UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

April 28, 2014 at 10:00 a.m.

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1. 13-35308-A-7 DOROTHY PARENT — MOTION TO
14-2034 BJ-1 — DISMISS OR TO STAY PROSECUTION
SWENDEMAN ET AL V. VINDING ET AL — 2-26-14 [15]

Tentative Ruling: The motion will be granted.

Dorothy Parent has been dismissed as a defendant.

Defendants Brady & Vinding (successor to or assignee of Scharff, Brady & Vinding), Michael Brady, and Michael Vinding move for dismissal of the second claim for relief pursuant to Fed. R. Civ. P. 12(b)(6). The second claim in the complaint seeks avoidance of a senior encumbrance on a real property in Red Bluff, California - one-half of which is now property of the bankruptcy estate in the underlying bankruptcy case – and a declaration of the rights of the plaintiffs as to the property.

Plaintiff Robert E. Swendeman, a judgment creditor of defendant and debtor Dorothy Parent, the one-half owner of record, holds the junior encumbrance on the property, an abstract of a $225,333.47 judgment, recorded only eight days after the recordation of the senior encumbrance, a deed of trust securing a $350,000 note held by Brady & Vinding, a partnership of which Michael Brady and Michael Vinding are members.

Plaintiff Airport Acres, L.L.C., apparently owns the other one-half interest as a tenant in common with Ms. Parent.

In the alternative, the movants are asking the court to stay the prosecution of the second claim, pending the sale of the subject property.

The plaintiffs, Robert Swendeman, and Kevin Butler and Anita Butler, as trustees of the 1990 Butler Family Trust, established March 15, 1990, respond that they have filed an amended complaint.

The movants reply that, despite the amended complaint, the prosecution of the second claim should be stayed.

Rule 12(b)(6) permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)(as amended)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any

set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citations omitted).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal at 678).

More recently, the Supreme Court has applied a "two-pronged approach" to address a motion to dismiss:

"First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'

"In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (Citations omitted).

The plaintiffs named in the original complaint included only Robert E. Swendeman, an individual doing business as T'N'T Real Estate, and Airport Acres, LLC, a Nevada limited liability company.

After the movants filed and served the instant motion on February 26, 2014, an amended complaint was filed on March 7, 2014. Dockets 20 & 21; see also Fed. R. Civ. P. 15(a)(1)(B), made applicable here by Fed. R. Bankr. P. 7015 (permitting amendment of a pleading as a matter of course within 21 days after service of a responsive pleading).

Airport Acres is no longer named a plaintiff in the amended complaint. The plaintiffs named in the amended complaint are Robert E. Swendeman, an

individual doing business as T'N'T Real Estate and Kevin C. Butler and Anita A. Butler, trustees of the 1990 Butler Family Trust, established March 15, 1990. The Butlers are alleged to be "successor[s] in interest to Airport Acres."

The court also notes that although the amended complaint names the same defendants as the original complaint - Dorothy Parent, Brady & Vinding, Michael Vinding and Michael Brady - the amended complaint also names the chapter 7 trustee of the underlying bankruptcy case, Alan Fukushima, as a defendant.

As Airport Acres is not named as a plaintiff in this proceeding any longer, the court deems Airport Acres to have dismissed all its claims.

Further, while the original complaint has been superseded by the amended complaint, the court will address the merits of the subject motion because the second causes of action in both complaints are identical, except for the change in parties.

First, upon the filing of a voluntary bankruptcy petition, 11 U.S.C. § 362(a) institutes an automatic stay with respect to both the debtor and the bankruptcy estate. Actions taken in violation of the automatic stay are void. Sambo's Restaurants, Inc. v. Wheeler (In re Sambo's Restaurants), Inc., 754 F.2d 811, 816 (9th Cir. 1985); O'Donnell v. Vencor Inc., 466 F.3d 1104, 1110 (9th Cir. 2006).

A creditor who has violated the automatic stay is required to reverse its actions. For instance, the stay requires the creditor to direct a levying officer to return or reverse post-petition collections, such as bank account or wage levy. In re Johnson, 262 B.R. 831, 847-48 (Bankr. D. Idaho 2001). The stay obligates the creditor to maintain or restore the status quo that existed as of the petition date. Id. (quoting Franchise Tax Board v. Roberts (In re Roberts), 175 B.R. 339, 343 (B.A.P. 9th Cir. 1994)).

The underlying bankruptcy case was filed on December 2, 2013. The instant adversary proceeding was filed on January 24, 2014. The amended complaint is seeking to have the subject real property partitioned and is seeking to avoid the senior encumbrance on the estate's one-half interest in the property. Both causes of action in the amended complaint are asserted against the bankruptcy estate.

As the causes of action were filed post-petition and concern an interest in property that is property of the bankruptcy estate, they were filed in violation of the automatic stay and are void. See 11 U.S.C. § 362(a)(1) (prohibiting the commencement of a process or proceeding against the debtor); see also 11 U.S.C. § 362(a)(3) (prohibiting "any act . . . to exercise control over property of the estate").

The plaintiffs have not sought relief from the automatic stay to commence the prosecution of the subject claims.

Second, assuming the Butlers are indeed successors in interest to Airport Acres and they own the other half of the real property, they do not have standing to seek avoidance of the recordation of the deed securing the $350,000 note held by Brady & Vinding.

A plaintiff must meet both the constitutional and prudential requirements of standing. Bennett v. Spear, 520 U.S. 154, 162 (1997). To establish standing under the case or controversy requirement of Article III of the United States Constitution, a plaintiff (1) must have suffered some actual or threatened

injury due to alleged illegal conduct, known as the "injury in fact" element; (2) the injury must be fairly traceable to the challenged action, known as the "causation element"; and (3) there must be a substantial likelihood that the relief requested will redress or prevent plaintiff's injury, known as the "redressability element." U.S.C.A. Const. Art. 3, § 1 et seq.; Allen v. Wright, 468 U.S. 737, 751 (1984); Dunmore v. United States, 358 F.3d 1107, 1111-12 (9th Cir. 2004) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

Here, only Ms. Parent's one-half interest in the property was encumbered by Brady & Vinding's deed of trust. The Butlers' one-half interest in the property is not encumbered by Brady & Vinding's deed. Thus, the Butlers' second claim to avoid Brady & Vinding's deed makes no sense. The Butlers have suffered no injury by the encumbrance and recordation of that deed against Ms. Parent's interest in the property. The Butlers then have no standing to seek the avoidance of Brady & Vinding's deed of trust.

Third, the only statements in the amended complaint that could be construed as pleading injury to the Butlers, resulting from Brady & Vinding's deed on the property, are those alleging that the deed resulted in "making [the property] more difficult to market." Docket 21 at 8.

However, Ms. Parent's apparently signed a note for $350,000 and then signed a deed encumbering her interest in the property and securing the note. The encumbrance and recordation of Brady & Vinding's deed was done with the agreement and consent of Ms. Parent. There is no contractual privity between the Butlers, on one hand, and Brady & Vinding, Michael Brady and Michael Vinding, on the other hand.

The court is unaware of any legal basis or authority prohibiting Brady & Vinding from recording a deed of trust against Ms. Parent's interest in the property, given her voluntary execution of the note and deed. The court is not aware of and the plaintiffs have not cited to any such permissible restraints on alienation.

Overall, the court is not persuaded that the allegations in the amended complaint rise to the level of a plausible claim for relief by the Butlers against Brady & Vinding, Michael Brady and Michael Vinding, seeking to avoid Brady & Vinding's recorded deed on the property because the deed has made the property more difficult to market.

Finally, absent court approval, only the bankruptcy estate has the authority to prosecute claims for the benefit of the estate and the creditors, such as the avoidance of a transfer. In re O'Reilly, Case No. C 13-3177 PJH, WL 460767, at * 8 (N.D. Cal. Feb. 3, 2014); J & J Sports Prods., Inc. v. Benitez, Case No. 1:12-CV-00735-LJO-SMS, WL 5347547, at * 4 (E.D. Cal. Sept. 23, 2013); Montgomery v. Wal-Mart Stores, Inc., Case No. 12CV3057 JLS (DHB), WL 5278649, at * 7 (S.D. Cal. Sept. 18, 2013); JMS Labs Ltd. (U.S.A.), LLC v. Silver Eagle Labs, Inc. (In re Lockwood), 414 B.R. 593, 602-03 (Bankr. N.D. Cal. 2008); State of California v. PG & E Corp. (In re Pac. Gas & Electric Co.), 281 B.R. 1, 13-15 (Bankr. N.D. Cal. 2002) (citations omitted).

11 U.S.C. § 541(a) provides that "[t]he commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held," including "all legal or equitable interests of the debtor in property as of the commencement of the case" and "[a]ny interest in property that the trustee recovers under section 329 (b), 363 (n), 543, 550, 553, or 723 of this title."

11 U.S.C. § 541(a)(1) & (3).

11 U.S.C. § 704 charges only the bankruptcy trustee to "collect and reduce to money the property of the estate" and to "examine proofs of claims and object to the allowance of any claim that is improper." 11 U.S.C. § 704(a)(1) & (5).

"[I]n order for a creditor . . . to obtain standing to object to another creditor's claims in such a case, the objecting party must first request the trustee to object to the claim, the trustee must refuse to object to the claim, and the Bankruptcy Court may then authorize the creditor . . . to proceed." In re Bakke, 243 B.R. 753, 756 (Bankr. D. Ariz. 1999).

Here, by seeking to avoid Brady & Vinding's deed, the plaintiffs are prosecuting a claim that only the bankruptcy trustee has authority to bring. Obviously, as the estate's one-half interest in the property is encumbered by Brady & Vinding's deed, the trustee would seek to avoid the deed, assuming there is actionable basis for such avoidance. Avoiding the deed would free equity in the property that could be liquidated for the benefit of the estate and all unsecured creditors.

The plaintiffs have not deferred to or asked the bankruptcy trustee about whether the estate would be seeking to avoid Brady & Vinding's deed. And, the plaintiffs have not sought court approval for their prosecution of the avoidance of the deed. Accordingly, the court will dismiss the amended complaint's second cause of action against Brady & Vinding, Michael Brady and Michael Vinding in the entirety.

2. 12-28413-A-7 F. RODGERS CORPORATION
CWC-8

MOTION TO
ASSIGN AVOIDANCE ACTION AND
LITIGATION CLAIMS
O.S.T.
4-17-14 [603]

Tentative Ruling: The motion will be denied without prejudice.

The trustee is asking the court to approve the estate's assignment of its claims in litigation known as the "Dittmore Litigation," as well as the related avoidance claims against Frank Rodgers, to the state court-appointed receiver for the debtor. The receiver was appointed by the state court after Wells Fargo Bank, as the debtor's largest secured creditor, initiated a pre-petition action against the debtor and other parties to recover the collateral securing its claims.

The avoidance claims pertain to the debtor's assignment of claims in the Dittmore Litigation to Mr. Rodgers in March 2012, approximately one month prior to the filing of this bankruptcy case. In exchange for the assignment, Mr. Rodgers agreed to pay the debtor 20% of the net recovery from the Dittmore Litigation.

Under the agreement with the receiver, the estate will transfer interest in the Dittmore Litigation and the avoidance claims against Mr. Rodgers, to be prosecuted by the receiver. In exchange, the receiver will pay the estate 15% of the net recovery from the Dittmore Litigation.

On a motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and

balance four factors: 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in the matter of collection; 3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and 4) the paramount interest of the creditors with a proper deference to their reasonable views. In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988).

The motion will be denied because page four of the motion document is missing. There is no page four in the motion. That page seems to contain important information about the background of the proposed assignment.

Nonetheless, even if the motion document had been complete, the court is unwilling to grant the motion as it has some concerns about the execution of the proposed assignment agreement.

While the court understands the trustee's reasons for assigning the claims to the receiver, the court is concerned about the receiver exceeding the authority granted to him by the state court in liquidating assets. The receiver was appointed by the state court to administer only assets that serve as collateral for Wells Fargo Bank's claims. The receiver answers to no one about the administration of other assets.

The court is also concerned about the fact that, even though Wells Fargo Bank is not objecting to this motion, the bank is not a party to this agreement and nothing prevents the bank from later asserting an interest in the 15% net recovery to which the estate would be entitled to under this agreement.

More, the receiver is a fiduciary to the bank and not the bankruptcy estate, complicating the performance of the receiver under this agreement. If the bank later asserts an interest in the 15% net recovery from the Dittmore Litigation, the trustee would have to challenge both the bank and the receiver in state court. The motion does not address these issues. The court is not convinced that the assignment agreement with the receiver is in the best interest of the estate and all creditors of the estate.

3.	07-25418-A-13 13-2360 TAEOTUI ET AL V. SPECIALIZED LOAN SERVICING, ARGENT MORTGAGE CO., LLC	PULEALII/ILAISA TAEOTUI PGM-1	MOTION TO APPROVE COMPENSATION OF DEFENDANT'S ATTORNEY 3-18-14 [23]

Tentative Ruling: The motion will be denied without prejudice.

The plaintiff's counsel, Peter Macaluso, is asking the court to award him $2,085 in fees and $246 in costs, for a total of $2,331, as compensation for representing the plaintiffs, Pulealii and Ilaisa Taeotui, in this adversary proceeding and obtaining a judgment for reconveyance of a deed of trust representing a mortgage that was stripped off in the underlying bankruptcy case.

The motion will be denied. First, the motion does not state the basis for the award of attorney's fees to the movant. Typically, the basis for an award of attorney's fees to a prevailing party is an agreement or a statute.

Second, although there may be an agreement that provides for attorney's fees to the mortgagee and California's reciprocity statute (Cal. Civ. Code § 1717(a)) may allow for attorney's fees to be awarded to the movant, no such agreement is part of the motion. The agreement is not part of the record with the motion.

Finally, the motion is asking for the compensation to be awarded against both defendants, Specialized Loan Servicing and Argent Mortgage. The court seriously doubts that both defendants are parties to the note and deed of trust agreements with the plaintiffs. The motion should clarify the basis for relief against each of the defendants.

4. 13-35329-A-12 KELLY/DEBORA HEISER — MOTION TO CONFIRM CHAPTER 12 PLAN
SJS-3 — 3-10-14 [24]

Tentative Ruling: The motion will be denied.

The debtors are asking the court to confirm their chapter 12 plan filed on January 16, 2014. Docket 15.

The Bank of New York Mellon, a creditor secured by the debtors' real property in Rio Linda, California (identified as located in Sacramento, California in Schedule A), objects to confirmation, arguing that:

(1) the debtors are not eligible for chapter 12 relief because "[t]he manufacturing of cages and the raising of chinchillas do not appear to constitute a farming operation as cages and chinchillas are not crops, poultry, or livestock and are not related to traditional farming practices;" and

(2) the plan is not feasible as the debtors "lack the income needed to fund their proposed Chapter 12 Plan."

11 U.S.C. § 109(f) provides that only a family farmer or family fisherman with regular income may be a debtor under chapter 12. 11 U.S.C. § 101(18) defines a family farmer as an individual or individual and spouse engaged in a farming operation or a corporation or partnership in which more than 50% of the outstanding stock or equity is held by one family.

"The term 'farming operation' includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state." 11 U.S.C. § 101(21). This is not an exclusive list. Rinehart v. Sharp (In re Sharp), 361 B.R. 559, 564 (B.A.P. 10th Cir. 2007).

As the debtors bear the burden of persuasion on all elements necessary for plan confirmation, they also bear the burden of persuasion on establishing eligibility for chapter 12 relief. First Nat'l Bank of Durango v. Woods (In re Woods), 743 F.3d 689, 705 (10th Cir. 2014) (citing Ames v. Sundance State Bank (In re Ames), 973 F.2d 849, 851 (10th Cir. 1992)); In re Sohrakoff, 85 B.R. 848, 850 (Bankr. E.D. Cal. 1988); In re Bircher, 241 B.R. 11, 14 (Bankr. S.D. Iowa 1999); Integra Bank, N.A. v. Ross (In re Ross), 270 B.R. 710, 714 (Bankr. S.D. Ill 2001).

The debtors' motion makes no effort even to discuss eligibility for chapter 12 relief. The motion does not contain evidence about the nature and extent of the debtors' business. While the objection states that the debtors are "manufacturing . . . cages and . . . raising . . . chinchillas," that is not evidence and is certainly not admissible evidence as the objection is not supported by a declaration. The court does not have a declaration from anyone about the nature and extent of the debtors' business. The declaration in support of the motion states nothing about the debtors' eligibility for chapter 12 relief.

The motion will be denied also because the debtors have not met their burden of persuasion on plan feasibility. As pointed out by the bank, Schedule J lists negative monthly net income of $2,893.77. The income listed in Schedule I is $4,564.07 and the expenses listed in Schedule J are $7,457.84.

While the debtors' declaration in support of the instant motion does not deny that the debtors' current monthly income is only $4,564.07, the declaration states that the debtors anticipate their business income to increase by $2,250 a month, making their total monthly income $6,814.07. Docket 26 at 2.

But, the debtors' declaration does not explain how or why their monthly income will increase by $2,250 a month. The court and the creditors are left to speculate about this.

Also, in stating that the debtors "anticipate an increase in monthly revenue of $2,250," the debtors appear to be speculating themselves. Docket 26 at 2. This anticipation does not have any factual basis. And, by merely "anticipating", the debtors are admitting that their income has not increased by $2,250 yet. The court cannot confirm a plan proposed on the mere anticipation of income.

Further, the debtors claim that their monthly expenses will decrease to $6,311.19 after stripping down their home mortgage and obtaining plan confirmation. Such reduced expenses are $1,146.65 less than the $7,457.84 of expenses reported in Schedule J. The debtors contend that the decrease of $1,146.65 in monthly expenses will consist of a reduction of $10 in their electricity and heating utility bills (from $368 to $358) and a reduction in their mortgage payments from $1,809 to $672.35 (a decrease of $1,136.65). The plan proposes to have the mortgage on the property stripped down from approximately $222,000 to $135,000, reamortizing the loan to 30 years at 4.35% interest, with monthly payments of $672.35.

However, assuming the debtors are successful at stripping down the mortgage claim to $135,000 and paying it over 30 years at 4.35%, the monthly payments of $672.35 will pay only the mortgage on the property. There is no provision in the plan for the payment of any property taxes or insurance on the property.

The reported mortgage amount of $1,809 in Schedule J included taxes and insurance on the property. The "Yes" boxes for taxes and insurance on the property are checked in Schedule J. Yet, there is no taxes or insurance payment included with the proposed new mortgage payment of $672.35.

Given the foregoing, the plan is not feasible and is therefore unconfirmable. This motion will be denied.

5. 13-25330-A-12 PAUL MENNICK — MOTION TO CONFIRM CHAPTER 12 PLAN
WW-4 — 4-2-14 [103]

Tentative Ruling: The debtor asks the court to confirm his second amended chapter 12 plan filed on April 2, 2014. Subject to hearing from any parties in interest at the April 14 hearing, the court will confirm the plan.

6. 14-20348-A-11 JOE/CAROL MOBLEY — MOTION FOR RELIEF FROM AUTOMATIC STAY
KMR-1 — 3-27-14 [39]
DEUTSCHE BANK NATIONAL TRUST CO. VS.

Tentative Ruling: The motion will be granted.

The movant, Deutsche Bank National Trust Company, seeks relief from the automatic stay as to a real property in Rescue, California.

The debtors oppose the motion, contending that the movant has not met its burden of persuasion as to the value of the property. The movant has filed a reply.

As noted by the debtors, 11 U.S.C. § 362(g) provides that:

"In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues."

In other words, the moving creditor has the burden of persuasion as to the value of and lack of equity in the property while the debtors have the burden of persuasion as to necessity to an effective reorganization. United Sav. Ass'n of Texas v. Timbers of Inwwod Forest Assocs., Ltd., 484 U.S. 365, 375 (1988). The standard in a chapter 11 proceeding is a showing that "the property is essential for an effective reorganization that is in prospect." This means, that there must be "a reasonable possibility of a successful reorganization within a reasonable time." Timbers at 376. While bankruptcy courts demand a less detailed showing during the four months of exclusivity, "even within that period[,] lack of any realistic prospect of effective reorganization will require § 362(d)(2) relief." Timbers at 376.

The movant asserts that the property has a value of $600,000 based on the debtors' valuation of the property in Schedule A.

The debtors argue though that the property cannot have a value of $600,000 because someone made an offer on January 7, 2014 to purchase the property for $705,000. The debtors also argue that they cannot determine whether the property is necessary to an effective reorganization until there is "proper valuation of the Property."

The movant has established that the value of the property is $600,000, based on the debtors' statement in Schedule A. Under the Federal Rules of Evidence, the debtors' statement of value in Schedule A is not hearsay and can be used as evidence against the debtors. See Fed. R. Evid. 801(d)(2)(A), 802. That is precisely what the movant has done here. In Schedule A, the debtors have stated under the penalty of perjury that as of the petition date, January 15, 2014 - less than 2.5 months before this motion was filed - the value of the property was $600,000. This is admissible and sufficient evidence to establish that there is no equity in the property, given that the movant's claim totals approximately $965,029.

The present assertion that the debtors do not know now what is the value of the property and that its value is more than $600,000, contradicts their earlier statement in Schedule A that the property has a value of $600,000.

The court does not consider the passage of two to four months as significant in affecting the value of the property. Stated differently, the passage of time since the petition date does not explain the debtor's change in position as to the value of the property.

The court rejects the debtors' assertion that the property has a value of more than $600,000. That assertion is based on inadmissible and inadequate evidence. The assertion is based on a $705,000 offer for the purchase of the property.

However, that offer is hearsay. Fed. R. Evid. 802. The court does not have a declaration from the person who made the offer, authenticating the offer that is submitted with the debtors' opposition.

Morever, even if the court had admissible evidence of the $705,000 offer, the fact that someone has made an offer to purchase the subject property for $705,000 is not persuasive evidence that the property indeed has a value of more than $600,000. For appraisal purposes, only closed sales are adequate evidence of value. No appraiser would ever base valuation of a real property on mere offers for the purchase of that property. Making an offer to purchase a home is easy. Closing escrow on a contract, however, is what really reflects the value of the property.

More important, the court notes that the $705,000 offer was made on January 7, 2014, eight days prior to the filing of this case on January 15, 2014. Ex. B, Docket 50. The debtors signed their declaration concerning schedules under the penalty of perjury on January 15, 2014. Docket 1.

Hence, under the penalty of perjury, the debtors stated that the value of the subject property is $600,000, even though they had received a $705,000 offer for the property, just eight days prior. And, the debtors have the audacity to ask the court to ignore now their $600,000 valuation in Schedule A, but recognize a higher valuation based on the $705,000 offer that should have influenced their valuation in Schedule A at the inception of the case.

As the debtors did not consider the $705,000 offer important enough to take it into account when valuing the property in Schedule A, the court also finds the offer unhelpful and inadequate in establishing the property's value.

Finally, even if the court had admissible and adequate evidence that the property has a value of $705,000, consistent with the $705,000 offer, there is still no equity in the property. The movant's claim totals approximately $965,029.

Based on the foregoing, the movant has established that there is no equity in the property.

On the other hand, the debtors have not carried their burden of proof that the property is necessary to an effective reorganization. They state simply that they do not know if the property is necessary to an effective reorganization because they do not know whether there is equity in the property.

The court does not have any evidence tending to show that there is any equity in the property. On the contrary, the $705,000 offer proffered by the debtors - even if admissible and adequate evidence of value - tends to indicate that the movant is still undersecured by approximately $260,000. And, Schedule A unequivocally states that "Debtor intends on short-sailing [*sic*] the property."

The debtors' intent to short sell property equates to liquidation without the expectation of receiving any proceeds from the sale. That is why short-sales must be approved by the mortgagee(s). Also, the court has no evidence in the record that the movant is willing to approve a short-sale with a carve-out for the estate. The debtors will not be receiving any proceeds from a short-sale,

assuming the movant approves such a sale. The court then is not convinced that the property is necessary to an effective reorganization.

The motion will be granted pursuant to 11 U.S.C. § 362(d)(2) to permit the movant to conduct a nonjudicial foreclosure sale and to obtain possession of the subject property following sale. No other relief is awarded.

The court determines that this bankruptcy proceeding has been finalized for purposes of Cal. Civil Code § 2923.5 and the enforcement of the note and deed of trust described in the motion against the subject real property. Further, upon entry of the order granting relief from the automatic stay, the movant and its successors, assigns, principals, and agents shall comply with Cal. Civil Code § 2923.52 et seq., the California Foreclosure Prevention Act, to the extent it is otherwise applicable.

Because the movant has not established that the value of its collateral exceeds the amount of its secured claim, the court awards no fees and costs in connection with the movant's secured claim as a result of the filing and prosecution of this motion. 11 U.S.C. § 506(b).

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will not be waived. That period, however, shall run concurrently with the 7-day period specified in Cal. Civ. Code § 2924g(d) to the extent section 2924g(d) is applicable to orders terminating the automatic stay.

7. 12-33158-A-12 GREG HAWES — MOTION TO DISMISS CASE 2-6-14 [151]
JPJ-1

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

The chapter 12 trustee moves for dismissal because the debtor has failed to prosecute this case.

The debtor opposes the motion, stating that he will be filing "a new plan prior to the date of this hearing to resolve the issues addressed in the Trustee's Motion."

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

This case was filed on July 17, 2012. The last plan in the case was filed on August 20, 2012, over 1.5 years ago. Docket 42. The only hearing on plan confirmation was held on October 1, 2012. Dockets 76 & 82. The court denied confirmation and the debtor has filed no other plan with the court.

The court also notes that the debtor's response to the instant motion is not supported by any evidence and the response does not explain why the debtor has not obtained confirmation of a plan during the 20-month duration of this case. This amounts to unreasonable delay that is prejudicial to creditors, which is cause for dismissal. Accordingly, the motion will be granted and the case will be dismissed.

8. 12-33158-A-12 GREG HAWES
SAC-13

MOTION TO
CONFIRM CHAPTER 12 PLAN
3-12-14 [158]

Tentative Ruling: The motion will be denied without prejudice.

The debtor is asking the court to confirm his chapter 12 plan filed on March 12, 2014. As the court is not granting the debtor's valuation motions, it cannot confirm the plan. This motion will be denied.

9. 12-33158-A-12 GREG HAWES
SAC-7
VS. BANK OF AMERICA, N.A.

MOTION TO
VALUE COLLATERAL
1-28-13 [87]

Tentative Ruling: The motion will be denied without prejudice.

This motion has been assigned a docket control number of a motion that was filed originally over a year ago on January 28, 2013 and was dismissed by the debtor on June 28, 2013, after several continuances and further briefing. Docket 134; Dockets 87-134. When the debtor filed the instant motion, he did not file another motion or further evidence in support of the motion. Rather, he filed only an amended notice of hearing with the docket control number for the motion filed on January 28, 2013. Docket 168.

Assuming the debtor is seeking the valuation of his primary residence in Palo Cedro, California, in an effort to strip down the first mortgage on the property held by Bank of America, as sought in the original motion with DCN SAC-7, the evidence filed by the debtor about the value of the property with the original motion is stale and outdated. This is especially true as property values in California have recovered significantly from a year ago.

Moreover, the evidence of value submitted with the original motion, claiming that the property is worth $550,000, is as of July 17, 2012, when the case was filed. In other words, the asserted value for the property with this motion is approximately 21 months old. The court takes judicial notice of the fact that real property values in California have increased dramatically since July 2012. Fed. R. Evid. 201(c).

Given that this case has been pending without a confirmed plan for 21 months already and that many courts have taken the position that valuation of claims should be as of the plan confirmation and not the petition date, the court will not allow the debtor to value the property as of the petition date.

"Although the amount of a creditor's claim is fixed at the petition date, there is nothing to indicate that the value of the claim must also be determined at the petition date. Since modification of claims occurs only through debtors' plans, it is at confirmation that the bankruptcy court considers whether proposed modifications comply with requirements for confirmation. Thus, it may be entirely appropriate to value a claim at the time of plan confirmation. (Citations omitted).

"[E]ven though the bankruptcy court's rationale for valuing BAC's claim at confirmation was reasonable, the interpretation of § 1123(b)(5) as setting the determination of whether a claim is protected from modification at the date of confirmation is flawed. That approach improperly shifts the time for fixing a creditor's claim from the petition date to some future valuation date. It conflates the analysis of whether a creditor *holds a claim* with a determination of the *value* of that claim. The value of BAC' claim, whether it is secured or

unsecured, is a distinct issue from whether BAC's claim is secured by the Debtors' principal residence."

BAC Home Loans Servicing, LP v. Abdelqadir (In re Abdelqadir), 455 B.R. 896, 902 (B.A.P. 9th Cir. 2011) (distinguishing between the time for fixing the amount of a claim and the time for valuing a claim and holding, on the other hand, that the appropriate time for determining whether the property is the debtor's principal residence is the petition date); Benafel v. One West Bank (In re Benafel), 461 B.R. 581, 587 (B.A.P. 9th Cir. 2011) (citing Abdelqadir with approval and recognizing that valuing a claim at plan confirmation is correct); In re Gutierrez, 503 B.R. 458, 462-63 (Bankr. C.D. Cal. 2013); In re Schayes, 483 B.R. 209, 214-15 (Bankr. D. Ariz. 2012); see also Mariners Inv. Fund, LLC v. Delfierro (In re Delfierro), Case No. WW-11-1249-KiJuH, WL 1933316, at *1 (B.A.P. 9th Cir. May 29, 2012); Wages v. J.P. Morgan Chase Bank, N.A. (In re Wages), Case No. ID-12-1397-JuKiKu, WL 1133924, at *3 (B.A.P. 9th Cir. Mar. 7, 2014).

In short, the debtor should file a new valuation motion with current evidence of value for the property. This motion will be denied.

10. 12-33158-A-12 GREG HAWES — MOTION TO VALUE COLLATERAL
SAC-8
VS. BANK OF AMERICA, N.A. — 1-28-13 [95]

Tentative Ruling: The motion will be denied without prejudice.

As the court is denying the debtor's related valuation motion on this calendar, DCN SAC-7, it will deny this motion as well, given that it pertains to the same property and this motion has the same issues identified in connection with the other valuation motion. The ruling on the other valuation motion is incorporated here by reference.

11. 14-21371-A-12 JEREMIAH/HOLLY HARPER — MOTION FOR RELIEF FROM AUTOMATIC STAY
JM-1
NAEDA FINANCIAL, L.L.C. VS. — 3-25-14 [18]

Tentative Ruling: The motion will be granted in part.

The movant, Naeda Financial, LLC, seeks relief from the automatic stay under both 11 U.S.C. § 362(d)(1) and (d)(2) with respect to two pieces of farming equipment, a 2010 Sweco Rice Ridger and 2011 Sweco 40 x 20 Triplane. In the alternative, the movant asks the court to order adequate protection payments.

The debtors oppose the motion, contending that there is equity in the equipment and that the equipment is necessary to an effective reorganization. On the other hand, the debtors welcome making adequate protection payments to the movant. The movant has filed a reply.

The court will deny relief under 11 U.S.C. § 362(d)(2) as the movant has not established that there is no equity in the equipment. According to the movant, the Ridger has a value of $4,500 while the claim secured by the Ridger totals $3,972.69 and the Triplane has a value of $16,000 while the claim secured by the Triplane totals $15,229. Docket 20.

Even though the equity in the equipment is minimal, that equity disqualifies the movant from relief under 11 U.S.C. § 362(d)(2).

As to cause and lack of adequate protection under 11 U.S.C. § 362(d)(1), the

court agrees with the movant that the equipment is declining in value as it is being used by the debtors in their farming operation. Consequently, the court will order adequate protection payments to be made to the movant, until the debtors obtain plan confirmation.

For the Ridger, the court will order the debtors to make monthly adequate protection payments in the amount of $150. For the Triplane, the court will order the debtors to make monthly adequate protection payments in the amount of $580. Such payments shall start in May 2014. Each payment shall be due no later than the fifth day of each month. The debtors shall make each payment separately and shall indicate with each payment which of the two loans is being paid. If the movant does not receive an adequate protection payment by the tenth day of the month, the movant may apply ex parte for an order granting relief from stay without a hearing. The application shall be supported by a declaration establishing all factual assertions. The motion will be granted in part.

12. 11-44274-A-11 GEOFFREY/MARIVIE FABIE — MOTION TO APPROVE DISCLOSURE STATEMENT 3-15-14 [327]
LP-10

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

The debtors should note, however, that they have not submitted an order on their motion pertaining to the stripping down and stripping off of the first and second mortgages, correspondingly, on the real property in Georgetown, Texas (DCN LP-7). See Docket 251.

13. 14-20583-A-11 LARRY JENT — STATUS CONFERENCE 1-23-14 [1]

Tentative Ruling: None.

14. 14-22884-A-11 RAYMOND/ROSA KING — STATUS CONFERENCE 3-21-14 [1]

Tentative Ruling: None.