

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

March 29, 2018, at 2:00 p.m.

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1. [17-90432-E-12](#) **CARLOS/BERNADETTE ESTACIO MOTION TO CONFIRM CHAPTER 12**
FW-8 **Peter Fear** **PLAN**
2-22-18 [125]

Tentative Ruling: 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.

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 in Possession, Chapter 12 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 22, 2018. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(8) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1) (requiring fourteen days' notice for opposition).

The Motion to Confirm the Plan 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 to Confirm the Plan is denied.

Carlos Estacio and Bernadette Estacio ("Debtor in Possession") seek confirmation of the plan proposed on February 22, 2018. Carlos Estacio testifies that Debtor in Possession will continue to farm land and lease real property to provide funds for the Plan. Dckt. 127 at 2:5–7. He explains various expenses related to future earnings from peaches, current projections for corn and oats, and earnings from being a real estate agent. He testifies that he is working on nights and weekends to sell real estate and anticipates having net income of \$2,000.00 per month from real estate commissions.

Co-Debtor in Possession Carlos Estacio also testifies that Debtor in Possession is attempting to sell real property located at 6955 Faith Home Road, Ceres, California, or at 4413 S. Prairie Flower Road, Turlock, California, with the S. Prairie Flower property currently listed for sale. He testifies that a plan provision calls for there to be an offer in escrow sufficiently high to pay all secured claims on S. Prairie Flower Road property by June 30, 2018, or Debtor in Possession will then list the Faith Home Road property for sale and accept whatever property yields an acceptable offer.

Debtor in Possession proposes that if escrow is not closed on one of the properties by January 31, 2019, then the case will be converted to Chapter 7.

KHATRI'S OBJECTION

Khatri Brothers, LP, (“Khatri”) a creditor with a secured claim, filed an Objection on March 9, 2018. Dckt. 132. Khatri argues that the last payment on its claim was October 24, 2016. Khatri’s main argument is that the current listing of the S. Prairie Flower Road property is unreasonable because of its \$2.1 million listing price when Debtor in Possession has scheduled the property at a value of \$1.4 million. Khatri argues that the overprice will not result in a purchase offer.

Khatri argues that as proposed, the Plan will give Debtor in Possession another ten months to live in their properties, rent-free, without reliable sources of income to fund the Plan, making the Plan infeasible and unconfirmable.

Khatri argues that the Plan was filed in bad faith because the listing price on the current sale is “so exorbitant that it will drive any prospective buyer away.” *Id.* at 6:24–25.

WELLS FARGO'S OBJECTION

Wells Fargo Bank (“Wells Fargo”) filed an Objection on March 9, 2018. Dckt. 134. Wells Fargo argues that the proposed plan is based on speculation about Debtor in Possession’s income and about the value of real property, leaving the court unable to find that Debtor in Possession will be able to make all of the plan payments. *See* 11 U.S.C. § 1225(a)(6). Wells Fargo also argues that the plan is too vague about potential sales of real property, such as listing terms and acceptable sales prices not being stated.

Wells Fargo argues that there is no support for Debtor in Possession’s claims about wages and commissions earned. Wells Fargo states that a payroll summary for the first ten months of 2017 shows Debtor in Possession’s wages as \$1,802.00 per month, but Debtor in Possession projects income at \$3,500.00 per month. Also, Wells Fargo argues that there is no evidence to support Mr. Estacio earning \$2,000.00 per month in real estate sales commissions.

Wells Fargo argues that the rental income for East Canal property has been overstated at \$1,450.00 when documents produced to the court showed only \$1,300.00 per month. Wells Fargo also argues that future income from the lease of a mobile home is unreliable because the lease for it is month-to-month. For Debtor in Possession’s Faith Home property, Wells Fargo argues that the \$1,000.00 per month projected as office rent is unreliable because that amount is being paid by Debtor in Possession’s elderly parents.

Wells Fargo does not believe that there is credible evidence to support Debtor in Possession's projections for future crop revenue because Debtor in Possession recently planted peaches, a new crop for Debtor in Possession, but does not have experience growing and marketing them.

For taxes, Wells Fargo argues that Debtor in Possession has not increased the income tax liability during the plan term even though projecting that net farming income will increase year-over-year. Wells Fargo also notes that Debtor in Possession has not provided for capital gains taxes for the sale of either of the properties proposed to be sold.

Even if Debtor in Possession's income projections are correct, Wells Fargo argues that the projections do not account for ongoing farming expenses, which leads to the projections being diminished. Wells Fargo argues that Debtor in Possession's calculations are a deliberate, bad faith attempt to manipulate figures while disguising the true financial state of this case.

Like Khatri, Wells Fargo opposes the valuation placed by Debtor in Possession on the proposed sale of property at \$2.1 million when it is scheduled at \$1.4 million. Wells Fargo argues that analyzing the proposed sale shows it would have to sell for at least \$2 million to pay the debts it secures, and Wells Fargo does not believe that such sales price is likely.

Wells Fargo argues that the plan does not explain how Debtor in Possession will pay the remaining balance on Wells Fargo's claim after the plan term. The unpaid principal balance is scheduled to be due in the seventy-third month. Wells Fargo argues that according to *Till v. SCS Credit Corp.*, the interest rate proposed in the plan does provide it with the present value of its claim.

Wells Fargo argues that there are too many feasibility issues with the proposed plan to confirm it, especially when so much of the monthly income relies upon leases that Wells Fargo does not project to last during the life of the plan.

JOINDER IN OBJECTIONS

B. Brent Bohlender, as Successor Trustee, Irene B. Collins 2007 Trust, and as named Executor under the Last Will and Testament of Irene B. Collins ("Collins") filed a Joinder on March 14, 2018. Dckt. 137. Collins joins in the objections filed by Khatri and Wells Fargo and asserts that the plan has been proposed merely to acquire more time without providing meaningful protection to creditors with secured claims.

Collins argues that Debtor in Possession has not made any payments on its claim since this case was filed, and the plan does not provide for paying insurance on the 2260 East Canal Drive, Turlock, California property that secures Collins's claim. Additionally, Collins argues that there is no plan provision that Debtor in Possession will pay taxes on the East Canal Drive property.

DEBTOR IN POSSESSION’S REPLY TO WELLS FARGO

Debtor in Possession filed a Reply to Wells Fargo’s Objection on March 22, 2018. Dckt. 159. Debtor in Possession argues that Wells Fargo ignores the deadlines to sell property that are designed to provide for payment of its claim.

Debtor in Possession also argues that Wells Fargo miscasts the facts and alleged income in this case. Debtor in Possession argues that farming expenses are covered in Exhibit D to the plan. Debtor in Possession argues that the proposed listing price is irrelevant to Wells Fargo because even if the property does not sell, the property will be liquidated through Chapter 7. Debtor in Possession responds to Wells Fargo’s concerns about wages and real estate commissions by stating that the amounts projected in Debtor in Possession’s declaration are accurate.

Debtor in Possession argues that the rent at the East Canal property has increased to \$1,450.00 as budgeted and argues that rent from the mobile home will hold as budgeted. Debtor in Possession argues that income from peach trees is additional income that Debtor in Possession is not actually relying on to fund plan payments. Debtor in Possession states that tax liabilities each year will be paid with money set aside in a reserve, and they also assert that they “will provide” for any capital gains taxes from property sales.

Debtor in Possession argues that the correct *Till* interest rate was proposed; in fact, Debtor in Possession argues that the plan proposes a full percent over the current prime rate of 4.5%.

In conclusion, Debtor in Possession realleges that the plan is feasible and that it was proposed in good faith.

DEBTOR IN POSSESSION’S REPLY TO KHATRI

Debtor in Possession filed a Reply to Khatri’s Objection on March 22, 2018. Dckt. 160. Debtor in Possession argues that Khatri ignores the deadline provisions that are meant to protect its claim. Debtor in Possession argues that Khatri’s main argument against the proposed \$2.1 million listing price “is entirely irrelevant.” *Id.* at 3:21. Debtor in Possession argues that Khatri will receive full payment of its claim whether Debtor in Possession is able to sell property and pay through the plan or whether Debtor in Possession converts to Chapter 7.

Debtor in Possession sets forth that it has adhered to the maxim set forth by the Bankruptcy Appellate Panel for the Ninth Circuit that a “debtor is not required to guarantee the ultimate success of his plan, but only to provide a reasonable assurance that the plan can be effectuated.” *Id.* at 4:11–15 (citing *Miller v. Nauman (In re Nauman)*, 213 B.R. 355, 358 (B.A.P. 9th Cir. 1997)).

Finally, Debtor in Possession accuses Khatri of not having read the plan before accusing it of being filed in bad faith because Debtor in Possession believes that the imposition of deadlines to sell property or convert to Chapter 7 indicates a good faith attempt to prosecute this case.

DEBTOR IN POSSESSION'S REPLY TO COLLINS

Debtor in Possession filed a Reply to Collins's Joinder on March 22, 2018. Dckt. 161. Debtor in Possession argues that Federal Rule of Bankruptcy Procedure 9014 has not adopted Federal Rule of Bankruptcy Procedure 7018 regarding joinder in adversary proceedings, making Collins's filing impermissible.

Nevertheless, Debtor in Possession responds to the substance of the Joinder by stating that its two other replies to Wells Fargo and Khatri have sufficiently addressed Collins's points.

WELLS FARGO'S SUPPLEMENTAL OBJECTION

Wells Fargo filed a Supplemental Objection on March 23, 2018. Dckt. 166. Wells Fargo supplements the record with complaints about Debtor in Possession's late-filed operating reports for November and December 2017. Wells Fargo expresses shock that Debtor in Possession reports holding \$2,181.75 at year-end without having made pre- or post-petition payments to creditors.

Wells Fargo highlights that total receipts are \$36,781.65 for the first seven months of the plan, which concerns Wells Fargo because May 2018 receipts are scheduled to somehow be \$10,800.00, with expenses of \$4,795.00, plan payments of \$4,640.31, and net receipts of \$1,364.69 before paying \$1,920.00 for farming expenses.

Wells Fargo questions how one can conclude that Debtor in Possession will begin earning \$10,800.00 per month in May 2018 when the latest operating report shows total receipts of \$1,180.82. Wells Fargo argues that the discrepancy between what Debtor in Possession states in its Replies and what is reported on the operating reports is glaring and inconsistent to the point of demonstrating that Debtor in Possession cannot propose a feasible plan payment.

Wells Fargo continues to assert over Debtor in Possession's Reply that income projections by Debtor in Possession have not been substantiated. Wells Fargo argues that income from fabricator wages and from real estate commissions has not been provided, and the only evidence shows irregular earnings.

Wells Fargo once again describes the scenarios in which Debtor in Possession's various projections could fail, leading to plan infeasibility. At the end, again, Wells Fargo argues that there is no provision for how its claim will be paid after the plan term.

DISCUSSION

As shown by various pleadings presented to the court in the matters on the court's March 29, 2018 calendar, the Parties (focusing on Debtor in Possession, Khatri, and Wells Fargo) are challenged in dealing with each other, as well as advocating their respective positions in this case. Though the bankruptcy case is only ten months old, Khatri and Wells Fargo appear to treat the failure to confirm a Plan as being one outside the bounds of bankruptcy. They have not helped their causes in how they have approached the pleadings, presenting unauthenticated evidence, providing "testimony" of witnesses based merely on information and belief, merely cross-referencing the other's pleadings, block-copy-and-pasting objections

into pleadings that may, or may not, be relevant, and presenting what may well be incomplete information to the court. It appears that both Wells Fargo and Khatri have substantially oversecured claims.

Debtor in Possession has played into the hands of what appear to be their arch enemies, Wells Fargo and Khatri, by handing them points to question Debtor in Possession's good faith in the prosecution of this case. After nine months in the case, Debtor in Possession's premise for prosecution of the case began with having Debtor in Possession's elderly, apparently ill, parents lease the properties and pay rent, presumably from the elderly parent's active farming operation. Then, when challenged on the reasonableness of such plan, Debtor in Possession has come up with a liquidation plan, but that liquidation plan is founded on Debtor in Possession contending that the property has jumped in value from \$1,400,000 as stated on the Schedules under penalty of perjury nine months ago to \$2,100,000 now. Debtor in Possession also proposes to try to market another property if the \$2,100,000 marketing plan is not successful, but with that unexplained jump in value (for at least a listing price), Debtor in Possession has created an air of the plan merely being for the purpose of delay, with no ability to pay creditors on their secured claims, with Debtor in Possession being able to put off dealing with the secured claims.

Despite their lack of comradery in this case, both Debtor in Possession and Khatri & Wells Fargo have presented arguments that merit considering whether a confirmable plan is before the court. There appears to be one key point. Does Debtor in Possession's proposal to sell property by deadlines or convert the case overcome the frail income projections that the creditors have seemingly dismantled with ease?

No, the deadlines do not show that the plan is feasible. Instead, they show that Debtor in Possession believes this case is headed for Chapter 7 unless they are able to acquire a miraculous sale of property at a price higher than valued. If Debtor in Possession believed that the \$2.1 million listing price was much closer to the true value of the property than the \$1.4 million listed on Schedule A, then Debtor in Possession would have responded to Khatri and Wells Fargo raising that point numerous times each by providing evidence of the higher value. Instead, Debtor in Possession has felt content to argue that the creditors should not care what price Debtor in Possession puts as the listing price (whether \$2.1 million or \$21) because if Debtor in Possession does not get that price, then this case will be converted anyway.

Debtor in Possession stating under penalty of perjury that the property has a value of \$1,400,000 on Schedule A/B has significance. The court does not treat statements under penalty of perjury lightly or treat the Schedules as being merely "formalities, divorced from the truth." Here, one of the debtors is a licensed real estate agent, adding to the weight of the value stated under penalty of perjury on Schedule A/B.

In the Declaration (Dckt. 127) filed in support of the Motion, debtor in possession Carlos Estacio does not provide any testimony as to how the value of the real property has risen 50% in the past ten months since this case was filed. Debtor in Possession's adoption of an apparent millions-or-bust sales prayer indicates to the court that Debtor in Possession has only proposed this plan to keep the property for a little longer before eventually liquidating.

Debtor in Possession's projections of future income are unbelievable, both for Mr. Estacio's personal income and for the income earned through leases. Mr. Estacio's income has not been substantiated in any way other than his own assertions that he will earn more money. The farm's income has not been substantiated in any way other than Debtor in Possession's own assertion that the farm will earn more

money. The leasing income has not been substantiated as continuing through the life of the plan in any way other than Debtor in Possession's own assertions that the leases will continue without interruption.

The financial picture set forth in the latest Monthly Operation Report for December 2017 (no monthly operating report has been filed for January or February 2018) does not paint an encouraging picture for operation of the businesses in this case. Dckt. 165. For the first six months of this bankruptcy case, Debtor in Possession shows \$38,969 in receipts—an average of \$6,494 per month. But during that time, Debtor in Possession had disbursements of \$36,781, which averages \$6,130 per month. Those expenses include “draws” of \$3,554 per month to Debtor in Possession.

The plan in this case has not been shown by Debtor in Possession to be feasible and indicates that dismissal is likely if Debtor in Possession is unable to put together a plan for the effective marketing and sale of the real property based on its actual value.

For the Plan as drafted, the Motion is denied.

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 Confirm the Chapter 12 Plan filed by Carlos Estacio and Bernadette Estacio (“Debtor in Possession”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Motion to Confirm is denied, and the proposed Chapter 12 Plan is not confirmed.

2. [17-90432](#)-E-12 **CARLOS/BERNADETTE ESTACIO CONTINUED STATUS CONFERENCE RE:
Peter Fear** **VOLUNTARY PETITION
5-23-17 [1]**

Debtors' Atty: Peter L. Fear

Notes:

Continued from 11/30/17

Operating Reports filed: 1/16/18

[SBM-1] Motion for Relief from the Automatic Stay and Alternatively Adequate Protection filed 2/14/18 [Dckt 99], set for hearing 3/29/18 at 10:00 a.m.

[SBM-2] Motion to Dismiss [creditor Wells Fargo Bank, N.A.] filed 2/14/18 [Dckt 106], set for hearing 3/29/18 at 10:30 a.m.

[VFG-1] Motion for Relief from the Automatic Stay and Alternatively Adequate Protection [creditor Khatri Brothers, LP] filed 2/16/18 [Dckt 113], set for hearing 3/29/18 at 10:00 a.m.

[FW-8] Motion to Confirm Chapter 12 Plan Dated February 21, 2018 filed 2/22/18 [Dckt 125], set for hearing 3/29/18 at 2:00 p.m.

[VFG-2] Motion to Dismiss [creditor Khatri Brothers, LP] filed 2/22/18 [Dckt 121], set for hearing 3/29/18 at 10:30 a.m.

3. [16-90634-E-7](#) LESTER/ANA RODRIGUEZ
[16-9018](#)
CHAIREZ V. RODRIGUEZ ET AL

CONTINUED PRE-TRIAL CONFERENCE
RE: AMENDED COMPLAINT FOR
D E T E R M I N A T I O N O F
DISCHARGEABILITY OF DEBT
4-7-17 [\[34\]](#)

Final Ruling: No appearance at the March 29, 2018 status conference is required.

Plaintiff's Atty: Wilber Manuel Salgado
Defendant's Atty: Mario Blanco

Adv. Filed: 11/14/16
Answer: none
Amd. Cmplt. Filed: 4/7/17
Answer: 6/1/17

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud
Dischargeability - willful and malicious injury

The Pretrial Conference is concluded and removed from the Calendar, the Parties having filed their Stipulation for Dismissal (Dckt 61) pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii) and Federal Rule of Bankruptcy Procedure 7041.

Notes:

Continued from 1/11/18. Counsel for Plaintiff reported that the matter had been settled and that dismissal was being filed with the court. Continued for administrative tracking of this Adversary Proceeding.

Agreed Stipulation of Dismissal filed 1/12/18 [Dckt 61]

MARCH 29, 2018 PRETRIAL CONFERENCE

The Parties have filed their Stipulation to dismiss this Adversary Proceeding with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii) and Federal Rule of Bankruptcy Procedure 7041. The Adversary Proceeding is dismissed, with prejudice, by the Stipulation, no order of the court required.

The Clerk of the Court shall update the Docket to show this Adversary Proceeding having been dismissed and close the file.

4. [13-92058-E-7](#) **SHERI HIEMSTRA**
[17-9016](#)
NELSON V. HIEMSTRA

**CONTINUED STATUS CONFERENCE RE:
COMPLAINT**
10-9-17 [1]

Plaintiff's Atty: David C. Johnston
Defendant's Atty: Michael R. Germain

Adv. Filed: 10/9/17
Answer: none

Nature of Action:
Validity, Priority or Extent of Lien, Injunctive Relief, Declaratory Judgment

The Status Conference is XXXXXXXXXXXXXXXXXXXXXX.

Notes:
Continued from 1/11/18 to allow Parties sufficient time to so diligently continue in the prosecution of this Adversary Proceeding.

[MRG-1] Order granting Motion to Dismiss Adversary Proceeding, and Complaint dismissed without prejudice. Plaintiff granted leave to file a first amended complaint on or before 2/1/18. Amended complaint not filed as of 3/19/18.

MARCH 29, 2018 STATUS CONFERENCE

Plaintiff filed a Status Report on March 27, 2018. Dckt. 21. Plaintiff reports that the Parties have agreed to settlement terms, but Plaintiff's counsel has been unable to compete the drafting of settlement documents due to illness in the family and a death in the family.

At the Status Conference, XXXXXXXXXXXXXXXXXXXXXX