

**UNITED STATES BANKRUPTCY COURT**

Eastern District of California

**Honorable Ronald H. Sargis**

Chief Bankruptcy Judge

Modesto, California

**March 11, 2021 at 2:00 p.m.**

---

1. [20-90478-E-7](#)            **TRICIA DODSON**  
[20-9011](#)  
**ANDERSON LITFIN, INC. V.**  
**DODSON ET AL**

**CONTINUED STATUS CONFERENCE RE:**  
**COMPLAINT**  
**9-11-20 [1]**

<b>The Status Conference is <span style="color: red;">XXXXXXX</span></b>
--

**MARCH 11, 2021 STATUS CONFERENCE**

On March 3, 2021, this court entered an order appointing Estela Pino, Esq., as the Bankruptcy Dispute Resolution Program (“BDRP”) Mediator. Dckt 27. That appointment was pursuant to a stipulation filed by counsel for Plaintiff and the Defendant-Debtor and Defendant-Spouse in *pro se* on March 2, 2021.

No updated Status Reports have been filed and no recommendations have been made concerning any continuance of the Status Conference and the scheduling for the BDRP Mediation. At the Status Conference, XXXXXXX

**JANUARY 28, 2021 STATUS CONFERENCE**

At the Status Conference, counsel for the Plaintiff reported that he will not be pursuing an equitable lien or trust in the adversary proceeding, and file just an unsecured claim in the bankruptcy case.

With respect to the property in which the equitable lien or constructive trust is asserted and whether the Chapter 7 Trustee is a necessary party, Plaintiff is addressing that with counsel for the Trustee.

Additionally, Plaintiff noted a typo in the Complaint, page 3, reference is made to the damage claim is from August 8, 2018 to October 2018. The time period commences actually September 2012, not in 2018.

Plaintiff’s counsel suggested continuing the Status Conference one more time to allow Defendant-Debtors to get their counsel in place, if they can get them in place.

**March 11, 2021 at 2:00 p.m.**

## **DECEMBER 17, 2020 STATUS CONFERENCE**

At the Status Conference, the parties requested a continuance. The two Defendants and Plaintiff discussed possible mediation. Defendants advised the court that they were attempting to re-engage counsel, and that in January 2021 Defendant William Dodson would likely be filing bankruptcy too.

### **SUMMARY OF COMPLAINT**

The Complaint filed by Anderson Litfin, Inc. (“Plaintiff”), asserts claims for nondischargeability of obligations owed by Tricia Dodson and William Dodson, the “Defendant Debtor” and William Dodson, the non-debtor “Defendant-Spouse.” In the First Claim for Relief, it is asserted that Defendant-Debtor was Plaintiff’s bookkeeper and in that position engaged in fraudulent conduct which caused damages of at least \$360,547.17 to Plaintiff. It is alleged that such damages are nondischargeable as provided in 11 U.S.C. § 523(a)(2)(A) and (B)(i)-(iv).

In the Second Claim for Relief, it is asserted that the damages caused by Debtor’s conduct are nondischargeable pursuant to 11 U.S.C. § 523(a)(4) and in the Third Claim for Relief that the damages are nondischargeable as provided in 11 U.S.C. § 523(a)(6).

In the Fourth Claim of Action Plaintiff seeks to recover attorney’s fees and costs. No specific basis for a right to attorney’s fees is stated. However, as provided in Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054, a request for attorney’s fees is made pursuant to a post-judgment motion.

In the Fifth Claim for Relief, Plaintiff seeks to assert an equitable lien or constructive trust against certain real property in Stanislaus County.

Further, in the Sixth Claim for Relief, Plaintiff asserts that the obligations at issue are community claims and are nondischargeable as to the non-debtor Defendant-Spouse. 11 U.S.C. § 524(a)(3).

### **SUMMARY OF ANSWER**

Tricia Dodson (“Defendant-Debtor”) and William Dodson (“Defendant-Spouse”) have filed an EDC Form Answer (Dckt. 13), denying each and every allegation of the Complaint, other than the procedural facts regarding the filing of the bankruptcy petition by Defendant-Debtor.

### **FINAL BANKRUPTCY COURT JUDGMENT**

Plaintiff alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 (by reference in citing to 28 U.S.C. § 157) and 157(b)(2), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E), (I), and (J). Complaint ¶ 4, Dckt. 1. In the Answer, Defendant-Debtor and Defendant-Spouse do not admit the allegations of jurisdiction and that this is a core proceeding.

The First Claim for Relief pursuant to 11 U.S.C. § 523(a)(2)(A) and (B), the Second Claim for Relief pursuant to 11 U.S.C. § 523(a)(4), the Third Claim for Relief pursuant to 11 U.S.C. § 523(a)(6), the Sixth Claim for Relief pursuant to 11 U.S.C. § 523(A)(3), and the related requests for attorneys’ fees in the

Fourth Claim for relief are core matter proceedings arising under the Bankruptcy Code for which the bankruptcy judge issues the final orders and judgment.

The Fifth Claim for Relief is for an equitable lien or construct trust against property of the Debtor. Currently, that property is property of the bankruptcy estate in Defendant-Debtor's Chapter 7 case, 20-90478. No exemption is claimed in this property by Defendant-Debtor on amended Schedule C. 20-90478; Dckt. 24. On Schedule D Defendant-Debtor lists the property having a value of \$312,400 and being encumber by an obligation in the amount of (\$240,583.82). *Id.*; Dckt. 1 at 19.

2.	<a href="#"><u>20-90479-E-12</u></a>	<b>JOE MACHADO</b>	<b>MOTION TO CONFIRM CHAPTER 12 PLAN</b>
	<b>DCJ-3</b>		<b>1-12-21 <a href="#">[64]</a></b>
	<b>2 thru 3</b>		

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 12 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 12, 2021. By the court's calculation, 58 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(8) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1) (requiring fourteen days' notice for opposition).

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

<b>The Motion to Confirm the Amended Plan is denied.</b>
--

The Chapter 12 debtor, Joe Anthony Machado ("Debtor in Possession") seeks confirmation of the Chapter 12 Plan. The Plan is based on the sale of the farm and provides for the following:

- A. List the farm property for sale no later than December 3, 2021.
- B. Employ real estate broker no later than January 14, 2021.

- C. File a motion for sale of the farm property no later than February 28, 2021.
- D. Pay from the sale proceeds:
  - 1. Escrow fees and approved sale costs
  - 2. Approved real estate broker's fees
  - 3. Allowed claims "secured by the farm"
  - 4. Priority and administrative expenses
  - 5. Debtor's homestead exemption of \$175,000.00
  - 6. Balance if any to the general unsecured creditors.

Plan, Dckt. 66. 11 U.S.C. § 1223 permits a debtor to amend a plan any time before confirmation.

### **CREDITOR'S OPPOSITION**

American Farm Mortgage Company, Inc. ("Creditor") holding a secured claim filed an Opposition on February 23, 2021. Dckt. 88. Creditor opposes confirmation of the Plan on the basis that:

- A. Plan was not filed in good faith.
- B. Plan may not be feasible if Debtor in Possession fails to file Motion to Approve Sale of the farm.

### **TRUSTEE'S OPPOSITION**

The Chapter 12 Trustee, Michael Meyer ("Trustee"), filed an Opposition on February 25, 2021. Dckt. 92. Trustee opposes confirmation of the Plan on the basis that:

- A. Plan does not comply with the bankruptcy code because Debtor in Possession has failed to show that the sale is feasible.
- B. Debtor in Possession's Plan fails the Liquidation Test.

### **DISCUSSION**

#### **Cannot Comply with the Plan**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1225(a)(6). Here, Part IV of the Plan requires Debtor in Possession file a Motion to Sell the farm no later than February 28, 2021. *See* Plan, Part IV, Execution. Unfortunately, a review of the court's docket shows that DIP has failed to file such a motion and, thus, the property has not been sold as required by the Plan. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Debtor having failed to file the motion to approve the sale, the Plan does not comply with 11 U.S.C. §§ 1222 and 1225(a) and is not confirmed.

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

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

The Motion to Confirm the Chapter 12 Plan filed by Joe Anthony Machado (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

**AMERICAN FARM MORTGAGE  
COMPANY, INC. VS.**

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

-----

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 12 Trustee, parties requesting special notice, and Office of the United States Trustee on January 8, 2021. By the court's calculation, 34 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion for Relief from the Automatic Stay is XXXXX.**

American Farm Mortgage Company, Inc. ("Movant") seeks relief from the automatic stay with respect to Joe Anthony Machado's ("Debtor") real property commonly known as 620 Denton Road, Hickman, California and certain personal property collateral, including, without limitation, all water and water rights, ditch and ditch rights, and irrigation equipment ("Property").

Movant did not provide a declaration to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant alleges that at the time of the filing, there was a pending foreclosure of the real property.

## DISCUSSION

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 \$933,190.01 (Motion, at 2:20), while the value of the Property is determined to be \$2,600,000.00, as stated in Schedules A/B and D filed by Debtor.

### 11 U.S.C. § 362(d)(1): Grant Relief for Cause

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because “cause” is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff’d sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). 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. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

Here, Movant argues that cause exists to terminate the automatic stay because:

- 1) The Debtor will not be able to confirm a plan; and
- 2) The Debtor’s inaction and delays indicate that he filed his bankruptcy case in bad faith for the purpose of delaying his creditors.

Specifically, Movant argues that despite filing the Plan nearly two months ago, Debtor has not filed a motion to confirm the Plan or otherwise given notice of a hearing on confirmation of the Plan, which will not be completed within 45 after the filing of the Plan.

Movant points the court to *In re Three Tuns, Inc.* and *In re Novak* for the argument that courts have found that a debtor’s repeated or prolonged failure to propose a plan may support a finding that cause exists for granting relief from the automatic stay. *In re Three Tuns, Inc.*, 35 B.R. 110, 111 (Bankr. E.D. Pa. 1983); *In re Novak*, 103 B.R. 403, 411-412 (Bankr. E.D.N.Y. 1989).

As to Movant’s argument that Debtor filed the bankruptcy case in bad faith, Movant argues that at the time the Debtor filed his voluntary petition, Movant’s foreclosure with respect to the Property was pending, and to date Debtor has failed to confirm a plan and will not be able to do so within the time required by 11 U.S.C. § 1224.

Additionally, according to Movant, Debtor has not complied with the terms of the proposed Plan because the plan requires Debtor to have listed the real property for sale and file an *ex parte* motion to employ a real estate broker both no later than November 30, 2020. Debtor listed the property on December

4, 2020 and has not yet filed an application to employ a real estate broker. Thus, Debtor is in breach of the plan terms and this inaction further evidences Debtor's bad faith in filing the bankruptcy case.

A review of the case docket shows that subsequent to the filing of this Motion, Debtor filed First Amended Plan and corresponding Motion to Confirm on January 12, 2021. Dckts. 66, 64. Filing a new plan is a *de facto* withdrawal of the pending plan. The hearing on the motion has been set for 10:30 a.m. on February 11, 2021.

A review of the proposed plan shows that Movant holding a secured claim is listed under Class 4, and provides the following treatment:

American Farm Mortgage Company, Inc., ("AFMC"), the holder of the claim in this class, will be paid the full amount of its claim in the sum of \$933,190 as of the Petition Date (Claim 11-1) (the "AFMC Claim"), plus interest on said sum at the rate of 6.25% per annum from and after the Petition Date until paid in full. In addition to the foregoing amounts, AFMC shall be entitled to add all of its post-petition attorneys' fees and costs and post-petition foreclosure fees and costs to the balance of the AFMC Claim (collectively, the "AFMC Post-Petition Fees and Costs"), which shall likewise accrue interest at the rate of 6.25% per annum until paid. The entire AFMC Claim, including all AFMC Post-Petition Fees and Costs, plus interest thereon in accordance with the terms of this paragraph, shall be paid in full no later than April 30, 2021 (the "AFMC Payment Deadline"). Notwithstanding the foregoing or any other terms of this Plan, if the Debtor materially defaults under the plan (which shall specifically include, without limitation, any failure to comply with the terms set forth in Part IV: Execution of the Plan), all amounts required to be paid to AFMC in accordance with this paragraph shall become immediately due and payable without notice or demand. receive cash equal to the allowed amount of its claim, together.

The AFMC Claim, including all AFMC Post-Petition Fees and Costs, plus interest thereon in accordance with the terms of this Plan, shall continue to be secured by the Farm and any other collateral granted as security thereof, which shall be based on the same lien and lien priority that existed immediately prior to the Petition Date, without the need for recording a modification of any deeds of trust or other security instruments. Except as expressly modified by the Plan, all other terms of the loan documents that evidence the AFMC Claim shall remain in full force and effect without change.

Proposed First Amended Chapter 12 Plan, Dckt. 66, at 5-6.

Moreover, on January 14, 2021, Debtor filed a Motion to Employ a real estate broker. Dckt. 70. The hearing on the motion has been set for 10:30 a.m. on February 11, 2021. The Declaration of William Clark Segerstrom, who is the President of Segerstrom Real Estate, Inc., doing business as Coldwell Banker Segerstrom (the "Broker"), testifies that the real property will be listed for \$2.1 Million dollars. Dckt. 72.

The court finds that Debtor in Possession having filed an Amended Plan, Movant listed as a creditor with a secured claim to be paid in full plus interest at a 6.25% rate, the real property having been



listed, and a motion to employ a broker set for hearing on February 11, 2021, could be grounds to deny the relief requested.

At the hearing, Debtor in Possession's counsel requested that the hearing be continued to 2:00 p.m. on March 11, 2021. As discussed at the hearing and the related Status Conference in this case conducted at the same time, Movant expressed concern over the reasonableness of Debtor in Possession's efforts in marketing the property.

Counsel for the Debtor in Possession reaffirmed his efforts in working with the Debtor in Possession and the Broker for the commercially reasonable, in light of the defaults and outstanding debtor, marking of the Property. He will also revisit with the Debtor in Possession what personal property may be sold, reducing the amount of the obligations secured by the real property, increasing the potential for Debtor in Possession to recover all of the claimed \$175,000 homestead exemption.

### **March 11, 2021 Hearing**

By separate order the court has denied confirmation of the proposed Plan. It required that by February 28, 2021, a motion to sell property be filed. It has not been filed.

No updated Status Report has been filed by the Debtor in Possession. The last pleading filed in connection with this Motion was the Motion for Relief and Exhibits on January 8, 2021. The hearing was continued to March 11, 2021, to be head with the anticipated Motion to Confirm Plan.

At the hearing xxxxxxxx

<b>The Status Conference is <span style="color: red;">xxxxxxx</span></b>
--

**MARCH 11, 2021 STATUS CONFERENCE**

No updated Status Report has been filed by the Debtor in Possession. At the Status Conference, xxxxxxx

**FEBRUARY 11, 2021 STATUS CONFERENCE**

At the Status Conference, Counsel for the Debtor in Possession has employed the real estate broker, who is marketing the Property. The listing price has been reduced three (3) times, and is now listed at \$1,175,000. In addition, an agricultural property broker has been engaged.

The Chapter 12 Trustee reminded the court that the listing has been reduced to the \$1,175,000. The personal property is now stated to be \$126,000. Based on the 1031 exchange, as reported by Debtor, there will be around \$250,000 capital gains tax.

Debtor needs the Chapter 12 sale to address the capital gains taxes. The real property needs to be sold for \$1,650,000 to maximize the homestead exemption.

While it will be necessary to sell off the equipment under the Plan, there has been no broker hired. Debtor in Possession's counsel stated that the equipment is necessary to maintain the property while it is being marketed for sale. Counsel for the Debtor in Possession shall readdress with the Debtor in Possession what non-essential equipment may be sold, which will reduce the obligations secured by the real property, and provide the Debtor in Possession with some additional cushion in attempting to preserve the entire \$175,000 homestead exemption as noted by the Chapter 12 Trustee.

Creditor American Farm Mortgage's counsel expressed that the concern with Debtor has been his reluctance to sell the Property.

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

-----

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 7 Trustee as stated on the Certificate of Service on February 14, 2021. The court computes that 25 days' notice has been provided.

**The Order to Show Cause is XXXXX.**

**ORDER TO SHOW CAUSE**

This bankruptcy case was commenced as a Chapter 13 case by Lorraine Erwin and Gary Erwin (the "Debtors"), but converted to one under Chapter 7 on August 31, 2010. Order, Dckt. 92. On January 4, 2021, Lorraine Erwin, one of the two debtors in this case, filed an Application for Unclaimed Funds. Dckt. 240.

The amount of unclaimed funds requested to be paid to Lorraine Erwin is \$47,805.58. Application, § 1. The basis asserted in the Application for the payment of the \$47,805.58 is stated to be:

Claimant [Lorraine Erwin] is the Owner of Record entitled to the unclaimed funds appearing on the records of the court.

Application, § 2.

Though the Chapter 7 Trustee diligently attempted to disburse the \$47,805.58 to U.S. Bank, National Association, as trustee for the MSM 2006-14SL pass-through certificates ("Creditor"), this creditor filing allowed Proof of Claim 21-1 refused/failed to negotiate the Trustee's disbursement check. The court has conducted a detailed review of the check, the failure to negotiate, and the claim of Creditor. Dckt. 249.

Subsequent to Creditor's failure to negotiate the check, the Debtors filed an Objection to Proof of Claim No. 21-1. The court sustained the Objection, to which Creditor had not filed an opposition. Civil Minutes, Order; Dckts. 235, 237. As discussed in the Civil Minutes, the Objection arises out of a stipulation for the treatment of Creditor's claim when this case was being prosecuted under Chapter 13. In the Objection, Debtors objected to Proof of Claim 21-1, for which Creditor refused to cash the check for an unsecured claim so that the money could be paid for the same claim, but it being denominated a secured claim.

While Debtor asserted the right to the \$47,805.58 personally as the "Owner of Record," superior to Creditor, the court did not find such "Owner" status being established. Civil Minutes, Dckt. 249.

## **January 28, 2021 Application Status Conference**

The court conducted a Status Conference on January 28, 2021, for Debtor's Application for Unclaimed Funds. Counsel for the Debtors reported at the Status Conference that she has retired and was appearing to assist her former clients. It was reported that the Debtors are facing a quiet title action because Creditor, which is refusing the funds, has not reconveyed the deed of trust that is clouding title to their Property.

Debtors' former counsel and Debtors reported that Creditor was non-responsive about the obligation and the deed of trust, for which it is a named beneficiary, that is encumbering Debtors' property. Debtors reported that the title company "advised" them that they needed to engage a title attorney, who would prosecute an expensive state court quiet title litigation if Debtors ever wanted to refinance or sell the Property.

The court discussed with Debtors' former counsel and Debtors the scope of federal court jurisdiction, the original secured claim and the amended unsecured claim filed by U.S. Bank, the scope of federal court jurisdiction arising under 28 U.S.C. § 1334, and the efficient, focused bankruptcy and bankruptcy related proceedings in the bankruptcy courts.

The court continued the hearing to allow Debtors' former counsel to assist her clients in obtaining bankruptcy knowledgeable counsel and investigating how to best proceed to identify if there is a creditor to whom the payment is to be made and to quiet title to Debtors' Property.

## **Order to Show Cause**

It appears that a case could be made that Creditor is the person entitled to the moneys, that Debtor's Objection to claim was not truly an "objection" but should have been part of an action to quiet title and force Creditor to accept money, and that Debtor should be the real party in interest to obtain a judgment/order determining if payment is to be accepted by Creditor and the cloud on title removed. Debtor having the "skin in the game" in this Debtor-Creditor dispute, it appears to be Debtor's ultimate money/property at issue. Therefore, rather than the Trustee prosecuting the adjudication of this Debtor-Creditor dispute, such should be the Debtor.

To the extent Debtor prosecutes such action in lieu of a trustee, the \$47,805.58 provides funds to compensate the necessary professional to be hired and the fees the court would allow pursuant to 11 U.S.C. § 330 (the Debtor operating in the place of a trustee). Assuming that the underlying note and loan documents are standard bank documents, if Debtor is the prevailing party, such attorney's fees and costs may be recoverable from Creditor.

## **March 11, 2021 Hearing**

On February 2, 2021, the court entered an order for the reappointment of a trustee in this case as requested by the U.S. Trustee. Order, Motion; Dckts. 251, 248.

No response to the Order to Show Cause has been filed by any party in interest. No Chapter 7 Trustee has been reappointed in this case.

At the hearing, **XXXXXXX**

6. [10-90281-E-7](#)      **LORRAINE/GARY ERWIN**      **CONTINUED STATUS CONFERENCE RE:  
MOTION FOR PAYMENT OF UNCLAIMED  
FUNDS IN THE AMOUNT OF  
\$47,805.58  
1-4-21 [[240](#)]**

<b>The Status Conference is <b>XXXXXXX</b></b>
--

#### **MARCH 11, 2021 STATUS CONFERENCE**

On February 2, 2021, the court entered an order for the reappointment of a trustee in this case as requested by the U.S. Trustee. Order, Motion; Dckts. 251, 248.

No responses to the Order to Show Cause or updated Status Report have been filed by any party in interest. No Chapter 7 Trustee has been reappointed in this case.

At the hearing, **XXXXXXX**

#### **JANUARY 28, 2021 CONFERENCE**

This bankruptcy case was commenced as a Chapter 13 case by Lorraine Erwin and Gary Erwin (the “Debtors”), but converted to one under Chapter 7 on August 31, 2010. Order, Dckt. 89. On January 4, 2021, Lorraine Erwin, one of the two debtors in this case, filed an Application for Unclaimed Funds. Dckt. 240.

The amount of unclaimed funds requested to be paid to Lorraine Erwin is \$47,805.58. Application, § 1. The basis asserted in the Application for the payment of the \$47,805.58 is stated to be:

Claimant [Lorraine Erwin] is the Owner of Record entitled to the unclaimed funds appearing on the records of the court.

Application, § 2.

The supporting documents stated to be filed with the Application are:

Proof of Identity of Owner of Record;  
Notarized signature of Owner of Record; and  
Completed Form AO 213P (Payee tax information).

Application, § 3. The Application is signed by Lorraine Erwin.

Attached to the Application is a Turnover of Unclaimed Dividend(s) that was filed by the Chapter 7 Trustee in this case on August 17, 2020. Application, Dckt. 240 at 6. This pleading filed by the Trustee states that he is turning over three checks, representing unclaimed creditor dividends in the case. One of the checks relates to Proof of Claim No. 21-1 ("Claim No. 21-1"), for which the Creditor is identified as U.S. Bank National Assn. ("Creditor"), for which the unclaimed dividend amount is \$47,805.58. This appears to be the unclaimed funds that are the subject of this Application filed by Debtor Lorraine Erwin.

Also attached to the Application is a copy of a Motion for Approval of Settlement Agreement and the Order granting the Motion. The Motion and Order are Docket Entries 165 and 184 in this bankruptcy case. The Settlement that is the subject of the Motion and Order relates to a medical treatment claim that was property of the bankruptcy estate. The Settlement provides for the bankruptcy estate in this case to receive the gross sum of \$200,000.00, which after payment of fees and expenses, would net \$116,388.26 for the bankruptcy estate.

#### **Objection to Unsecured Claim of U.S. Bank National Association**

Attached to the Application is the copy of an objection filed by Debtor Lorraine Erwin to the Claim No. 21-1 that was filed by Creditor. The Objection to Claim is filed as Docket Entry 226 in this case. The Objection was that Claim No. 21-1 was a duplicate of Claim No. 3-1 previously filed by Creditor. As addressed in the Civil Minutes from the hearing on the Objection to Claim (Dckt. 235), Claim No. 21-1 was an unsecured claim allowed pursuant to a stipulation between the Debtors and Creditor in connection with the confirmation of the Chapter 13 Plan in this case. For purposes of the Chapter 13 Plan and the valuation of Creditor's claim, the unsecured claim replaced the secured claim (Claim No. 3-1). However, such unsecured claim was allowed only for the Chapter 13 case, and Creditor would retain its lien, and its secured claim, if the bankruptcy case was converted or dismissed. The bankruptcy case being converted, Claim No. 21-1 was disallowed, and Creditor now holds only the secured claim asserted in Claim No. 3-1.

#### **Entitlement to the \$47,805.58 Relating to Disallowed Claim No. 21-1**

The court's order sustaining the Objection and not allowing the Creditor's unsecured claim for which the Trustee had previously attempted to disburse the \$47,805.58 to Creditor, was entered on November 23, 2020. Order, Dckt. 237. The Chapter 7 Trustee turned over to the Clerk of the Court the \$47,805.58 on August 6, 2020 – three months before the court disallowed Claim No. 21-1. Disallowing the claim resulted in Creditor having no right to the distribution of \$47,805.58. Thus, it appears that rather than being "unclaimed funds," the \$47,805.58 appears to be monies that have not been administered by the Chapter 7 Trustee.

The Trustee's Account and Distribution Report states that \$74,375.68 was distributed to claimants with unsecured claims and that \$163,558.45 in claims were discharged without payment. Dckt. 223 at 1. The Trustee's Report identifies there being a total of \$188,677.85 in general unsecured claims

allowed, which includes Creditor's (now disallowed) unsecured claim for \$121,274.24. *Id.* at 6-9. Backing out the \$121,274.24 disallowed unsecured claim, there is only \$67,403.61 of allowed unsecured claims based on the Trustee's Report.

\$74,375.68 was discussed for the general unsecured claims (including the \$47,805.58 for Creditor's now disallowed claim) appears to be approximately a 61.13% dividend paid to creditors with general unsecured claims. It appears that having disallowed Claim No. 21-1, this may be a surplus case.

**Basis For Debtor Lorraine Erwin's  
Claim of Ownership of the \$47,805.58**

Debtor Lorraine Erwin does not state in the Application the basis for asserting ownership of the \$47,805.58 that the Chapter 7 Trustee formerly attempted to disburse to Creditor prior to the court disallowing Creditor's Claim No. 21-1. Given that Creditor was not entitled to the \$47,805.58 once the court disallowed Claim No. 21-1, Debtor Lorraine Erwin cannot be heard to say that she stands in the shoes of, and can assert the rights of, Creditor.

The Bankruptcy Code addresses unclaimed property in 11 U.S.C. § 347. It provides that in a Chapter 7 case, ninety (90) days after the final distribution, the Trustee shall stop payment on any check remaining unpaid and any remaining property of the bankruptcy estate shall be deposited with the Trustee as provided under Chapter 129 of Title 28. It appears that the \$47,805.58 is not property of the estate the Trustee attempted to distribute to a creditor entitled to payment. Rather, Claim No. 21-1 having been disallowed, the Trustee has not yet distributed it.

In Debtors' Objection to Claim No. 21-1 filed on October 1, 2020 (approximately two months after the Trustee filed his Turnover of Unclaimed Funds), Debtors not only objected to Creditor's unsecured claim, asserting that Creditor held a secured claim because the case had been converted to one under Chapter 7, but Debtors went further, stating in the Objection:

12. Because there is still a lien on the house [Creditor's collateral], those funds could have been applied to the outstanding balance as a secured claim but instead those funds have been dispersed as part of the unsecured claims but for whatever reason are now sitting in the unclaimed funds pool doing no good for Debtors or the creditors.

Wherefore, Debtors are requesting an order that sustains the objections to the Amended Claim and would therefore identify the Original Claim (a secured claim) as the only claim for Servicer on behalf of Claimant. If the Court does sustain the objection the Debtors are requesting that the unclaimed funds be deemed property of the estate and that the Trustee be required to disperse those funds according the dispersal schedule.

Objection, p. 3:3-12; Dckt. 226. It appears that Debtor could be seeking to have the \$47,805.58 of unencumbered monies that related to disallowed unsecured Claim No. 21-1 be diverted to pay the secured claim (Claim No. 3-1) of Creditor. The court's order sustaining the Objection just disallows Claim No. 21-1 and does not purport to allocate the \$47,805.58 to the secured claim of Creditor or any other person.

## Joint Status Conferences

The Application For Unclaimed Funds filed by Debtor is not accompanied by a Certificate of Service. However, presumably the Chapter 7 Trustee has been electronically served by the Clerk of the Court as provided in Federal Rule of Bankruptcy Procedure 9036.

Debtor Lorraine Erwin does not provide with the Application any basis for showing that she is the owner of the \$47,805.58 that formerly was to be distributed to Creditor on its general unsecured claim (disallowed Claim No. 21-1). This claiming of unclaimed distributions in a Chapter 7 case pursuant to 28 U.S.C. § 2042 is discussed in Collier on Bankruptcy, ¶ 347.02[4], which includes (emphasis added):

The claimant must file a petition for an order directing payment to the claimant. Notice must be given to the United States Attorney and a full proof of the right to the funds must be furnished by the claimant. Assuming that the claimant is entitled to the funds, the court does not have the discretion to deny the petition. The statute does, however, require that the **claimant must show “full proof of the right thereto,” so an application that does not clearly show that the claimant is the creditor entitled to payment and that the debt remains unpaid cannot be granted.**

Debtor Lorraine Erwin has not presented the court with a basis for asserting ownership of monies of the bankruptcy estate that is part of the disbursement to creditors holding general unsecured claims. This court noted a possible problem with trying to divert monies through the Debtors to Creditor on its secured claim, stating in the Civil Minutes for the hearing on the Objection to Claim:

What is interesting at this point is why the Debtor and Debtor’s counsel could not contact the Creditor, tell Creditor that there is \$47,805.58 in monies that were paid on the claim (whether secured or unsecured, it is the same debt) and that Debtor has that amount in a cashier’s check for Creditor, and ask to whom should it be paid so the check is cashed and Creditor gets almost \$50,000 in one lump sum.

Civil Minutes, p. 3; Dckt. 235. Possibly the ethics of Creditor, Debtor, and counsel precluded such a behind the scenes distribution of the monies though the unsecured claim (Debtor not objecting to it) and to pay down the secured claim.

At this juncture, the court does not see any proof that Debtor Lorraine Erwin has a right to the \$47,805.58. The court does not know whether the Chapter 7 Trustee is aware that Claim No. 21-1 has been disallowed and the \$47,805.58 of unencumbered monies he was attempting to disburse to Creditor does not relate to any allowed unsecured claim of Creditor.

## Discussion at January 28, 2021 Conference

Counsel for the Debtors reported at the Status Conference that she has retired and was appearing to assist her former clients. It was reported that the Debtors are facing a quiet title action because U.S. Bank, which is refusing the funds, has not reconveyed the deed of trust that is clouding title to their Property.

Debtor’s counsel and Debtors reported that U.S. Bank was nonresponsive about the obligation and the deed of trust, for which it is a named beneficiary, that is encumbering Debtors’ property. Debtor



reported that the title company “advised” them that they needed to engage a title attorney, who would prosecute an expensive state court quiet title litigation if Debtors ever wanted to refinance or sell the Property.

The court discussed with Debtors’ former counsel and Debtors the scope of federal court jurisdiction, the original secured claim and the amended unsecured claim filed by U.S. Bank, the scope of federal court jurisdiction arising under 28 U.S.C. § 1334, and the efficient, focused bankruptcy and bankruptcy related proceedings in the bankruptcy courts.

The court continues the hearing to allow Debtor’s former counsel to assist her clients in obtaining bankruptcy knowledgeable counsel and investigating how to best proceed to identify if there is a creditor to whom the payment is to be made and to quiet title to Debtor’s Property.

# FINAL RULINGS

- |    |   |                   |  |
|----|---|-------------------|--|
| 7. | <a href="#"><u>18-90600-E-7</u></a><br><a href="#"><u>19-9016</u></a><br>MCGRANAHAN V. GARIBA<br>ADVERSARY PROCEEDING | CORAZON HERNANDEZ | CONTINUED STATUS CONFERENCE RE:<br>COMPLAINT<br>9-30-19 <a href="#"><u>[1]</u></a> |
|----|---|-------------------|--|

**DISMISSED: 2/19/21**

**Final Ruling:** No appearance at the March 11, 2021 Status Conference is required.

The Adversary Proceeding having been dismissed (Notice of Dismissal, Dckt. 52), **the Status Conference is concluded and removed from the Calendar.**

8. [16-90898-E-7](#)      **THOMAS COPE**      **STATUS CONFERENCE RE:**  
[20-9015](#)           **COMPLAINT**  
    **12-21-20 [1]**  
**COPE V. SCHULTZ, JR. ET AL**

**Final Ruling:** No appearance at the March 11, 2021 Status Conference is required.

**The Status Conference is continued to 2:00 p.m. on May 20, 2021.**

## SUMMARY OF COMPLAINT

The Complaint filed by Thomas R. Cope (“Plaintiff-Debtor”), Dckt. 1, asserts claims for violation of the discharge injunction. Plaintiff-Debtor asserts that he commenced his Chapter 7 bankruptcy case, 16-09898, on September 29, 2016. On January 12, 2018, the Chapter 7 Trustee filed a no asset report, which report was served on the Defendant. On February 6, 2017, Plaintiff-Debtor was granted his discharge in the Chapter 7 case.

Plaintiff-Debtor asserts that on August 20, 2020, Defendant filed a lawsuit in the California Superior Court that was based on an obligation discharged in the 2016 bankruptcy case. In the First Cause of Action, Plaintiff-Debtor seeks a determination that the debt upon which the State Court Action is based was discharged. In the Second Cause of Action, Plaintiff-Debtor seeks to enforce the Discharge Injunction,

issue a judgment specifically enforcing the injunctive effect of the Discharge Injunction, that acts taken in violation of the Discharge Injunction are void, and costs.

## **SUMMARY OF ANSWER**

No answer has been filed, Plaintiff-Debtor and Richard and Marie Schultz, the defendants (“Defendant”) having entered into several stipulations to extend the time to answer. Stipulation/Request to Extend Time. Dckts. 8, 12. Pursuant to the Second Stipulation, the court has ordered the time to file an answer in this Adversary Proceeding has been extended to March 23, 2021. Order, Dckt. 14.

## **STATUS REPORT**

On March 1, 2021, Defendant filed a Status Conference Statement. Dckt. 16. In the Statement Defendant states that Defendant was not given notice of the bankruptcy case, was unaware of the bankruptcy case, and was not aware of the bankruptcy case when the State Court Action was filed and initially prosecuted.

Defendant reports that counsel for Defendant is communicating with counsel for Plaintiff-Debtor, that certain agreements have been made in connection with the State Court Action, and that this court has extended time to answer or otherwise plead to March 23, 2021. Defendant recommends that the court continue the Status Conference 60 days to allow the Parties to continue to address the issues and that the filing of an answer and cross complaint (11 U.S.C. § 523) if the matter is not resolved.

In light of the ordered extension, continuance is proper.