UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

March 26, 2024 at 1:30 p.m.

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1. **[23-22845](23-22845)-E-13** **[RHS](RHS)-1** | **GEORGENE HICKS AND RICARDO ESPARZA, JR.** | **CONTINUED STATUS CONFERENCE RE: RICARDO ESPARZA ORDER ON MOTION TO IMPOSE AUTOMATIC STAY ORDER RE: PLAN 1-11-24 [101]**

Debtor's Atty: Peter G. Macaluso

Notes:
Continued from 2/27/24. The court continued the status conference one month to see if the Debtor fulfills his fiduciary duties to the Estate to protect and administer property of the Bankruptcy Estate.

The Status Conference is ~~concluded and removed from the Calendar.~~

March 27, 2024
Continued Status Conference

As the court has previously addressed, the court, *sua sponte*, set this post-confirmation Status Conference to allow Debtor, creditors, and other parties in interest to address the lingering question under the Confirmed Plan – what interest, if any, does the Debtor/Estate have in the real property that was the subject of a pre-petition foreclosure sale, but not deemed final until after the automatic stay went into effect in this case.

The court entered its Order granting the Motion to Confirm the Amended Chapter 13 Plan was entered on January 11, 2024. Order; Dckt. 102. The court's review of the Docket on March 21, 2024 (two months after the court granting the Motion to Confirm) reflects that no other action has been taken by Debtor or any other party in interest relating to the rights and interests in the real property at issue.

It appears that the Status Conference procedure is not having a positive effect on the prosecution of this case.

~~The Status Conference is concluded and removed from the Calendar.~~

OVERVIEW OF PROCEEDINGS

On January 12, 2024, the court entered its order granting the Motion to Confirm the Amended Chapter 13 Plan in this Bankruptcy Case. Order; Dckt. 102. On that same day, the court conducted a hearing on the Debtors' Motion to Impose the Automatic Stay in this Case. As discussed in the Civil Minutes from the hearing on the Motion to Impose the Automatic Stay, some very "interesting" questions arising under California Civil Code § 2924m exist in this case which bears on the effect of a pre-petition nonjudicial foreclosure sale and the sale being "deemed final" fifteen days after the filing, which fifteenth day ran after the court imposed the automatic stay on an interim basis. Civ. Min.; Dckt. 99.

When the court was addressing the confirmation of the Amended Plan and terms thereof, the court did not link the Amended Plan to the Order Imposing the Stay and the California Civil Code § 2924m issues. The Amended Plan provides for payments to be made to the Class 1 Creditor for whom the foreclosure sale was conducted (which was not the highest bidder at the pre-petition foreclosure sale). However, that Creditor has not filed a proof of claim in this case. As the court addressed in the Civil Minutes, there appeared to be ways that the Debtors could provide adequate protection for the highest bidder at the nonjudicial foreclosure sale (for whom the 15-day period specified in California Civil Code § 2924m did not expire until after the § 362 stay was imposed in this case).

The court schedules this Status Conference so the Debtors and Chapter 13 Trustee can address with the court supplemental orders or joint *ex parte* motions (possibly orally placed on the record at the Status Conference) for plan modifications which may be necessary for the Trustee to hold the substantial monies to be paid on the Class 1 Claim (for which there is no proof of claim) and the Class 2 Claim of U.S. Bank, N.A. (the junior lien holder and highest bidder at the prepetition nonjudicial foreclosure sale). The Parties appearing in this Case to date have clearly demonstrated their good faith and efforts to "take on" these California Civil Code § 2924m issues (the statute having been recently amended and presenting the court and parties with an untilled field to interpret).

The court intends this Status Conference (and as it may be continued) to provide a simplified process for proper *ex parte* or limited notice stipulations to address some more administrative issues for the Chapter 13 Trustee holding monies in this case and adequate protection issues as the parties "fire up their tractors" to begin plowing the new § 2924m fields.

January 30, 2024 Status Conference

The Court's January 29, 2024 review of the Docket disclosed that no Status Conference statements have been filed stating how the Debtor and the Chapter 13 Trustee intend to address the issues relating to the changes in the California nonjudicial foreclosure sale law and how to adequately protect the interests of the purchaser at the nonjudicial foreclosure sale and the creditor having the nonjudicial sale conducted.

At the Status Conference, counsel for the Debtor reported he is planning on attempting over the next 30 days to try and communicate with both the junior lien creditor, the purchaser at the nonjudicial foreclosure sale, and the foreclosing creditor. Further, he discussed getting on file and adversary proceeding to determine the rights, title, and interest in the Property that was the subject of the Foreclosure Sale.

The Trustee requested that the court issue a supplemental order for the Trustee to hold the payments under the Confirmed Amended Plan (Dckt . 81) due under the Plan for named creditor Select Portfolio Servicing, and Class 2 creditor US Bank, National Association given that: (1) only the junior, foreclosed out creditor US Bank, National Association purchaser at the foreclosure sale having filed a secured claim (which would appear to be a foreclosed out lien if the nonjudicial sale is valid, and (2) that is not yet determined if they are creditors after the nonjudicial foreclosure sale.

Debtor's counsel concurred in the Trustee's request for a supplemental order providing for such monies to be held pending further order of the court.

The court will issue such supplemental order, using the Docket Control No. PGM-2 (the docket control number for the Motion to Confirm First Amended Plan).

The Status Conference is continued to 1:30 p.m. on February 27, 2024.

FEBRUARY 27, 2024 STATUS CONFERENCE

As of the court's February 23, 2024 review of the Docket, no Status Reports or motions (or any other pleadings) have been filed since the February 6, 2024 confirmation of the Plan in this Case. There is no indication of what Debtor is doing to address the issues concerning the pre-petition nonjudicial foreclosure sale and the sale being deemed "final" after the court has imposed the 11 U.S.C. § 362 stay in this case.

The court entered its Amended Order Imposing the Automatic Stay and Setting an initial hearing on the Motion on September 12, 2023. Dckt. 15. On January 11, 2024, the court issued a Final Order imposing the 11 U.S.C. § 362 stay in this case, in full force and effect, until terminated by operation of law or further order of the court. Final Order; Dckt. 101.

As the court addressed in the Civil Minutes (the court's findings of fact and conclusions of law) for the January 9, 2024 final hearing on the Motion to Impose the Stay, the court noted:

> **Need for Determination of California Law and the Rights and Interests of the Parties**
>
> As the court addresses below, what may have been perceived to be a "simple plain language
> statutory analysis," the California Legislature has made some sweeping changes to the nonjudicial foreclosure statutes in the past several years (amending the same statutory provisions multiple
> times).
>
> In simple terms, the Legislature has expressed an intent to promote purchasers at foreclosure sales to be people who intend to occupy the properties rather than large corporate real estate holding companies. While simple in concept, the courtroom is where the legislative rubber meets the adjudication road.
>
> . . .

Post-Petition Interests
In the Property

> At the heart of the dispute is what is the effect of a foreclosure sale conducted before the bankruptcy case is filed and what occurs when, statutorily, that sale is not "deemed final" until after the expiration of a time period. As has been well known, prior California law provided that so long as the trustee's deed was timely filed (former Cal. Civ. § 2924h), the perfection of such title by recording the trustee's deed was permitted pursuant to 11 U.S.C. § 362(b)(3).
>
> . . .
>
> Here, it is disputed that First Franklin is the owner of the Property. Rather, Debtor asserts that the Debtor/Bankruptcy Estate own it and First Franklin is "merely" an oversecured creditor. Additionally, there is some other creditor (only identified by the name of a loan servicer) who holds an even larger oversecured claim in the Bankruptcy Case.
>
> In the past, when the bankruptcy stay is being used in place of a preliminary injunction while a debtor diligently adjudicates disputes over ownership and obligations, the court has required the debtor to self fund an injunction bond and/or make adequate protection payments. Here, Debtor's First Amended Plan has been funded with $33,000.00 through December 2023 (which the Chapter 13 Trustee should be holding) and will be funded with $6,900 a month for 56 months. For the Select Portfolio Servicing Class 1 Secured Claim, Debtor is allocating $2,850.07 a month in payments. For the First Franklin Class 2(A) Secured Claim, Debtor allocates another $3,115.00 a month.
>
> Thus, it would appear that adequate protection could be set up where the portion for the Class 1 Claim will be held, subject to award by the court to First Franklin, for damages caused by the injunction and then the $3,115.00 a month could be paid on the First Franklin Claim. Even if First Franklin is correct and it has purchased the property and it's claim set forth in Proof of Claim 6-1 is a foreclosed out junior, the Plan still provides for payment of its ($150,379.06) unsecured claim in full. Over 60 months, that would average approximately $2,510 a month.
>
> Therefore, in light of the open question of law as to the effect of California Civil Code § 2924m as amended to delay the foreclosure sale being "final," the post-sale contingencies prior to it being final consisting of persons other than the Debtor being able to put forward bids on the Property, and the apparent ability of Debtor to fund adequate protection payments, the Motion is granted and the automatic stay is imposed pending further order of the court.

Minutes; Dckt. 99 at 9, 11, 13.

It is unclear to the court what actions the Debtor is pursuing to address the disputed title in this Case. No adversary proceeding, no motion for the court to approve a stipulation resolving this

dispute, or other document or pleadings addressing this ownership issue has been filed with the court.

At the Status Conference, counsel for Debtor said they would prosecute such actions, and planned to have it on file within two weeks (which would be mid-March, 2024. Though Debtor has failed to act, the court continues the Status Conference one month to see if the Debtor fulfills his fiduciary duties to the Estate to protect and administer property of the Bankruptcy Estate.

The Status Conference is continued to 1:30 p.m. on March 26, 2024.

The court shall issue an 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 Post Confirmation Status Conference having been conducted by, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Status Conference is ~~concluded and removed from the calendar~~.

2.	24-20252-E-13 GLF-1	**KENNETH KOCH** **Jessica Galletta**	**CONTINUED MOTION TO EXTEND AUTOMATIC STAY** **2-13-24 [33]**

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.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Not Provided. There is no Proof of Service filed in this case, so the court is unable to tell who has been served and on which date. Movant has not complied with Local Bankruptcy Rule 7005-1 which requires the use of a specific Eastern District of California Certificate of Service Form (Form EDC 007-005). This required Certificate of Service form is required not merely to provide for a clearer identification of the service provided, but to ensure that the party providing the service has complied with the requirements of Federal Rule of Civil Procedure 5, 7, as incorporated into Federal Rule of Bankruptcy Procedure 7005, 7007, and 9014(c).

Further, in accordance with this court's Interim Order (Docket 25), counsel for Debtor was to serve a copy of that Order, the Motion and Supporting Pleadings, and Notice of Hearing on or before February 9, 2024, and provide notice that Written Oppositions, if any, shall be filed and served on or before February 23, 2024; and Replies, if any, may be presented orally at the hearing. Debtor did not comply with this time line, serving the present Motion on February 13, 2024, setting the Motion as a Local Bankruptcy Rule 9014-1(f)(2) motion, and not filing the required Certificate of Service sheet.

On February 6, 2024, two Certificates of Service (Dckt. 21, 22) were filed attesting to service of the Notice of Hearing, Motion, Declaration, and Points and Authorities were served on the parties in interest.

The Motion to Extend the Automatic Stay was set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The Motion to Extend the Automatic Stay is xxxxxxx

Kenneth Koch ("Debtor") seeks to have the provisions of the automatic stay provided by 11

U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor's second bankruptcy petition pending in the past year. Debtor's prior bankruptcy case (No. 23-24236) was dismissed on December 27, 2023, after Debtor failed to file the required schedules and documents. *See* Order, Bankr. E.D. Cal. No. 23-24236, Dckt. 22, December 27, 2023. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

March 26, 2024 Hearing

The court continued this Hearing to hold the final Hearing on the Motion to Extend the Automatic Stay, the court having previously extended the stay on an interim basis through and including 11:59 p.m. on April 15, 2024. Order, Docket 48. In continuing this Hearing, the court set the deadline for any Opposition to this Motion be filed and served by March 12, 2024, with any Reply pleadings filed and served by March 19, 2024. *Id.*

Creditor CSPN, LLC ("Creditor") timely filed an Opposition on March 12, 2024. Docket 53. In its Opposition, Creditor states:

1. Debtor owns an entity called Eshkoch LLC. Eshkoch LLC borrowed $20,500,000 from Creditor. Debtor is the guarantor on that loan. The loan was secured by real property. *Id.* at ¶ 5.

2. Creditor nonjudicially foreclosed on the real property security after a notice of default was issued. Although there was another bidder at the foreclosure sale, the Creditor was the successful bidder and the bid was not sufficient to satisfy the Loan. *Id.* at ¶ 6.

3. On or about January 30, 2023, the Creditor commenced a state court action against the Debtor, seeking to recover the balance of the Loan. Debtor has not filed any responsive pleadings in that case and has been served with a default request on October 16, 2023. *Id.* at ¶¶ 8-9.

4. The amount due to the Creditor by the Debtor as of January 29, 2024 was $23,151,953.64. *Id.* at ¶ 9.

5. Debtor Scheduled Creditor's Claim as $0 and stated it is disputed. Schedule E/F, Docket 40 p. 15 line 4.1.

6. Debtor's proposed Plan on its face is unconformable because the Plan does not commit all of his monthly disposable income. The Plan only proposes $3,000 a month in payments, but Debtor's Schedule J lists his monthly disposable income as $16,632.13. Docket 52, ¶¶ 3, 11.

Creditor's Supporting Evidence

Creditor filed two Declarations (Dockets 53, 55) and Exhibits (Docket 54) in support of its Opposition. David Blatt, manager and authorized representative of Creditor, testifies to the authenticity of the facts presented in the Opposition. Decl., Docket 53. Creditor's attorney Gabriel P. Herrera further testifies to the authenticity of the facts alleged in the Motion. Decl., Docket 55. In its exhibits,

Creditor submits the state court complaint for breach of personal guaranty, which also includes a copy of the Deed of Trust Note, a Security Agreement, the personal guaranty agreement entered into by Debtor, and the necessary transfer documents showing how Creditor has been assigned the rights to enforce the Deed of Trust. Exhibit A, Docket 54 ps. 2-110. Creditor also filed a Request for Entry of Default as Exhibit B. *Id.* at ps. 111-114.

DISCUSSION

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because he filed the case to stop the foreclosure of his home, but he was unable to procure an attorney to assist him at that time. Decl., Docket 36 ¶ 4. Now, Debtor has the assistance of counsel, and Debtor pledges to diligently prosecute his case in an effort to save his home which he, his wife, and their two young children currently reside in. *Id.* at ¶ 10. Debtor's Memorandum further states grounds, as supported by Debtor's declaration, which include:

> A. The previous case filed in 2023 by Debtor in *pro se* was filed under the wrong Chapter and quickly dismissed. (Case 23-24236 was filed as a Chapter 7 case.)
>
> B. Debtor's prior case was not dismissed due to Debtor failing to make payments, but because of his inability, being in *pro se*, to get all of the required documents filed.
>
> C. Debtor has substantial net income to fund a Plan.
>
> D. Debtor's proposed plan will not seek to modify secured claims of creditors, but to provide for the cure of the arrearage and bring such secured claims current.
>
> E. Debtor and Debtor's counsel will get the Debtor's Schedules, Statement of Financial Affairs, and other related documents promptly filed.

Memo, Docket 35 ps. 1:9–2:6.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). As this court has noted in other cases, Congress expressly provides in 11 U.S.C. § 362(c)(3)(A) that the automatic stay **terminates as to Debtor**, and nothing more. In 11 U.S.C. § 362(c)(4), Congress expressly provides that the automatic stay **never goes into effect in the bankruptcy case** when the conditions of that section are met. Congress clearly knows the difference between a debtor, the bankruptcy estate (for which there are separate express provisions under 11 U.S.C. § 362(a) to protect property of the bankruptcy estate) and the bankruptcy case. While terminated as to Debtor, the plain language of 11 U.S.C. § 362(c)(3) is limited to the automatic stay as to only Debtor. The subsequently filed case is presumed to be filed in bad faith if one or more of Debtor's cases was pending within the year preceding filing of the instant case. *Id.* § 362(c)(3)(C)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 362(c)(3)(C).

In determining if good faith exists, the court considers the totality of the circumstances. *In re*

Elliot-Cook, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209–10 (2008). An important indicator of good faith is a realistic prospect of success in the second case, contrary to the failure of the first case. *See, e.g.*, *In re Jackola*, No. 11-01278, 2011 Bankr. LEXIS 2443, at *6 (Bankr. D. Haw. June 22, 2011) (citing *In re Elliott-Cook*, 357 B.R. 811, 815–16 (Bankr. N.D. Cal. 2006)). Courts consider many factors—including those used to determine good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine good faith under § 362(c)(3) are:

A. Why was the previous plan filed?

B. What has changed so that the present plan is likely to succeed?

In re Elliot-Cook, 357 B.R. at 814–15.

Creditor filed an Opposition asserting an amount it is owed and identifying issues regarding Debtor timely informing Creditor that he had filed bankruptcy. Creditor also points out that Debtor is not committing all of his disposable income. However, while the amount Creditor asserts it is owed is an extremely large number, Creditor has not raised any specific facts to rebut Debtor's good faith filing. Rather, creditor has merely identified problems with Debtor's Plan and debtor's treatment of Creditor's claim, should Creditor's claim be what Creditor asserts. Debtor has not outright ignored Creditor's claim, instead listing it as 0$ and informing the court that it is disputed.

In Creditor's final sentence, Creditor states, "[f]inally, the dismissal of the Chapter 7 Case (Case no. 23-24236) was for the same reason as the Debtor's entity, the Borrower." Docket 52 ¶ 11. The sentence does not provide a viable basis for the court finding Debtor's current case has not been filed in good faith. Creditor has not provided the court with any reasons for the court to deny extending the automatic stay.

Review of Debtor's Projected
Disposable Income

On Schedule I, Debtor list his monthly net income from the operation of his real estate business to be $6,346.13. Dckt. 40 at 19-20. Debtor then adds an additional $15,000 a month in other income for "Anticipated RE sales/development/consulting income." *Id*. There is no provision for payment of any taxes (income, self-employment, Social Security, Medicare, and the like) on Schedule I.

On Schedule J Debtor states a family unit of five persons – Debtor, Non-Debtor Spouse, and three minor children. *Id*. at 21. For this family unit of five persons Debtor computes having reasonable and necessary monthly expenses of ($4,714). *Id*. at 22. This does not include a housing expense (mortgage, rent, taxes, and insurance).

On the Statement of Financial Affairs Debtor states that he does and did not have any income from employment or from operating a business in 2024, 2023, or 2022. *Id*.; Stmt Fin Affairs ¶ 4. Additionally, Debtor states that he have no other income (including unemployment, social security, pensions, and the like) from any other source. *Id*. at 25.

The proposed Plan filed by Debtor in this case, prepared with the assistance of his counsel of record, provides for monthly plan payments of $500 for one month and then $3,000 a month for the remaining 59 months of the Plan. Plan, § 7; Dckt. 41 at 7. The Plan, § 7, states that the Class 1 claims will

received monthly cure payments of $1,000 each for arrears, but no post-petition monthly payments that come due. Debtor will be seeking a loan modification. The Plan states that Debtor has no unsecured debt. *Id*.

Motion to Substitute Counsel

On March 19, 2024, Debtor and Debtor's counsel filed a pleading titled Substitution of Attorney. Dckt. 57. By this pleading Debtor and Debtor's counsel purport to substitute Debtor's counsel out and substitute the Debtor in as a *pro se* party.

Consistent with the Local Rules of the District Court, the Local Bankruptcy Rules for the Eastern District of California require that when counsel seeks to withdraw and substitute the client in pro se,

> (e) Withdrawal. Unless otherwise provided herein, an attorney who has appeared may not withdraw leaving the client in *propria persona* without leave of court upon noticed motion and notice to the client and all other parties who have appeared. The attorney shall provide an affidavit stating the current or last known address or addresses of the client and the efforts made to notify the client of the motion to withdraw. Withdrawal as attorney is governed by the Rules of Professional Conduct of the State Bar of California, and the attorney shall conform to the requirements of those Rules. The authority and duty of the attorney of record shall continue until relieved by order of the Court issued hereunder. Leave to withdraw may be granted subject to such appropriate conditions as the Court deems fit.

L.B.R. 2017-1(e). *See also*, E.D. Cal. District Court Local Rule 182(d).

Ruling

As addressed above, Congress provides in 11 U.S.C. § 362(c)(3), for this debtor the stay would terminate only as to the Debtor, but not as to the bankruptcy estate. Creditor states that it has conducted a nonjudicial foreclosure on real property that secured the debt of a third-party for which Debtor executed a personal guaranty. After applying the sales proceeds/credit bid amount to the secured debt, there remains a deficiency of $23,151,953.64. Creditor has chosen not to file a proof of claim as of this time.

On Schedule E/F Debtor lists Creditor having a claim for $0.00, asserting Debtor's offsetting counterclaims for an alleged breach of contract. Dckt. 40 at 15. In reviewing Schedule A/B, the court cannot identify any such legal action/claims listed as being assets of the Debtor. *Id*. at 3 - 9.

The court further notes, that basic bankruptcy law provides that for an individual to qualify as a Chapter 13 Debtor, the individual must:

> (e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated debts of less than $2,750,000 or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated debts that aggregate less than $2,750,000 may be a debtor under chapter 13 of this title.

11 U.S.C. § 109(e). The debt limits are based noncontingent, liquidated debtor being less than $2,750,000,

for which there are no future contingencies and the amount of the debt being asserted can be computed by the creditor. It does not provide for reductions based on debtor disputes, asserted counterclaims, or likes that a debtor seeks to assert against the creditor. Collier on Bankruptcy explains this provision as follows:

> **[b] Only Noncontingent Debts Counted Toward Chapter 13 Limitation**
>
> In deciding whether a claim is noncontingent, and therefore counted toward the debt limit, courts have generally ruled that if a debt does not come into existence until the occurrence of a future event, the debt is contingent. A claim is contingent as to liability if the debtor's legal duty to pay does not come into existence until triggered by the occurrence of a future event. Thus, a creditor's claim is not contingent when the "triggering event" occurred before the filing of the chapter 13 petition. In some cases, there may be a dispute regarding whether the "triggering event" has occurred—for example, because the party whose debt the debtor guaranteed raises defenses to the principal debt. In others, the debtor may be found to be jointly and severally liable under state law, and no prior recourse to the principal debtor is required
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> . . .
>
> **[c] Only Liquidated Debts Counted Toward Chapter 13 Limitation**
>
> A debt must also be liquidated to count toward the debt limit. Although for purposes of this section, "liquidated" is not defined, courts have generally held that a debt is liquidated if its amount is readily and precisely determinable, as where the claim is determinable by reference to an agreement or by a simple computation. For example, a tort cause of action against the debtor for personal injuries, pain and suffering would obviously be an unliquidated claim, and not counted no matter how large the potential damages. In *In re Wenberg*, the Court of Appeals for the Ninth Circuit held that when a creditor's claim was unliquidated, but an award of attorney's fees to the creditor was readily ascertainable, the attorney's fees were liquidated but the damages were not. If a judgment has already been entered in excess of the eligibility limits, the debtor is ineligible even if there remains additional litigation about punitive damages. In *In re Nikoloutsos*, the Court of Appeals for the Fifth Circuit held that a debtor was ineligible to convert his case to chapter 13 because at the time of his petition there had already been a judgment for compensatory damages entered against him in excess of $600,000, much more than the debt limit then in effect.
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> . . .
>
> A debt is not liquidated if there is a substantial dispute regarding liability or amount.42 Although there may be issues whether a substantial dispute exists, the Court of Appeals for the Ninth Circuit has held that one exists when determination of liability requires an extensive and contested evidentiary hearing involving substantial evidence. However, in the context of statutory obligations, it has been held that the fact that a debtor disputes the amount of the obligation does not necessarily make the obligation unliquidated. . . .

2 Collier on Bankruptcy (16th Edition) ¶ 109.06.

While issues may exist as to Debtor's ability to prosecute this case, and there may be issues

relating to Debtor's counsel attempting to substitute out as counsel, that does not preclude that the Debtor from being able to prosecute this case. Creditor asserts that it has a $23 MM+ unsecured claim and Creditor desires to have that claim be adjudicated in the State Court than this court determining Creditor's claim.

Debtor has sufficiently demonstrated the case was filed in good faith under the facts of this case and the prior case for the court to extend the automatic stay. Debtor has complied with court orders in filing this present Motion and procuring counsel to diligently prosecute the case. Debtor has also provided in his testimony real life reasons for why he has filed bankruptcy, and how he plans to use bankruptcy to restructure his debts. *See* Decl., Docket 36. A review of the docket on February 21, 2024 reveals that Debtor has filed the required schedules and other documents, as well as a Chapter 13 Plan on February 20, 2024, showing this case is moving forward. Dockets 39-41. (Though the accuracy of such appears to be not completely accurate.) Debtor appears to have significant income allowing him to fund a viable Chapter 13 Plan.

Additionally, as provided in 11 U.S.C. § 1307(c) this court may convert this case to one under Chapter 7 for cause.

The court shall issue an 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 Extend the Automatic Stay filed by Kenneth Koch ("Debtor") having been presented to the court, the court having entered an interim order extending the automatic stay pursuant to the prior Motion to Extend the Stay, DCN: SLF-1, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes and parties, unless terminated by operation of law or further order of this court.

3. 22-20264-E-13 MOH-1 **AMANDA HILL Douglas Jacobs** **CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY 9-5-23 [63]**

ERIC MELI 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—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 5, 2023. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The court notes that the notice provided does not meet the standard of Local Bankruptcy Rules 9014-1(d)(3)(B)(ii) and (iii). Specifically, Eric Meli's ("Movant") counsel states it is the attorney for Debtor in its Notice of Hearing, which is not the case. Dckt. 64. Because the notice complies substantially with all requirements, the court will waive the defect. However, counsel is reminded failure to comply is cause to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

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). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Relief from Automatic Stay is xxxxxxx.

March 26, 2024 Hearing

The court continued this Hearing because the Parties reported that they are working on a consensual refinance of the Property to resolve issues surrounding the State Court Dissolution Judgment and Property Order without further litigation in either the Bankruptcy or the Family Law courts. A review of the Docket on March 20, 2024 reveals that no new documents have been filed with the court.

At the hearing, **xxxxxxx**

REVIEW OF THE MOTION

Eric Meli ("Movant" or "Creditor") seeks relief from the automatic stay with respect to Amanda Hill's ("Debtor") real property commonly known as 2591 Tom Polk Ave., Chico, California ("Property"). Movant has provided the Declaration of Eric Meli to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor has not complied with a Superior Court judgment issued on December 9, 2021 by failing to timely refinance the Property, remove Creditor's name from the deed, and to pay $65,183.00 to Movant for his equal share of equity in the Property. Declaration, Dckt. 65. Movant further states Debtor did not appeal the judgment within the required 90 days, nor did she comply within the required time frame, instead opting to file this Chapter 13 bankruptcy on February 4, 2022. *Id.* As such, Movant argues Debtor has ignored the final judgment from the Superior Court and not given that judgment full faith and credit.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on September 12, 2023. Dckt. 69. Debtor asserts that:

A. Movant presented no authority for his Motion for Relief from the Automatic Stay. The reasons provided in Creditor's Declaration are not adequate examples of "cause[s]" as defined by 11 U.S.C. § 362(d)(1) and (2).

B. The motion did not state with particularity the factual and legal grounds as required by the Local Rules of Bankruptcy Procedure. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

Dckt. 69.

CREDITOR'S RESPONSE TO DEBTOR'S OPPOSITION

Movant filed a Response to Debtor's Opposition on September 19, 2023. Dckt. 72. In Its Response, Movant states:

A. The factual grounds for cause, pleaded with specificity, are that Debtor failed to comply with a lower court's judgment that required the equalization payment.

B. Creditor's divorce attorney mailed a copy of the Judgment of Dissolution to Debtor. Dckt. 66.

C. Debtor's contention that Debtor has no equity in the property is false. Creditor is fully vested and on title to the property where there is "substantial" equity.

D. Specific legal and factual grounds regarding the provision of the Motion for Relief of the Automatic Stay include, "[i]t is fundamental that higher courts are supposed to give full faith and credit to the rulings and orders of lower courts unless the higher court finds some incredibly good reason no[sic]

to..."

E. The Supplemental Declaration was filed as evidentiary support to refute and declare as untrue allegations made by Debtor.

Dckt. 72.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee ("Trustee"), filed an Opposition on September 19, 2023. Dckt. 76. Trustee asserts that

A. The Plan was confirmed on July 17, 2022, and under U.S.C. § 1327, the Confirmed Plan binds Creditor and Debtor.

B. Creditor is owed an equalization payment, which is dischargeable in a Chapter 13 case; however, while Creditor has standing to attempt to modify the Plan to reflect the owed amount, this Motion does not accomplish that.

C. Debtor is current in plan payments.

D. The Confirmed Plan provides general unsecured claims shall receive no less than 17.5%.

E. Creditor's motion does not cite any specific reason under 11 U.S.C. § 362(d) why relief should be granted other than "to give full faith and credit" to the state court judgment.

Dckt. 76.

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 $65,183.00 (Declaration, Dckt. 65), while the value of the Property is determined to be $363,969.00, as stated in Schedules A/B and D filed by Debtor.

The State Court Dissolution Judgment is on the standard dissolution judgment form. Exhibit 1, Dckt. 66. The paragraph "4. m" box is checked, stating that a property division order is attached to the Dissolution Judgment. With respect to the Order, which is part of the State Court Dissolution Judgment, it states that Debtor "will receive,"

> [t]he real property located at 2591 Tom Polk Ave., Chico, CA which will either be sold or refinanced by [Debtor] as set forth herein.

Exhibit 1, Property Order Attachment to Judgment, Dckt. 66 at 4. The "plain language" of the Order that is part of the Dissolution Judgment states that Debtor "will receive" the real property, but that the real property <u>must</u> be either sold or refinanced.

The Property Order states in Paragraph 6, as part of the State Court Dissolution Judgment, that:

> Sale of property. The following property will be offered for sale and sold for the fair market value as soon as a willing buyer can be found, and the net proceeds from the sale will be [divided as follows]:
>
> [Creditor] shall receive the first $65,183.00 from the net proceeds. The balance shall be assigned to [Debtor]. If [Debtor] refuses to cooperate in the listing and/or sale of the real property described herein, the Clerk of the Court shall be appointed Elisor to act in Respondent's place.

Id. at 5. The State Court Dissolution Judgment and Order further provides:

> [Debtor] shall have 90 days from the date that Judgment in this matter is entered to refinance the current loan on the property located at 2591 Tom Polk Ave., Chico, CA to remove [Creditor's] name as a liable party and pay to him the total sum of $65,183.00. If [Debtor] does not do so, it will be listed for sale. The Clerk of the Court shall be appointed Elisor to act in [Debtor] place, if [Debtor] fails to cooperate in the listing and/or sale of the property identified herein.

Id., Paragraph 7.

Based on the undisputed State Court Dissolution Judgment and Order, it appears that the rights and interest of the Debtor and Creditor are not simply that Debtor owns the property (Schedule A/B, ¶ 1; Dckt. 1) and there is an unsecured obligation owed to Creditor (Schedule E/F *Id.* at 29; and POC 5-1).

The State Court Judgment states that Debtor "is granted full title to" receive the Property subject to the refinance or sale conditions, and payment of the specified dollar amount for Creditor's interests in the Property.

Creditor seeks relief from the stay to enforce the rights in the Property, to have it sold and proceeds of the sale paid to Creditor, if Debtor fails to refinance the property, have Creditor removed from the property and pay Creditor for his interest in the Property.

The Chapter 13 Plan that has been confirmed in this case does not provide for the State Court Dissolution Judgment and Property Order, Debtor's right that she "will receive" the Property, subject to the refinance or sale condition, and the rights and interests of Creditor in the Property pursuant to the State Court Dissolution Judgment and Order.

Conversely, Creditor has filed Proof of Claim 5-1 stating that his claim is unsecured. As one knows, a proof of claim is *prima facie* evidence of a claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires financial information and factual arguments. *In re Austin*, 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018).

However, a copy of the State Court Dissolution Judgment and Property Order is attached to Proof of Claim 5-1.

The court is presented with an "interesting" situation. There is a State Court Dissolution Judgment and Property Order providing when and how Debtor "will receive" the Property and Creditor's rights to proceeds from the sale of the Property if Debtor has not refinance/removed Creditor from the loan and paid Creditor for his interest in the Property.

The Motion and Oppositions do not address the effect and enforceability of the final State Court Dissolution Judgment and Property Order, the extent to which a Chapter 13 plan may alter the property rights to be received and being divested.

The Motion presented to the court is one stating that Creditor is seeking "relief from the stay," but does not state relief is sought for what purposes, proceedings, or exercise of rights. It does state at the end of paragraph 9:

> Allowing the Superior Court to proceed with the sale of the property will allow Mr. Meli to be in a better position to try and purchase a home of his own sooner, free of this recorded mortgage debt. This will assure some respect for the judicial process, regardless of which Court the parties find themselves in, and basic equity.

Motion; Dckt. 63. While this could be considered the relief stated with particularity (Fed. R. Bankr. P. 9013), it is likely that the necessary relief (if it should properly be granted) would be more extensive.

Rather than the court undertaking the research of the effect of the State Court Dissolution Judgment and Property Order, the effect of it providing that Debtor "will receive" the Property, whether the conditions of refinance are conditions precedent or subsequent to Debtor receiving the Property, and whether Creditor has an interest in the Property, the court is confident that the respective bankruptcy and family law attorneys can provide the court with a well organized analysis of State law and how it applies to the present situation.

October 3, 2023 Hearing

At the hearing, the respective counsel address the issues concerning whether Movant has an interest in the Property and proceeds thereof. The attorneys request a continuance of this hearing so they can meet to address these issues and possible resolutions.

November 7, 2023 Hearing

As of the court's review of the Docket on November 3, 2023, no further pleadings have been filed by the Parties. At the hearing, the Parties agreed to continue the hearing on the Motion to 1:30 p.m. on March 26, 2024. The Parties reported that they are working on a consensual refinance of the Property to resolve these matters without further litigation in either the Bankruptcy or the Family Law courts.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief from the Automatic Stay filed by Eric Meli

("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Relief from Automatic Stay is **XXXXXXX**.

4. 23-24568-E-13 RDW-2 | **SUNDREA GORDON-HACKLEY** Carl Gustafson | **MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION 3-12-24 [39]**

ROGER E. LARSEN, TRUSTEE OF THE LARSEN FAMILY TRUST ET AL. 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.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) 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 13 Trustee, parties requesting special notice, and Office of the United States Trustee on March 12, 2024. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion for Relief from the Automatic Stay / Motion for Adequate Protection was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ---------------------------------.

The Motion for Relief from the Automatic Stay is granted.

Roger E. Larsen and Elizabeth E. Larsen, Trustees of the Larsen Family Trust dated March 15, 2006 as to an undivided 55.804% interest and Mark Belotz and Silvia Belotz, also known as Marta Silvia Belotz, as trustees of the Belotz Family 1999 Trust, as Amended & Restated in 2014, dated July 6, 1999 as

to an undivided 44.196% interest, its successors and/or assignees ("Movant," "Creditor") seeks relief from the automatic stay, or, in the alternative, adequate protection payments, with respect to Sundrea Danyelle Gordon-Hackley's ("Debtor") real property commonly known as 948 Lake Canyon Avenue, Galt, California 95632 ("Property"). Movant has provided the Declarations of Reilly D. Wilkinson and Rich Mendoza to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property. Decl., Dockets 41, 42.

Movant argues Debtor has not made three post-petition payments, with a total of $12,558.33 in post-petition payments past due. Declaration, Dckt. 42 ¶ 9. Movant also provides evidence that there is a pre-petition arrearage of $26,393.23. *Id.* The total amount now owed on the loan is $487,986.46. *Id.* at ¶ 10.

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 $486,737.46 (*Id.*; the amount of debt less asserted attorney's fees), while the value of the Property is determined to be $624,900 as stated in Schedules A/B and D filed by Debtor. Schedule A/B, Docket 1 p. 10 line 1.1.

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).

In this case, Debtor's Schedule J indicates Debtor has $9,037 in disposable monthly income. Schedule J, Docket 1 p. 34 line 23c. Debtor's proposed Plan at Docket 2 places creditor in Class 1, while improperly listing the loan servicer and not the Creditor, and proposed to pay the mortgage payment in full at $4,166 per month and cure the arrearage with payments of $1,604.40 per month. Docket 2, ¶ 3.07(c). However, Debtor is not making payments in the Plan as the record indicates Trustee has not disbursed any sums to creditor. Decl., Docket 41 ¶ 3. 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.

Request for Attorneys' Fees

In the prayer of the Motion, almost as if an afterthought, Movant requests that it be allowed attorneys' fees. The Motion does not allege any contractual or statutory grounds for such fees. No dollar

amount is requested for such fees in the prayer. No evidence is provided of Movant having incurred any attorneys' fees or having any obligation to pay attorneys' fees. Based on the pleadings, the court would either: (1) have to award attorneys' fees based on grounds made out of whole cloth, or (2) research all of the documents and California statutes and draft for Movant grounds for attorneys' fees, and then make up a number for the amount of such fees out of whole cloth. The court is not inclined to do either.

Federal Rule of Bankruptcy Procedure 4001(a)(3)
Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests in th prayer of the Motion, for no particular reason, that the court grant relief from the Rule as adopted by the United States Supreme Court. With no grounds for such relief specified, the court will not grant additional relief merely stated in the prayer.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is not granted.

Other Requests in the Prayer

Movant requests the court to enter "an order allowing Movant to seek and collect any damages ordered by any Court for the wrongful retention of the subject property after foreclosure of the subject Property." Docket 39 p. 3:19-21. Such an order would not be necessary; if relief from stay is granted, Movant may file a claim in Debtor's case for alleged wrongful retention of the Property after foreclosure if Debtor's action give rise to a colorable claim for wrongful retention.

Similarly, Movant requests "an order permitting Movant to offer and provide Debtor with information regarding potential Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss Mitigation Agreement, and to enter into such agreement with Debtor if approved by Movant." *Id.* at p. 3:22-25. Such an order is again unnecessary. These types of communications with Debtor are not an act stayed by 11 U.S.C. § 362(a), but rather consist of simple communications with Debtor.

No other or additional relief is granted by the court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief from the Automatic Stay filed by Roger E. Larsen and Elizabeth E. Larsen, Trustees of the Larsen Family Trust dated March 15, 2006 as to an undivided 55.804% interest and Mark Belotz and Silvia Belotz, also known as Marta Silvia Belotz, as trustees of the Belotz Family 1999 Trust, as Amended & Restated in 2014, dated July 6, 1999 as to an undivided 44.196% interest, its successors and/or assignees ("Movant," "Creditor"), having been presented to the

court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed that is recorded against the real property commonly known as 948 Lake Canyon Avenue, Galt, California 95632 ("Property") to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale to obtain possession of the Property.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is not waived for cause.

No other or additional relief is granted.

FINAL RULINGS

5. 23-23777-E-12 CAE-1 | **BRENDAN SMITH** | **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 10-24-23 [1]**

Final Ruling: No appearance at the March 26, 2024 Hearing is required.

Debtor's Atty: Jenny L. Doling

Notes:
Continued from 2/1/24. With the continuance of the Status Conference, the Debtor in Possession and other parties in interest shall show cause why the court should not convert this case to one under Chapter 7.

Trustee Report at 341 Meeting lodged 2/23/24

Resignation of Chapter 12 Trustee filed 2/27/24 [Dckt 62]

Trustee's Final Report and Account filed 3/5/24 [Dckt 64]

[BLL-2] Motion for Order Dismissing Chapter 12 Case [by Creditor, West Family Trust] filed 3/6/24 [Dckt 66], set for 4/4/24 at 10:30 a.m.

[RBK-1] Motion to Dismiss Chapter 12 Case [by Banner Bank] filed 3/6/24 [Dckt 71], set for hearing 4/4/24 at 10:30 a.m.

[BJI-1] Motion of Farm Credit Services of America for Relief From the Automatic Stay filed 3/15/24 [Dckt 84]; set for hearing 4/4/24 at 10:00 a.m.

The Status Conference is continued to 10:30 a.m. on April 4, 2024.

The Hearing on the Order to Show Cause is continued to 10:30 a.m. on April 4, 2024.

MARCH 26, 2024 CONTINUED STATUS CONFERENCE AND HEARING ON ORDER TO SHOW CAUSE

The court has issued an Order to Show Cause as to why this Case should not be converted to one under Chapter 7. As addressed in the prior Civil Minutes, Debtor in Possession does has not bee actively prosecuting this Chapter 12 Case. This has led the court to conclude that if such conduct is not corrected, then cause exists to convert the case to one under Chapter 7. These grounds to convert the case have been

stated in the Civil Minutes for the February 1, 2024 Status Conference.

Since the last Status Conference, the following pleadings have been filed:

1. Motion to Dismiss Bankruptcy Case, DCN: BLL-2; Dckt. 66.

   a. The hearing is set for April 4, 2024, pursuant to Local Bankruptcy Rule 9014-1(f)(2), for which opposition must be filed 14 days before the April 4, 2024 hearing date. That deadline expires on March 21, 2024. No opposition had been filed when the court reviewed the Docket on the morning of March 21, 2024.

2. Motion for Relief From the Stay, DCN: BJI-1; Dckt. 84.

   a. The hearing is set for April 4, 2024, pursuant to Local Bankruptcy Rule 9014-1(f)(2), for which opposition must be filed 14 days before the April 4, 2024 hearing date. That deadline expires on March 21, 2024. No opposition had been filed when the court reviewed the Docket on the morning of March 21, 2024.

3. Amended Schedule A/B; Dckt. 93.

4. No Monthly Operating Reports have been filed, as are required by Order of the Court. Order; Dckt. 15.

At the Continued Status Conference and Order to Show Cause Hearing, **XXXXXXX**

FEBRUARY 1, 2024 STATUS CONFERENCE

At the continued conference counsel for the Debtor in Possession (who is a fiduciary of the Bankruptcy Estate), counsel for Creditors, and the Chapter 12 Trustee reported that no cash collateral stipulation has been worked out and that the financial documents and records have not been produced for the Chapter 12 Trustee.

Counsel for the Fiduciary Debtor in Possession reported that the Debtor's pre-petition accountant has refused to turn over documents, financial records, and financial information, which are property of the Bankruptcy Estate, to the Fiduciary Debtor in Possession. Counsel for the Fiduciary Debtor in Possession also reported that no action has been taken since the December 12, 2023 Status Conference to compel the turnover of these records and documents via a 2004 Examination or other procedure that the Debtor in Possession, a fiduciary to the Bankruptcy Estate, to recover these necessary Documents.

Apparent Fiduciary Debtor in Possession's Unauthorized Use of Cash Collateral

It was further reported that no use of cash collateral stipulation has been worked out and there is no order authorizing the use of cash collateral. At this juncture it is unclear whether the fiduciary Debtor

in Possession has been using cash collateral in violation of 11 U.S.C. § 363(c)(2), which states:

> (2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—
>
> > (A) each entity that has an interest in such cash collateral consents; or
> >
> > (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

given that there has not been the consent of the creditor given and no order of this court authorizing the use of cash collateral.

Fiduciary Debtor in Possession Engaging the Services of a Professional Without Obtaining Court Authorization

Counsel for the Fiduciary Debtor in Possession further reported that attorney Raymond Sandelman, Esq. is special counsel for the Fiduciary Debtor in Possession, who has control over the Bankruptcy Estate, in which are such claims to be prosecuted by Special Counsel are now located (11 U.S.C. § 541(a)), has failed to obtain authorization to be employed by the Fiduciary Debtor in Possession (11 U.S.C. § 327) and appears to be refusing to do such. As is well known, while a professional may work for a trustee or debtor in possession, if the court has not authorized the employment, the professional may no be paid any compensation for his/her services. *See*, 11 U.S.C. § 330(a)(1) requiring that a professional be authorized to be employed for that professional receiving any compensation for the services rendered.

The State Bar identified only one Raymond Sandelman admitted to practice law in California, with Mr. Sandelman listing his office as being in Chico, California.

Fiduciary Debtor in Possession Employment of Real Estate Professions Without Obtaining Authorization From the Court

Counsel for the Fiduciary Debtor in Possession further reported that the Fiduciary Debtor in Possession and Tyler Tamagni, a co-owner in the 16.32 acres in Tehama County, California, APN: 091-220-016-000, have engaged the services of a real estate broker; identified as Elt Ranch Properties, Inc, with Kyle Dalrymple serving as the licensed Broker Associate. The California Department of Real Estate identifies ELT Ranch Properties, Inc. having a Broker's License and Kyle Dalrymple being a Broker Associate. [Fn. 1.]

The address listed for the Broker and Broker Associate by the California Department of Real Estate is:

ELT Ranch Properties, Inc.
Randal Howard Edwards, Designated Officer
Anthony Joseph Toso, Designated Officer
Kyle Evan Dalrymple, Broker Associate
8408 Lander Ave
Hilmar, CA 95324

FN. 1. https://www2.dre.ca.gov/publicasp/pplinfo.asp?License_id=02105819

While the Fiduciary Debtor in Possession may not need court authorization to list a property for sale, any sale contract the Fiduciary Debtor in Possession enters into must be approved by the court before the sale can proceed. 11 U.S.C. § 363(b)(1).

Additionally, it is only the Fiduciary Debtor in Possession, in that fiduciary capacity, who may enter into a listing agreement or contract to sell property of the Bankruptcy Estate - not the individual Debtor. All of the Debtor's prepetition property immediately became property of the Bankruptcy Estate upon the filing of this Case. *See*, 11 U.S.C. § 341(a), subject to some exceptions not applicable here.

Further, the Broker and Broker Associate cannot be paid any compensation for their services unless their employment has been authorized by the court.

<u>Counsel Authorized to be Employed is the Attorney for the Fiduciary Debtor in Possession, not the non-fiduciary Debtor</u>

On November 11, 2023, the court authorized the Fiduciary Debtor in Possession to employ Jenny L. Doling, Esq. of J. Doling Law, PC as the counsel for the Fiduciary Debtor in Possession. As such employed profession, counsel for the Debtor in Possession has fiduciary duties running to the Bankruptcy Estate.

Apparent Dysfunctional Administration of the Bankruptcy Estate

What has been presented to the court appears to show that in the three months since the filing of this Bankruptcy Case the Fiduciary Debtor in Possession has grossly failed to fulfill his duties and obligations as a debtor in possession. The Fiduciary Debtor in Possession has failed to obtain documents and financial information to present to the Chapter 12 Trustee.

As clearly set forth in the Order Setting Chapter 12 Status Conference, the Fiduciary Debtor in Possession is required to file monthly operating reports.

> **IT IS FURTHER ORDERED**, the debtor-in-possession shall prepare, file, and serve Monthly Operating Reports as required by Local Bankruptcy Rules 2015-1 using the form found on the court's website.

Chapter 12 Status Conference Order, p 2; Dckt. 15.

A review of the Court's Docket shows that the Fiduciary Debtor in Possession has not filed a monthly operating report for November 2023 or December 2023, for which the filing dates have passed.

The Order Setting Chapter 12 Status Conference further notifies the Fiduciary Debtor in Possession and the Debtor that:

> **NOTICE IS HEREBY GIVEN**, that the court may, *sua sponte*, at the status conference, order the case dismissed or converted to Chapter 7 for

> cause if appropriate. At the request of the Debtor(s), the court may convert the case to Chapter 13 or 11.

Id.

The court could have at the February 1, 2024 Status Conference converted this case to one under Chapter 7 due to the apparent gross breaches of fiduciary duties by the Fiduciary Debtor in Possession. However, the court prefers to set a further hearing on that and will be issuing an Order to Show Cause Why This Case Should Not Be Converted to One Under Chapter pursuant to the Court's Order Setting Status Conference. This is to allow a "good faith" debtor in possession who did not appreciate his fiduciary and statutory duties to correct his or her conduct and that he or she can fulfill the fiduciary duties going forward.

Given this conduct by the Fiduciary Debtor in Possession, conduct of the purported Special Counsel, and the inability of the Fiduciary Debtor in Possession and the counsel authorized to be employed by the Fiduciary Debtor in Possession to obtain and provide financial records and information, the court has determined that it is necessary for the Debtor in Possession, Special Counsel for the Fiduciary Debtor in Possession, and the bankruptcy counsel employed by the Fiduciary Debtor in Possession to appear in person at the March 12, 2024 Status Conference in Person, no telephonic appearances allows for the persons ordered to appear in person.

Additionally, if the financial records and information have not been provided by the Debtor's prepetition Enrolled Agent Tracy Hannick, of Bean Counting Firm, Inc., and the Fiduciary Debtor in Possession has exercise his Bankruptcy Law and Rules rights to compel the production of the financial documents and information, the court will order Tracy Hannick to appear, along with the other persons who have been ordered to appear at a continued Status Conference to be held within 2 weeks of March 12, 2024.

The Clerk of the Court shall serve copies of the Order Continuing the Status Conference, to which will be the Civil Minutes from the February 1, 2024 Status Conference on the following persons either electronically or at their physical address:

Brendan Christopher Smith, Debtor in Possession
9081 Stanford Lane
Durham CA 95938

Jenny L. Doling, Esq.
J. Doling Law, PC
36-915 Cook Street
Palm Desert, CA 92211

David Burchard, Chapter 12 Trustee
PO Box 8059
Foster City CA 94404

Robert B. Kaplan, Esq.
Counsel for Banner Bank
2 Embarcadero Center 5th Fl
San Francisco CA 94111-3824

ELT Ranch Properties, Inc.
Randal Howard Edwards, Designated Officer
Anthony Joseph Toso, Designated Officer
Kyle Evan Dalrymple, Broker Associate
8408 Lander Ave
Hilmar, CA 95324

Byron Lee Lynch, Esq.
Counsel for the West Family Trust
PO Box 685
Shasta Lake CA 96019

Ian McGlone, Esq.
Boutin Jones, Inc.
555 Capitol Mall Ste 1500
Sacramento, CA 95814

Raymond L. Sandelman, Esq.
196 Cohasset Rd.,#225
Chico, CA 95926-2284

The U.S. Trustee for Region 17
Sacramento Division

Tracy Hannick, EA
Bean Counting Firm Inc.
383 Connors Court Suite D & E
Chico, CA 95926

DECEMBER 12, 2023 STATUS CONFERENCE

On October 24, 2023, Brendan Smith, the Debtor commenced this voluntary Chapter 12 Case. In his Status Conference Statement filed on December 5, 2023, the Debtor in Possession reports that there is substantial litigation over claims of the Estate against the Glenn-Colusa Irrigation District for alleged damage to the Debtor's 2021 crop. In the Status Report the Debtor in Possession provides the court with an analysis of Debtor's eligibility to seek relief pursuant to Chapter 12 of the Bankruptcy Code.

At the Status Conference, counsel for the Debtor in Possession reported that books and records are being produced by the Debtor's C.P.A., which should be delivered later on December 12, 2023.

The Debtor in Possession and creditors are working on a stipulation to use cash collateral. The Chapter 12 Trustee reported that the First Meeting of Creditors has been continued to allow for the financial records to be produced.

Banner Bank addressed the litigation with Glenn-Colusa, and the need for the non bankruptcy counsel has not yet been appointed. Debtor in Possession counsel reported that a draft of the employment application has been prepared, has been reviewed, and is to be promptly.

Counsel for the West Family Trust discussed the amount of debt coming due in January 2024, and whether any portion of that will be paid. A stipulation has been reached with Wells Fargo Bank, which will be submitted shortly with respect to its secured claim.

Counsel reported that Debtor's income has been increased by $150,000 by virtue of his new job with the Irrigation District