

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge
Modesto, California

May 22, 2014 at 3:30 p.m.

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1. [13-90901](#)-E-12 ANDREW NAPIER STATUS CONFERENCE RE: VOLUNTARY
PETITION
5-9-13 [[1](#)]

Debtor's Atty: Scott A. CoBen

Notes:

Order Setting Post-Confirmation Status Conference filed 4/8/14 [Dckt 211]

[JPJ-1] Trustee's Motion to Dismiss Case filed 4/8/14 [Dckt 206], set for hearing 5/22/14 at 10:30 a.m.

2. [11-94224](#)-E-11 EDWARD/ROSIE ESMAILI CONTINUED CONFIRMATION OF
RHS-1 AMENDED PLAN OF REORGANIZATION
FILED BY DEBTORS
9-13-13 [[339](#)]

CONT. FROM 4-10-14, 3-6-14, 1-16-13

Tentative Ruling: The Confirmation of Amended Plan of Reorganization 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 Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, all creditors, and Office of the United States Trustee on November 14, 2013. By

May 22, 2014 at 3:30 p.m.

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the court's calculation, 63 days' notice was provided.

The Motion to Confirm Plan of Reorganization 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 court's decision is to deny confirmation of the Amended Plan of Reorganization.

PRIOR HEARING

The Debtors in Possession and BBCN have not resolved their dispute. BBCN has voted against the proposed amended Plan and there is no impaired class of claims voting to confirm. The Proposed Plan improperly excludes BBCN from voting in Class 7, purporting to treat its unsecured claim as part of Class 2.

DISCUSSION

The Plan Proponent has complied with the Service and Filing Requirements for Confirmation:

- 11-15-13 Plan, Disclosure Statement, Disc Stmt Order, and Ballots Mailed
- 12-16-13 Last Day for Submitting Written Acceptances or Rejections
- 12-16-13 Last Day to File Objections to Confirmation
- 12-30-13 Last Day to File Replies to Objections, Tabulation of Ballots, Proof of Service

Tabulation of Ballots Filed 1/15/14:

Class	Voting	Ballot Percentage Calculation	Claim Percentage Calculation
1 - IRS	For: 0 Against: 0		
2 - BBCN	For: 0 Against: 1	100% against	100% against
3 - Bank of America, N.A.	For:0 Against:0		
4 - Key Bank, N.A.	For:0 Against:0		
5- Wells Fargo Bank, N.A.	For:0 Against:1	100% against	100% against

6 - Wells Fargo Bank, N.A.	For:0 Against:1	100% against	100% against
7 - General Unsecured	For: 1 Against: 0	100% for	100% for
8 - Debtors' ownership interests	For: 0 Against: 0		

At the hearing, the Debtors in Possession advised the court that only one ballot, for a \$2,000.00 general unsecured claim was filed voting for the Plan. Four other ballots voting no were filed for classes of secured claim. One Creditor, BBCN, asserts that it also has a general unsecured claim for hundreds of thousands of dollars which would swamp the one \$2,000 claim. No ballot was returned by BBCN for the general unsecured claim.

EVIDENCE

The declaration of Edward Esmaili was filed in support of confirmation providing evidence of the compliance with the necessary elements for confirmation in 11 U.S.C. § 1129. Dckt. 410.

OPPOSITION

Wells Fargo Bank, N.A. (Kay Circle Property)

Wells Fargo Bank, N.A., holding a first priority deed of trust against the real property commonly known as 1153 Kay Circle, Turlock, California, objects to the plan on the basis that it fails to comply with 11 U.S.C. § 1129(a)(11). Creditor states that while Debtors address how they intend to pay post-confirmation property taxes and insurance but have failed to address if they intend to pay the post-petition, pre-confirmation tax and insurance advances made by Creditor.

Creditor also argues that it is unclear if the rental properties listed by Debtors are income generating properties. If so, Debtors need to disclose which properties do and why Debtors should be allowed to retain and subsidize a negative cash flow property instead of surrendering it.

Lastly, Creditor states Debtors' Amended Plan cannot be confirmed on the grounds that the Debtors appear to have commingled Secured Creditor's cash collateral and/or used Wells Fargo's cash collateral without obtaining Wells Fargo's consent or prior Court approval. According to monthly operating report for month ending November 30, 2013, the cumulative (Case to Date) rents/leases collected is \$29,200.00. The bank account statement (account ending 8493) attached to the MOR where the rental income of \$1,100.00 appears to have been deposited, shows a beginning balance of \$761.83 and ending balance of \$559.65. Creditor argues that Debtor should explain and account for all of Creditor's cash collateral.

Creditor withdrew its opposition on April 3, 2014, Dckt. 453.

Wells Fargo Bank, N.A. (Aldersgate Property)

Wells Fargo Bank, N.A., holding a first priority deed of trust against the real property commonly known as 2281 Aldersgate, Turlock, California, objects to the plan on the basis that it fails to comply with 11 U.S.C. § 1129(a)(11). Creditor states that while Debtors address how they intend to pay post-confirmation property taxes and insurance but have failed to address if they intend to pay the post-petition, pre-confirmation tax and insurance advances made by Creditor.

Creditor also argues that it is unclear if the rental properties listed by Debtors are income generating properties. If so, Debtors need to disclose which properties do and why Debtors should be allowed to retain and subsidize a negative cash flow property instead of surrendering it.

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Creditor withdrew its opposition on April 3, 2014, Dckt. 451.

BBCN Bank

Creditor BBCN Bank, successor in interest by merger with Nara Bank, objects to Debtors' Plan because it fails to contribute all of the Debtors' post-petition earnings to fund the plan and because the plan violates the absolute priority rule.

As explained in the Plan, the Bank holds a claim of \$130,000 as either an administrative claim or a secured claim. If the Bank's claim is allowed as an administrative claim, it will allegedly be paid on the Effective Date. If it is merely secured, it will be paid over ten years. Additionally, the Bank holds a general unsecured claim of \$677,057 which should fall into Class 7. It is not clear why the Debtors have placed secured and unsecured classes in the same class or whether this is even proper.

Creditor argues that the Plan only provides for payment of 20% to unsecured claims, yet the numbers provided by the Debtors indicate that they can contribute far more. Creditors state the Debtors claim a monthly net income of \$18,724 but only propose to pay \$14,110 into the Plan; a monthly disparity of \$4,614 that should also be paid to creditors. Furthermore, Creditor objects to several of the monthly expenses identified by the Debtors, including depreciation of \$1,365.00; administrative expense of \$10,421; equipment repairs of \$2,348; fees and charges of \$1,145; and professional fees of \$1,161. Creditor states that these are not explained and are not supported by any documentation whatsoever. Neither the Plan nor the accompanying Disclosure Statement attaches a single exhibit to support

the business expenses claimed by the Debtors. Moreover, the Debtors provide themselves with a \$6,000 monthly draw with no discussion of their monthly expenses whatsoever even though this case is an individual Chapter 11 case.

CONTINUANCE

The Debtors-in-Possession did not provide a tabulation of ballots in support of plan confirmation. Furthermore, the Debtors-in-Possession did not provide evidence in support of confirmation.

The court continued the Confirmation Hearing to allow the Debtors in Possession and BBCN Bank (the one remaining objecting creditor) to address the true underlying economic issues for the treatment of this claim. The Debtors in Possession and Wells Fargo Bank, N.A. advised the court and parties in interest that the Wells Fargo objection had been resolved. The Debtors in Possession will propose plan amendments for the surrender of the collateral to Wells Fargo Bank, N.A.

AMENDED PLAN OF REORGANIZATION

On March 31, 2014, Debtors-in-Possession filed an Amended Plan of Reorganization. Dckt. 447. The Amended Plan states that Creditor BBCN has agreed to different treatment, namely payment within 45 days of the Effective Date of the Plan. The plan also allows Creditor Wells Fargo Bank, N.A. to exercise its contractual rights under state law of their claims against the real properties in the estate.

However, it has not resolve the objection and the no votes of BBCN against confirmation.

No supplemental pleadings or documents have been filed to date.

3. [14-90538-E-11](#) REYES DRYWALL, INC.

STATUS CONFERENCE RE: VOLUNTARY
PETITION
4-14-14 [[1](#)]

Debtor's Atty: David C. Johnston

Notes:

Operating Report filed: 4/21/14

Debtor's Chapter 11 Status Report filed 5/2/14 [Dckt 22]

Meeting of creditors scheduled for 5/19/14 at 11:00 a.m.

xxx

STATUS CONFERENCE SUMMARY - MAY 22, 2014

The Debtor in Possession reports that due to the economic slowdown in construction and real estate, the Debtor's business suffered. However, for 2012 the gross revenues were \$860,768 and for 2013 the gross revenues were \$1,258,971. For the first four months of 2014 (identified to be the slowest season for the Debtor's business) the gross revenues were \$330,720.

The Debtor in Possession that the present financial difficulties also stem from a lawsuit filed by the Debtor against a general contractor to obtain the final retention payment and additional delay damages. A cross claim was filed and an assertion made that the Debtor's construction license did not allow it to do some of the work under the subcontract.

SUMMARY OF SCHEDULES

Real Property Schedule A	FMV	LIENS	
None			

Personal Property Schedule B	FMV	LIENS	
Bank Accounts	\$2,800		
Accounts Receivable	\$10,000		
Claim Against Tricorp Construction	\$160,000		
Claim Against West Bay Builders	\$121,000		
Vehicles	\$7,000		
Office Equipment	\$1,000		
Machinery, Equipment	\$4,500		

Secured Claims Schedule D	TOTAL CLAIM AMOUNT	FMV	UNSECURED CLAIM PORTION
None			

PRIORITY UNSECURED CLAIMS SCHEDULE E	TOTAL CLAIM AMOUNT	PRIORITY	GENERAL UNSECURED
California Employment Development Department	(\$76,000)	(\$60,000)	(\$16,000)
Internal Revenue Service	(\$230,000)	(\$200,000)	(\$30,000)

GENERAL UNSECURED CLAIMS SCHEDULE F	TOTAL CLAIM AMOUNT	GENERAL UNSECURED
	(\$157,401)	
American Express Bank, FSB		(\$3,600)
District Counsel 16 No. Cal. Health & Welfare Trust Fund		(\$153,801)
Proof of Claim Filed by Tricorp Construction, Inc.		(\$427,206)

Statement of Operations, Balance Sheet, and Cash Flow (Dckt. 15)	January 1, 2014 - April 21, 2014	
Total Expenses	(\$317,855)	
Payroll Expense	(\$273,060)	
Professional Fees	(\$15,713)	
Union Fees	(\$4,406)	
Old Tax Debt	(\$6,576)	

STATEMENT OF FINANCIAL AFFAIRS

Question 1 Income

	Gross Income	Net Income
2014 YTD	\$330,270	(\$44,381)
2013	\$900,000	\$0 (unknown losses)
2012	\$860,768	\$5,438

Question 2 Non-Business Income

2014 YTD	None	
2013	None	
2012	None	

Question 3 Payments within 90 days

Creditor	Amount	Date
None ("All payments made in ordinary course of business. No payments of antecedent debts.")	Response is incomplete - requires disclosure of all transfers within 90 days aggregating in excess of \$6,225, not merely those asserted by DIP to not be in ordinary course of business or for antecedent debts.	

Payments within one year

Creditor	Amount	Date
Dennis Reyes (Officer, Shareholder)	\$90,000	Monthly Salary Total for Year

Debtors' Atty: Nelson F. Gomez

Notes:

Continued from 3/27/14

MARCH 27, 2014 STATUS CONFERENCE

The Debtors in Possession reported that all required payments have been made to the creditor with the one secured claim.

SUMMARY OF SCHEDULES

I. Schedule A - Real Property

- A. 5001 East Monte Vista
 - 1. Value.....\$ 65,000
 - 2. Liens.....(\$186,948)

II. Personal B - Personal Property

- A. \$34,094.00
 - 1. Nursery Inventory.....\$ 3,500
 - 2. Three Vehicles.....\$29,020
 - 3. Business Equip.....\$ 3,200
 - 4. Cash/Bank Accts.....\$ 474

III. Schedule D - Secured Claims

- A. IndyMac Mortgage Services
 - 1. Monte Vista Property....(\$186,948)

IV. Schedule E - Priority Unsecured

- A. None

V. Schedule F - General Unsecured

- A. (\$504,672)
 - 1. Saxon Mortgage Service.....(\$374,239)
 - 2. GMAC Mortgage.....(\$ 93,596)
 - 3. J&L Teamworks.....(\$ 30,056)

VI. Schedule I - Income

- A. \$5,305 (Gross)
 - 1. Operation of Business.....\$3,865
 - 2. Contrib. From Daughter.....\$1,440

VII. Schedule J - Expenses

A. (\$4,518)

- 1. Mortgage/Rent.....(\$1,440)
- 2. Property Taxes.....(\$ 110)
- 3. Home/Renter Insurance.....(\$ 0)
- 4. Business Expenses.....(\$1,664)
- 5. Food.....(\$ 400)

SUMMARY OF STATEMENT OF FINANCIAL AFFAIRS

I. Question 1 - Income From Employment or Business

- A. 2012.....\$19,809
- B. 2011.....\$21,929
- C. 2010.....\$13,212

II. Question 2 - Other Income

- A. 2012.....None
- B. 2011.....None
- C. 2010.....None

5. [13-91588-E-12](#) MARY JO MEIRINHO

CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
8-29-13 [[1](#)]

Final Ruling: No appearance at the May 22, 2014 Status Conference is required.

The court having dismissed the Chapter 12 case pursuant to the Motion of the Debtor in Possession after noticed hearing, **the Status Conference is removed from the calendar.**

Debtor's Atty: Scott A. CoBen

Notes:

Continued from 4/10/14 to be heard in conjunction with motion to confirm plan

Request for Dismissal Without Prejudice filed by Debtor 4/22/14 [Dckt 118], court set for hearing 5/22/14 at 10:30 a.m.

Declaration of Tim Byrd in Response to Order Setting Hearing on Debtor in Possession's Request for Dismissal Without Prejudice filed 5/12/14 [Dckt 123]

6. [13-91588-E-12](#) MARY JO MEIRINHO
SAC-3

CONTINUED MOTION TO CONFIRM
CHAPTER 12 PLAN

Final Ruling: No appearance at the May 22, 2014 hearing is required.

The Motion to Confirm Chapter 12 Plan is dismissed without prejudice.

On May 22, 2014, the court granted the Debtor in Possession's Motion to Dismiss the Chapter 12 case. This was after the court noticed a hearing on the Motion and provided the Chapter 12 Trustee, U.S. Trustee, Creditors, and other Parties in Interest to file Responses to the Motion. Other than the Debtor in Possession providing a Supplemental Declaration, no Opposition to the Motion to Dismiss were filed.

The court having ordered the case dismissed, the Motion to Confirm the Plan is rendered moot. The court dismisses the Motion 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 Confirm Chapter 12 Plan filed by the Debtor in Possession having been presented to the court, the Chapter 12 case having been dismissed pursuant to the Motion of the Debtor in Possession after noticed hearing, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is dismissed without prejudice.