearage of the Vlach claim to be paid back in a reasonable time under 11 U.S.C. § 1222(b)(3) and (b)(5).

AMENDED CHAPTER 12 PLAN

On January 23, 2014 (a month after denial of confirmation of the prior plan), the Debtor in Possession filed a First Amended Chapter 12 Plan. Dckt. 77. The basic terms of the First Amended Plan are:

- A. The Plan Payments to be made by the Debtor are
 - 1. On or before November 1, 2013, payments totaling \$41,355.00.
 - 2. On or before June 1, 2014, payments totaling \$30,000, or such other amount as sufficient to complete the Plan. Additional Provisions. Plan ¶ 6.02, sub-¶ 6.
- B. \$10,000.00 to counsel for the Debtor in Possession from the pre-petition retainer. Plan ¶ 2.06.
- C. \$0.00 for Chapter 12 Administrative Expenses. Plan ¶ 2.07.
- D. Class 1 Secured Claim of Union Bank, N.A. - \$559.60 monthly contractual payment and \$201.59 monthly to cure \$12,096.00 arrearage. Plan ¶ 2.08.
- E. Class 2 Secured Claims - None. Plan ¶ 2.09.
- F. Class 3 Secured Claims, Surrender of Collateral - None. Plan ¶ 2.10
- G. Class 4 Secured Claims, Direct Payment Not by Trustee - None. Plan ¶ 2.11.
- H. Class 5 Priority Unsecured Claims - None. Plan ¶ 2.13.
- I. Class 6 Designated Unsecured Claims - None. Plan ¶ 2.14.
- J. Class 6 General Unsecured Claims - 100% of projected \$82,711.00 in claims. Plan ¶ 2.15.
- K. Secured Claim of Kay Vlach, paid with interest computed at rate of 4.75% per annum,

1. The first day of the month after the month in which the plan is confirmed, \$10,708.00, which "represents the interest on the claim from the petition date to June 1, 2014."

2. On or before June 1, 2014, payment of the claim in full from the sale of the real property securing the claim. Plan ¶ 6.02, sub-¶ 1.

L. Secured Claim of CNH Capital America LLC, paid with interest computed at the rate of 4.75% per annum,

1. The first day of the month after the month in which the plan is confirmed, \$10,708.00, which "represents the interest on the claim from the petition date to June 1, 2014."

2. On or before June 1, 2014, payment of the claim in full from the sale of the real property securing the Kay Vlach claim. Plan ¶ 6.02, sub-¶ 2.

M. The Secured Claim of Union Bank, N.A. will be paid pursuant to the terms of the Stipulation attached as Exhibit A to the Plan. No Stipulation is attached to the Plan.

1. The court has previously approved aa stipulation between the Debtor in Possession and Union Bank, N.A. which provides,

- a. The Debtor in Possession must tender the regular monthly contractual payments to the Chapter 12 Trustee for disbursement to Union Bank, N.A. until the outstanding balance has been paid in full.
- b. In addition, the Debtor in Possession shall tender arrearage cure payments of \$201.59 a month for 60 months, to cure a \$12,095.24 arrearage. Order, Dckt. 58.
- c. The court's findings of fact and conclusions of law clearly state that the Stipulation was not approved to the extent that it purported to state the terms of a confirmed Chapter 12 Plan. Civil Minutes, Dckt. 56.

On January 23, 2014, the Debtor in Possession filed a Motion to Confirm the First Amended Chapter 12 Plan. Dckt. 78. The hearing on the Motion to Confirm is scheduled for March 6, 2014. In addition, on January 23, 2014, the Debtor in Possession filed a Motion to Employ a real estate agent. Dckt. 82. The Motion states the following grounds with particularity (Fed. R. Bankr. P. 9013) in support of employment of the professional:

A. The bankruptcy case was commenced on August 29, 2013.

- B. The Debtor in Possession needs the assistance of a real estate agent to list her home for sale.
- C. The Debtor in Possession desires to employ George Rocha.
- D. The Debtor in Possession has selected George Rocha "due to his real estate with farm land in [Debtor's in Possession] area."
- E. The fees to be paid George Rocha is a 6% commission, which may be split with the buyer's agent.
- F. George Rocha "has indicated a willingness" to act on the Debtor's in Possession behalf."
- G. To the best of the Debtor's in Possession knowledge, George Rocha has no conflicts with respect to serving as a professional in this case.

Id.

George Rocha provides his declaration in support of his employment. Dckt. 83. He testifies that he is a real estate agent with White House Real Estate and has been selling farmland for 10 years. Further, that he has no connection to the Debtor, Debtor in Possession, or U.S. Trustee, and does not represent any adverse interests to the Debtor or the bankruptcy estate. A copy of the Listing Agreement is provided as Exhibit B. Dckt. 84.

The Listing Agreement is not with George Rocha, the person to be employed, but with White House Real Estate. The agreement states that the listing price is to be \$1,050,750.00. It further states, "Seller to remain in the house for 90 days after close of escrow to complete a 1031 exchange."

The Schedules disclose that the property to be sold, 3818 Shoemaker Avenue is not merely the Debtor's "home," but "Home and Farm." Schedule A, Dckt. 14 at 3. The Vlach Family Trust has filed Proof of Claim No. 3, asserting a claim in the amount of \$298,143.73 which is secured by the Shoemaker Property. The arrearage for this claim is listed in the amount of \$298,143.73.

CNH Capital America, LLC has filed Proof of Claim No. 1, asserting a secured claim in the amount of \$109,265.15. This claim is identified as being secured by a Case IH Steiger 400 Tractor serial number ZBF126535. The arrearage for this claim is stated to be \$23,583.88.

On January 23, 2014, the Debtor in Possession filed a Status Report for the January 30, 2014 Status Conference. She reports that an interested buyer for in excess of \$1.3 million has been found, with an inspection of the property to occur on January 24, 2014. The Debtor in Possession projects that by the January 30, 2014 she will be in contract to sell the property and that escrow will close within 60 days.

DISCUSSION

The proposed plan, while promising to get a quick payment in full to creditors, causes the court some concerns. First, it does not disclose the "secret condition" that the Debtor in Possession/Plan Administrator will sell the Property, but retain possession of it for 90 days after the close of escrow. The Real Estate Agent offers no opinion as to how this will effect the marketability of the Property. Second, the Plan makes no provision of what will occur if the Plan Administrator defaults and fails to sell the Property. Third, for more than 180 days of the Plan the Debtor in Possession and then Plan Administrator take the monthly income and use it without disclosure or limitation. Fourth, though the Chapter 12 Trustee has the money, the Debtor in Possession does not propose to make a distribution of interest payments to the creditors with secured claims until a month after the plan is confirmed. With a March 2014 confirmation hearing date, it is likely that any such disbursement will coincide with the promised no later than June 1, 2014 disbursement of the proceeds from the sale of the Real Property. The promise to pay interest appears to be illusory.

The Debtor in Possession can rectify these problems through the confirmation process and providing for disbursement of the interest payments prior to confirmation. The court continued the hearing to allow the Debtor in Possession to address these issues, file any proposed amendments, and file any necessary motions.

Nothing has been filed to date.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss filed by Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is xxxx.

5. [13-35954-E-7](#) ICING ON THE CUPCAKE, CONTINUED MOTION TO SELL AND/OR
HLC-1 LLC MOTION TO COMPEL ABANDONMENT
O.S.T.
1-30-14 [[44](#)]

CONT. FROM 2-6-14

Local Rule 9014-1(f)(3) Motion - Continued Hearing.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on January 30, 2014. By the court's calculation, 7 days' notice was provided.

Tentative Ruling: The Motion to Sell was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Consequently, the Debtor, Creditors, the Trustee, 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 offers 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 court's tentative decision is to grant the Motion to Sell. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

PRIOR HEARING

The Bankruptcy Code permits the Trustee to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b).

Here, Creditor BBC Blue Oaks, LLC ("BBC") and the Chapter 7 Trustee ("Trustee") propose to sell for \$2,500 cash, subject to overbids, all right, title, claims and interests of Debtor in the following assets:

(1) all assets of the Icing on the Cupcake business, including equipment, office furniture, recipes, accounts, account receivables, client lists, phone number, name, trademarks and all other intellectual property and assets, but excluding (a) vehicles, (b) rights to leased premises excepting the premises located at 6839 Lonetree Boulevard, Suites 68G-101/102, in Rocklin, CA (the "Premises") which Premises will be immediately surrendered to BBC (regardless of who the successful bidder is) upon Close of Escrow, and (c) avoidance actions.

The terms of the sale are set forth in the Declaration of John R. Roberts in support of the Motion to Sell. Dckt. 47.

As described, all assets of Icing on the Cupcake business, where ever located and whatever they may be, are sold for \$2,500.00. The motion and contract do not purport to sell only the assets which are listed on the Schedules, not the assets located physically at the place of business, or assets which are described with some particularity. In essence one of two things is being said to the court. (1) Judge, just sign a blank piece of paper and blindly approve a sale of personal property because none of us know what it is and it's not worth our time to figure it out. (2) Judge, just sign a blank piece of paper because there are more valuable assets out there and hopefully we can slip them by the court.

No purchase and sale agreement is provided the court as an exhibit, though there are detailed terms which appear in the Motion. It appears that these terms and conditions may have been copied and pasted from a purchase and sale agreement which is not disclosed. It is curious that such detailed terms and conditions can be summarized in the Motion and there is no purchase and sale agreement provided as an exhibit.

The summarized terms also include a provision that personal property is sold to BBC, but that if BBC doesn't want it, then the property will be abandoned back to the Trustee. For the Trustee, and the court approving the sale of every possible asset in the world of this Debtor, this makes the transaction appear to be more of a "pig-in-a-poke deal" than an actual sale.

Adding to the confusion is that BBC and the Trustee have combined two separate contested matters into one motion - a motion to approve sale and a motion to compel abandonment. Federal Rule of Civil Procedure allowing for multiple claims to be asserted in one complaint is not incorporated as part of the law and motion practice in bankruptcy court. See Fed. R. Bank. P. 9014(b). Given the rapidity at which bankruptcy cases move and the substantive relief granted and rights altered in the bankruptcy law and motion practice, combining multiple claims in one motion (such as a motion to sell-abandon-grant relief from stay-obtain post-petition credit-value claim) would not only be a recipe for confusion, it would be a breeding ground for attorneys who are seeking to abuse the Bankruptcy Code, rights of the parties, and the Constitutional requirements for Due Process.

CONTINUANCE

The court continued the hearing to allow the Movant to file a Purchase Agreement and properly identify the assets they seek to sell.

On February 6, 2014, Movant and the Trustee provided the Supplemental Declaration of the Trustee in which the personal property being sold by the Estate. This property is identified as follows:

PHOTO NO	Sched B NO	ITEM	SCHED B	Count Check	MANUFACTURER	LICENSE	MODEL - NO	SERIAL NO
4	4	Office Desks	10	10				
5	5	Office Chairs	8	10				
6	6	Cabinets	5	5				
7	7a	Printers	1	4	HP	CM1312nfiMFP		CND8999J55
8	7b				Canon	F159502		HCG57902
9	7c				HP	CM1312nfiMFP		CND897RJP3
10	7d				Smamsung	SCX-4623F		Z2TDBFFB202474D
11	8a	Computers	8	6	Dell	Vostro 330		FLK85P1
12	8b				Dell	Ispiron 560		HCP7CP1
13	8c				Dell	Dimention 2400		1Q7K981
14	8d				Dell	Ispiron 560 s		1B65BP1
15	8e				Dell	Ispiron 620		BG1LHQ1
16	8f				Dell	Vostro 330		DWRB5P1
17	9	Misc. Office supplies						
18	10	Baker Racks	25	29				
19	11	Baker Racks Covers	25	26				
20	12	Carts	7	11				
21	13	Dunnage Racks	9	16				
22	14	Sifter	1	1	Burford	2805		18660
23	15a	Mixers	7	6	Hobart	HL662		31-1362-176
24	15b				Hobart	HL200		31-1391-210
25	15c				Globe	SP8		70-11472
26	15d				Globe	SP8		MISSING
27	15e				Globe	SP8		MISSING
28	15f				Globe	SP8		MISSING
29	16	Ice Machine	1	1	Hoshizaki	KM-900MRH3		Q00199J
30	17	Misc. Kitchen Utensils		40/70				
31	18	Metro Shelves	50	55				
32	19a	Microwave Oven	2	3	Amana	ALD100T		1144139JL
33	19b				MenuMASTER	MCS10DS		1112212078
34	19c				Daewood	KOR-9GDEB		TH136E22504923
35	20a	Ovens	3	3	Blodgett	XR8G/AB		071112DJ118Z
36	20b				Blodgett	XR8G/AB		062308DJ036Z
37	20c				Blodgett	XR8G/AB		012711DJ150Z
38	21	Pallet Jack	1	1	Uline	H-1043		57196
39	22	Baking Pans	150	215				
40	23a	Range	1	2	Royal (2burner)	RHP-12-2		0710708
41	23b				Imperial (4burner)	IR-4		04151707
42	24a	Refrigerators	3	7	True	T-49		1-4139292
43	24b				True	T-49		6849658
44	24c				True	T-23		7230145
45	24d				True	TUC-27-LP		5327940
46	24e				True - Pepsi	GDM-12		1-2800189
47	24f				Fogel - Pepsi	DECK-12-BEV-BLK-RH		110410477
48	24g				True	TN-24F		4908320
49	25a	Scales	7	3	Taylor	TE22		1812V0047
50	25b				Taylor	TE22		0812V0047
51	25c				Globe	GPS10		8020552
52	26	Sheet Pans	200	280				
53	27	Sinks	6	6				
54	28	SS Tables	18	18				
55	29	Perishable Inventory						
56	30a	Monitors	0	5	Dell	ST2410		MX-0X175R-74262-08K-16JU
57	30b				Dell	S2209Wb		CN-0N764H-74261-960-233U
58	30c				Dell	IM2020Mb		CN-094WNT-74261-092-03NS
59	30d				Magnavox	15MF605T/17		B22A0641227178
60	30e				Samsung	913T		MJ19HVVEA100063F

PHOTO NO	Sched B NO	ITEM	SCHED B	Count Check	MANUFACTURER	LICENSE	MODEL - NO	SERIAL NO
61	31	Dishwasher	0	1		4224VH1		Job# 367883
62	32	Ice Maker	0	1	SPT	IM-150US		MISSING
63	33	Phone System Contoler	0	1	Vertical Comm. Inc	7500-10		TCSB100416
64	34a	System Phones	0	6	Vertical Comm. Inc	IP2041		TCSB103867
65	34b				Vertical Comm. Inc	IP2041		TCSB102549
66	34c				Vertical Comm. Inc	IP2041		TCSB102981
67	34d				Vertical Comm. Inc	IP2041		TCSB102472
68	34e				Vertical Comm. Inc	IP2041		TCSB102318
69	34f				Vertical Comm. Inc	IP2041		TCSB102153
70	35	Touch Screen Sales Register	0	1	Casio	QT-6100		MISSING
71	36	Credit Card Reader	0	1	Verifone	VCP570		213-469-648
72	37	Cell Phones	0	2	Nexus s	GT-19020T		
73	38	DVR & 8 Cameras	0	1	Swann	8CH H.264 DVR		2458307111001
74	39	Miscellaneous Chairs	0	43				
75	40	Miscellaneous Tables	0	8				
76	41	Grease Separator	0	1	Big Dipper	W-200-IS-115/60		200.213392C-1

ALHAMBRA/SACRAMENTO LOCATION

NO	ITEM	SCHED B	Count Check	MANUFACTURER	LICENSE	MODEL - NO	SERIAL NO
1	Bar Stools		8				
2	Beverage Refrigerator, Small			Vogel		branded w/Pepsi logo	
3	POS System inc. cash register, screen, card reader, small receipt printer		1				
4	Telephone		1	AT&T			
5	Refrigerator, Small		1	SPT			
6	Refrigerator, Large 3-Door		1	Beverage Air		E-Series	071b291
7	Safe (no combination)		1				
8	Metal Baking Sheets		53				
9	Tall Cooling Racks w/Wheels		3				
10	Short Cooling Racks w/Wheels		1				
11	Large 4-Shelf Stationary Storage Racks		2				
12	Fax/Copier		1	Imageclass			MF4450
13	First Aid Kit		1				
14	Misc Merchandising Materials						
15	Misc Office Supplies						

Personal Property: all recipes, client/customer lists, phone numbers, trade name(s), trademarks and all other intellectual property owned by Icing on the Cup

CITRUS HEIGHTS LOCATION

NO	ITEM	SCHED B	Count Check	MANUFACTURER	LICENSE	MODEL - NO	SERIAL NO
1							
2							
3							
4							
5							
6							
7							

Personal Property: all recipes, client/customer lists, phone numbers, trade name(s), trademarks and all other intellectual property owned by Icing on the Cup

FOLSOM LOCATION

NO	ITEM	SCHED B	Count Check	MANUFACTURER	LICENSE	MODEL - NO	SERIAL NO
1							
2							
3							
4							

At the hearing the court considered such other offers as stated on the record. The court approves the sale of the personal property identified above to BBC Blue Oaks, LLC for \$2,500 cash, on the terms as stated in the Motion and the Supplemental Declaration of the Trustee.

Counsel for BBC Blue Oaks, LLC shall prepare and lodge with the court a proposed order approving the sale as set forth in this Ruling.