

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

April 22, 2014 at 1:30 p.m.

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1. [14-20708-E-13](#) NOEL ORLANDO MOTION FOR RELIEF FROM
TJP-1 Scott D. Hughes AUTOMATIC STAY
3-18-14 [[23](#)]

GATEWAY ONE FINANCE &
LENDING VS.

Tentative 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).

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.

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) 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 13 Trustee, and Office of the United States Trustee on March 18, 2014. By the court's calculation, 35 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). 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). The defaults of the non-responding parties 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 court's tentative ruling is to continue the hearing on the Motion for Relief From the Automatic Stay to May 20, 2014 at 3:00 p.m., to be heard with the Motion to Confirm the First Amended Plan filed by the Debtor.

Noel Orlando ("Debtor") commenced this bankruptcy case on January 27, 2014. Gateway One Finance & Lending ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2007 Audi A8, VIN ending in 0428 (the "Vehicle"). The moving party has provided the Declaration of Adriana Jackson to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Jackson Declaration provides testimony that Debtor has not made 3 post-petition payments, with a total of \$1,872.09 in post-petition payments past due. The Declaration also provides evidence that there are 2 pre-petition payments in default, with a pre-petition arrearage of \$1,248.06.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$31,088.86, as stated in the Jackson Declaration, while the value of the Vehicle is determined to be \$30,000, as stated in Schedules B and D filed by Debtor.

The motion also asserts that the Debtor's proposed Chapter 13 plan will surrender the Vehicle to the Movant.

OPPOSITION TO MOTION

Debtor's counsel has filed his own declaration in opposition to the motion. Debtor's counsel asserts that an amended Chapter 13 plan was filed on March 27, 2014, after the present motion was filed. The amended plan proposes to pay Movant's claim in full, and for the Debtor to retain the Vehicle. In addition, the opposition asserts that the three post-petition missed payments are "not really in default" because the payments have to be made through the Chapter 13 Trustee and the plan has not been confirmed. Finally, Debtor's counsel states that he has discussed the motion and amended plan with his client, and that his client needs the second vehicle in order to reorganize and conduct his affairs.

RULING

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. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the debtor and the estate have not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee 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 Vehicle for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). Though the

declaration of Debtor's counsel asserts that his client needs the car for his reorganization, that evidence was not presented by way of his client's declaration, and as such, it is inadmissible hearsay which cannot be considered by the court.

Because the confirmation or denial of the amended plan is likely to have a material impact on the subject of this motion, the hearing on the present motion is continued, with the consent of creditor, to be heard with the motion to confirm the first amended plan on May 20, 2014 at 3:00 p.m.

If creditor does not consent to the continuance, the court finds that denial of the motion is proper. The Debtor is prosecuting the case and providing for this claim.

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 Gateway One Finance & Lending ("Movant") 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 hearing on the Motion for Relief from the Automatic Stay is continued to be heard on May 20, 2014 at 3:00 p.m. with the Motion to Confirm the First Amended Plan.

IT IS FURTHER ORDERED that the Chapter 13 Trustee is authorized to disburse the \$587.66 in monthly Plan Payments to Gateway One to be applied to its secured claim in this case.

No other or additional relief is granted.

2. 09-30220-E-13 KURT KRAMER
JMC-1 Peter G. Macaluso

MOTION FOR RELIEF FROM
AUTOMATIC STAY
3-7-14 [[140](#)]

HOLDREGE & KULL CONSULTING
ENGINEERS AND GEOLOGISTS VS.

Tentative 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).

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.

Below is the court's tentative ruling.

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff's Counsel, and Counsel for Intervener Financial Pacific Insurance Company, parties to the pending state court litigation, on March 7, 2014. By the court's calculation, 46 days' notice was provided. 28 days' notice is required. That requirement was met.

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). The defaults of the non-responding parties 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 court's tentative decision is to deny Motion for Relief From the Automatic Stay.

SERVICE ISSUES

The Proof of Service filed by Holdrege & Kull Consulting Engineers and Geologists ("Movant") shows that the moving papers were served on Kevin J. Hobson, Counsel for Plaintiffs in the state court litigation, and Patrick J. Campbell, Counsel for Intervener Financial Pacific Insurance Company on behalf of Defendant Thomas Construction & Development, Inc., in the state court litigation. The Proof of Service does not show that the moving papers

were served on Debtor, Debtor's Counsel, or the Chapter 13 Trustee. The Proof of Service does direct the court to "See [the] Attached Mailing Matrix," however, no such mailing matrix is attached.

The Debtor, through his counsel, has filed a non-opposition to the motion, thereby waiving the service defect. However, the service issue as to the Chapter 13 Trustee remains.

On this basis and for the reasons detailed above, the Motion for Relief from the Automatic stay is denied without prejudice.

ALTERNATIVE RULING

The service issue appears to be a clerical error in filing a complete Proof of Service, as opposed to an actual defective service. Therefore, assuming the Movant can provide proof of proper service on the Chapter 13 Trustee, or if the Chapter 13 Trustee waives the service defect, the court's ruling will be as follows:

DISCUSSION

Movant seeks relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1), alleging that cause exists to allow them to continue litigation in the Superior Court of California for the County of Amador. Movant has provided the Declaration of J. Michael Cochrane in support of the motion. The Cochrane Declaration states that Movant is a defendant in the action entitled *Walter Baehr, et al. v. Holdredge & Kull, Consulting Engineers and Geologists, et al.*, Case Number 10-CV-6923, filed in the Amador Superior Court. The Cochrane Declaration provides that Movant seeks relief from stay in order to file a cross-complaint against the Debtor for work done by the Debtor on the construction project which is the subject of the litigation.

The Debtor has filed a statement of non-opposition.

The court may grant relief from stay for cause when it is necessary to allow litigation in a nonbankruptcy court. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). The basis for such relief when there is pending litigation in another forum is predicated on factors of judicial economy including whether the suit involves multiple parties or is ready for trial. See *Packerland Packing Co., Inc. v. Griffith Brokerage Co. (In re S. Kemble)*, 776 F.2d 802 (9th Cir. 1985); *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162 (9th Cir. 1990); *Santa Clara County Fair Ass'n, Inc. v. Sanders (In re Santa Clara County Fair Ass'n, Inc.)*, 180 B.R. 564 (9th Cir. BAP 1995); *Truebro, Inc. v. Plumberex Specialty Products, Inc. (In re Plumberex Specialty Products, Inc.)*, 311 B.R. 551 (Bankr. C.D. Cal. 2004).

The court finds that the nature of the state court litigation warrants relief from stay for cause.

The court shall issue a minute order modifying the automatic stay as it applies to the Debtors, and each of them, to allow the Movant to file a cross-complaint against the Debtor in the state court litigation.

The automatic stay is not modified with respect to the enforcement of any judgment against the Debtors, Trustee, or property of the bankruptcy estate. Any judgment obtained shall be brought back to this court for the proper treatment of any claims under the Bankruptcy Code.

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, Holdrege & Kull Consulting Engineers and Geologists, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED the automatic stay provisions of 11 U.S.C. § 362(a) are modified to allow Holdrege & Kull Consulting Engineers and Geologists, its agents, representatives, and successors, ("Movant") to file a cross-complaint against the Debtor, Kurt Jason Kramer, and to continue the state court litigation in the case of *Walter Baehr, et al. v. Holdredge & Kull, Consulting Engineers and Geologists, et al.*, Case Number 10-CV-6923, pending in the Superior Court of California for the County of Amador.

IT IS FURTHER ORDERED that, except as expressly provided in this paragraph, the automatic stay is not modified with respect to the enforcement of the judgment against the Debtors, Trustee, or property of the bankruptcy estate. The judgment may be enforced to allow enforcement of the judgment to obtain payment from any third-party insurance company or insurance policy. Any judgment obtained shall be brought back to this court for the proper treatment of any claims under the Bankruptcy Code.

No other or additional relief is granted.

3. [14-22483](#)-E-12 MARILYN MOWRY AND PETER MOTION FOR RELIEF FROM
CLG-1 BOWLING AUTOMATIC STAY
Len ReidReynoso 4-4-14 [[27](#)]
11905 BORDEN ROAD, LLC VS.

**MOVED FROM 3:00 CALENDAR TO BE HEARD IN CONJUNCTION
WITH THE MOTION TO DISMISS, MOTION FOR EXTENSION OF
TIME TO FILE DOCUMENTS AND STATUS CONFERENCE**

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*), Trustee Jan Johnson, and Office of the United States Trustee on April 4, 2013. By the court's calculation, 18 days' notice was provided. 14 days' notice is required. That requirement was met.

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 grant the Motion for Relief from the Automatic Stay. 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:

Creditor, 11905 Borden Road, LLC ("Creditor"), seeks relief from the automatic stay with respect to the real property commonly known as 11905 Borden Road, Herald, California. The property consists of two parcels, each with their own APN, including 152-080-065 and 152-080-066. One parcel consists of the Debtors' residence, and the other is an adjacent piece of land which Creditor believes is used for business purposes. The moving party has provided the Declaration of Adham Sbeih to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Deed of Trust shows that the property was owned by Oasis Ranch, Inc., when the loan was given on March 2011, but was transferred via a grant deed from Oasis Ranch, Inc. to Marilyn Mowry, as a married woman on August 7, 2012. Creditor attaches a grant deed to the Declaration of Christina L. Geraci, but Creditor advises that the filing of evidence attached to declarations, rather than separately on the court docket, is improper. The

Revised Guidelines for Preparation of Documents of the Eastern District require that the motion, points and authorities, each declaration, and the exhibits document to be filed as separate electronic documents.

On or about August 7, 2012, the day before the scheduled trustee's sale, Debtors filed for their first Chapter 13 bankruptcy, Case No. 12-34482, in which debtors filed multiple proposed Chapter 13 Plans, and Creditor objected to each one. Creditor filed opposition to each proposed plans, on the grounds that Debtors were asking for an additional 6 months to sell the property to fund the Plan (even though Debtors' first two proposed plans claimed that she would sell horses to fund the Plan, it remains unclear what came of those horses or the funds from the sale thereof), and Debtors had only made 1 post-petition mortgage payment.

At the hearing on the Debtors' Fourth Modified Chapter 13 Plan, the court held that Debtors had acted in bad faith, had not fully disclosed their financial statement and/or financials of the company, Oasis Ranch, and was not proposing a good faith plan to pay holders of secured claims. On or about September 16, 2013, the Court issued an order granting Debtors' Motion to Confirm the Modified Chapter 13 Plan, provided that Debtors complete the sale of the subject property on or before January 31, 2014, and that the automatic stay provisions of 11 U.S.C. § 362 are vacated effective February 2014. Order, Bankr. E.D. Cal. No. 12-34482, Dckt. No. 217. On or about October 16, 2013, the court executed an order incorporating the same language. Order, Bankr. E.D. Cal. No. 12-34482, Dckt. No. 220.

Creditor states that it waited 18 months, from the date the bankruptcy matter was filed on August 8, 2012, to the date the court lifted the automatic stay on February 1, 2014. During this period, the Creditor only received on post-petition mortgage payment, and four "\$100/month Plan Payments." Creditor scheduled the foreclosure sale for March 18, 2014, but the sale was halted by this subsequent Chapter 12 filing by Debtors on March 12, 2014, which Creditor states was not filed in good faith because the prior bankruptcy remains pending and the stay has been lifted by the court.

The Declaration of Adham Sbeih states that the Debtors defaulted under the terms of the Promissory Note, and a Notice of Default was recorded on April 11, 2012. A Notice of Sale was recorded, setting the Trustee's sale for August 8, 2012. During the 18 months that Debtors' Chapter 13 bankruptcy case was pending, Creditor only received one post-petition payment, and four "\$100/month Plan payments." The Promissory Note matured on March 31, 2014, and the entire balance of \$524,689.22 is now fully due and payable. According to Debtors' Schedules, Debtors value the property at \$780,000.00.

The automatic stay was lifted on February 1, 2014, and the foreclosure sale was rescheduled for March 18, 2014. Order, Bankr. E.D. Cal. No. 12-34482, Dckt. No. 217. The rescheduled sale was halted by the Debtors' subsequent bankruptcy filing. This court has already noted that Debtors' current Chapter 12 case appears to be improper in considering the Trustee's Motion to Dismiss the previously filed Chapter 13 Case, Case No. 2012-34482. Debtors filed a Chapter 12 petition, before receiving a discharge under their Chapter 13 case, and before their Chapter 13 Plan has been substantially consummated. See Case No. 14-22483.

A comparison of Debtors' petitions, Schedules, Plan, in their Chapter 12 and Chapter 13 cases shows that Debtors are attempting to discharge the same debts, and that the proceedings cover the same property and assets claimed by Debtors as part of the bankruptcy estate. The court recognizes that Debtors cannot have two pending bankruptcy proceedings in which they are seeking discharge of the same obligations. *Freshman v. Atkins*, 269 U.S. 121 (1925).

Creditor has also raised the issues that Debtors filed this Chapter 12 case in bad faith. A subsequently filed case is presumed to be filed in bad faith if the Debtor failed to perform under the terms of a confirmed plan. *Id.* at § 362(c)(3)(C)(i)(II)(cc). The court notes that Debtors are delinquent under their confirmed Chapter 13 Plan, and that Debtors have not effected the sale of the subject property as called for by the order confirming the Plan in the Chapter 13 Case. Debtors have not attempted to amend the current Chapter 13 Plan, which calls for the prompt sale of the Borden Road Property.

Additionally, another creditor in Debtors' Chapter 13 case has alleged that Debtors made a fraudulent conveyance of property to their corporation, Oasis Ranch, Inc., which is the potential subject of further litigation, and adds complications to Debtors' prosecution of their bankruptcy cases. Debtors have failed to perform the terms of their confirmed plan, in addition to committing other missteps in pursuing bankruptcy relief, that indicate that Debtors may have filed for bankruptcy to evade and hide assets from their creditors.

With respect to the current Motion for Relief, the court maintains the right to grant relief from stay for cause when the 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. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the Debtors have not made post-petition payments on the property. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

The court shall issue a minute order terminating and vacating the automatic stay to allow 11905 Borden Road, LLC, and its agents, representatives and successors, and all other creditors having lien rights against the property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the property.

Creditor has not pleaded adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not granted.

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

APRIL 16, 2014 HEARING

The court continued the hearing on the Trustee's Motion to Dismiss the Chapter 13 case from April 16, 2014, so that the instant matter may be heard in conjunction with the hearing on Debtors' Motion to Dismiss. Dckt. No. 253.

REVIEW OF THE MOTION

Trustee moves the court for an order dismissing this case pursuant to 11 U.S.C. § 1307 on multiple grounds.

First, Debtors are currently delinquent more than \$6,000.00 under the terms of the confirmed plan. Debtor has paid a total of \$22,250.00 to the Trustee, with the last payment received on December 9, 2013. The confirmed Plan, Dckt. No. 164, in Section 1.02, called for the proposed sale of real property located at 11905 Borden Road, Herald, California, by January 31, 2014, with the sales proceeds paid to the Trustee. No monies have been received. Debtors will be delinquent \$7,500.00 if the April, 2014 scheduled payment is not received, based on the monthly payment alone. Debtor is in material default with respect to the terms of the confirmed plan pursuant to 11 U.S.C. § 1307(c) (6).

Debtors must be current under all payments called for by any pending Plan, Amended Plan, or Modified Plan as of the date of the hearing on this motion or the case may be dismissed. Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c) (1).

Second, the Trustee reports that Debtors have also filed a subsequent Chapter 12 case, assigned to the Honorable Robert Bardwil, Bankr. E.D. Cal. Case No. 14-22483. It appears that the Debtors filed a Chapter 12 petition, before receiving a discharge under their Chapter 13 case, and before their Chapter 13 Plan has been substantially consummated. Case No. 14-22483. That case has been transferred to Department E, this court, as having the first filed case by these Debtors.

A comparison of Debtors' petitions, Schedules, Plan, in their Chapter 12 and Chapter 13 cases shows that Debtors are attempting to discharge the same debts, and that the proceedings cover the same property and assets claimed by Debtors as part of the bankruptcy estate. This is improper; the Debtors cannot have two pending bankruptcy proceedings in which they are seeking discharge of the same obligations. *Freshman v. Atkins*, 269 U.S. 121 (1925). The pendency of an application for discharge in prior bankruptcy proceedings will preclude discharge in a second voluntary proceeding, with respect to the same debts as listed in first proceeding. *Id.* at 123.

The Trustee also notes that "one other significant transfer to Debtor was identified previously in the case." Dckt. No. 237. The Trustee is referring to an opposition entered against Debtors' Objection to Claim, LRR-11. Debtors filed this Objection to a Proof of Claim on the grounds that Debtors' corporation, Oasis Ranch, Inc., is liable for the claim asserted and that the claim is not as personal debt of the Debtors. Dckt. No 231. The Creditor opposed the objection, on the grounds that Oasis Ranch, Inc., is a corporation solely owned by the Debtors, and that a transfer of real estate effected by Debtor Marilyn Mowry (who transferred real property from Oasis Ranch, Inc. to

herself) constituted a fraudulent conveyance of the property of the corporation. Dckt. No. 237.

The Trustee asks that the court grant an order dismissing this proceeding, unless the court finds cause to convert the matter to a Chapter 7 under 11 U.S.C. § 1307(c) to convert the case and finds that 11 U.S.C. § 1328(f) does not prevent such a conversion.

ORDER SETTING HEARING ON DEBTORS' MOTION TO DISMISS

On March 31, 2014, the Debtors filed an *ex parte* Motion to Dismiss their Chapter 13 Case. Dckt. No. 247. Upon reviewing the Motion, the court issued an Order Setting Hearing on Request for Dismissal of the Chapter 13 Petition, Dckt. No. 249. The court recognized that the Debtors' confirmed Chapter 13 Plan requires that the 11905 Borden Road Property shall be sold, with a motion to approve the sale and escrow to be opened within 180 days of the confirmed plan (order confirming filed on September 17, 2013). That 180-period expired in March 2014, without a motion to approve sale having been filed.

The court also noted that Debtors have filed a Chapter 12 case, Bankr. E.D. Cal. 14-22483, filed in *pro se*. The court has set a status conference and a hearing on the Debtors' motion to extend time for the filing of the Schedules and Statement of Financial Affairs in the Chapter 12 case for April 22, 2014. The Debtors have not attempted to amend the current Chapter 13 Plan which calls for the prompt sale of the Borden Road Property. The court set a hearing on Debtors' Motion to Dismiss on April 22, 2014, and ordered that the Chapter 13 Trustee, U.S. Trustee, Creditors, the Debtors, and any other parties in interest may file pleadings addressing whether it is proper and in the best interests of the Estate to dismiss this Chapter 13 case or if it should be converted to one under Chapter 7 to allow a Trustee to fulfill the substance of the obligations of the Debtor under the Chapter 13 Plan for the orderly marketing and sale of the Borden Road Property. Order, Dckt. No. 249.

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 the Chapter 13 case filed by the Chapter 13 Trustee 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 granted and the case is dismissed.

5. [12-34482-E-13](#) PETER BOWLING AND MARILYN MOWRY
Len ReidReynoso MOTION TO DISMISS CASE
3-31-14 [[247](#)]

Debtors filed this ex parte Motion to Dismiss on March 31, 2014. Dckt. No. 247. It appears that no other parties in interest were served pursuant to Local Bankruptcy Rule 9014-1.

Tentative Ruling: The Motion to Dismiss has been set for hearing.

The Motion to Dismiss is denied without prejudice. 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:

Debtors request a dismissal of their bankruptcy case pursuant to 11 U.S.C. § 1307(b), which states that on the request of the debtor at any time, if the case has not been converted under 11 U.S.C. §§ 706, 1112, or 1208, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

Upon reviewing the Motion, the court issued an Order Setting Hearing on Request for Dismissal of the Chapter 13 Petition, Dckt. No. 249. The court recognized that the Debtors's confirmed Chapter 13 Plan requires that the 11905 Borden Road Property shall be sold, with a motion to approve the sale and escrow to be opened within 180 days of the confirmed plan (order confirming filed on September 17, 2013). That 180-period expired in March 2014, without a motion to approve sale having been filed.

The court also noted that Debtors have filed a Chapter 12 case, Bankr. E.D. Cal. 14-22483, filed in *pro se*. The court has set a status conference and a hearing on the Debtors' motion to extend time for the filing of the Schedules and Statement of Financial Affairs in the Chapter 12 case for April 22, 2014.

The Debtors have not attempted to amend the current Chapter 13 Plan which calls for the prompt sale of the Borden Road Property. The court set a hearing on Debtors' Motion to Dismiss on April 22, 2014, and ordered that the Chapter 13 Trustee, U.S. Trustee, Creditors, the Debtors, and any other parties in interest may file pleadings addressing whether it is proper and in the best interests of the Estate to dismiss this Chapter 13 case or if it should be converted to one under Chapter 7 to allow a Trustee to fulfill the substance of the obligations of the Debtor under the Chapter 13 Plan for the orderly marketing and sale of the Borden Road Property. Order, Dckt. No. 249.

The Debtors have raised serious issues concerning their commencement and prosecution of this bankruptcy case. The court concludes that they have not prosecuted, and are not requesting dismissal of this case in good faith. Rather, dismissal at the Debtors' request is part of what appears to be a bad faith scheme to abuse the Bankruptcy Code.

However, the Chapter 13 Trustee has filed a separate motion to dismiss this case. The court is granting the Trustee's motion to dismiss, rendering Debtors' Motion moot.

The Motion to Dismiss is denied without prejudice.

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 the Chapter 13 case filed by Debtors 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 denied without prejudice.

6. [14-22483](#)-E-12 **MARILYN MOWRY AND PETER BOWLING** **DEBTORS' MOTION FOR EXTENSION OF TIME TO FILE DOCUMENTS**
Len ReidReynoso **3-26-14** [[14](#)]

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 the Chapter 13 Trustee, all creditors, and Office of the United States Trustee on February 6, 2014. By the court's calculation, 33 days' notice was provided. 28 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Extend the Time to File Schedules, Statements, and Chapter 13 Plan was properly 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).

The Motion to Extend the Time to File Schedules, Statements, and Chapter 13 Plan is denied. 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:

MOTION DOES NOT CONFORM TO THE PLEADING REQUIREMENTS OF FRBP 9013

Debtors make an *ex parte* motion, requesting that the deadline to file their bankruptcy schedules be extended to April 1, 2014. The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

- A. Due to Joint Debtor Marilyn Mowry Bowling being diagnosed with endometrial cancer on March 12, 2014, and resulting procedures, diagnostic appointments, pending surgery and radiation appointments, Debtors ask that the due dates for Debtors' Schedule C, E, F, I, J, Statement of Financial Affairs, and Summary of Schedules be extended to April 1, 2014.
- B. Debtor shall serve a copy of the order to file a status report and attend conference dated March 13, 2014 on the "persons designated."

The Motion to Extend Deadline to File Schedules, Statements, and Chapter 13 Plan does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief is based. The motion merely states that Debtor seeks an extension of time to file the listed schedules and Statement of Financial Affairs, without citing any legal authority. Failure to cite legal authority justifying the relief sought is a ground for denial of the motion. LBR 9014-1(d)(5), 1001-1(g). This is not sufficient.

Furthermore, Debtors have not provided any evidence to support their factual contentions. Local Bankruptcy Rule 9014-1(d)(6) requires that every motion be accompanied by evidence establishing its factual allegations and demonstrating that the movant is entitled to the relief requested. Affidavits and declarations shall comply with Fed. R. Civ. P. 56(e). Debtors provide no evidence substantiating their claims of Debtor Marilyn Mowry's condition, and do not provide any sworn documents in which they swear under the penalty of perjury that their statements are true and correct. Federal Rules of Evidence

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to

state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; see also *In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing,

[and] shall state with particularity the grounds therefor, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities - buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

Based on the lack of competent evidence before the court on Debtor's need for an extension of deadlines to file the required bankruptcy paperwork, and the Motion's failure to conform to the requirements of Federal Rule of Bankruptcy Procedure 9013, 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 for Extension of Deadlines 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 for Extension of Deadlines is denied.

