UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

May 14, 2018 at 10:00 a.m.

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1. 17-25004-A-11 SARINA BRYSON — MOTION TO APPROVE DISCLOSURE STATEMENT 3-12-18 [75]
MRL-5

Tentative Ruling: The motion will be denied without prejudice.

The debtor seeks approval of the disclosure statement filed on March 12, 2018 (as amended by docket 92, exhibit A), which accompanies an amended chapter 11 plan filed that same date. Dockets 75 & 76.

This motion was continued from April 30, 2018 to allow the debtor to file a second amended disclosure statement correcting the issues raised by the court. The debtor has filed has filed that second amended disclosure statement. Docket 92, Ex. A.

The debtor has addressed most of the court's concerns:

(1) The disclosure statement indicates that the debtor has budgeted $150 a month for life insurance. However, it also states that the debtor's salary includes a deduction for life insurance. The expense and the deduction seems to be duplicative.

The second amended disclosure statement explains that the debtor has two life insurance policies, one through her employer and one purchased directly be the debtor.

(2) The disclosure statement budgets $295.52 a month for "Telephone, Cell phone, Internet, Cable" without disclosing the number of telephones, Internet, and Cable TV accounts the debtor maintains. On its face, $295.52 seems excessive for a household of two.

The second amended disclosure statement now includes an itemization of these costs.

(3) The disclosure statement budgets $224 a month for "Entertainment, Clubs, Recreation, Newspapers, Magazines, and Books." $224 seems excessive.

The second amended disclosure statement explains that this primarily consists of the cost to make two annual trips to visit the debtor's daughter. Additionally, the debtor estimates she spends $75 month to dine out and for recreation.

(4) The disclosure statement budgets $270 a month for horse food and care, without explaining why this is a reasonable expense given that creditors will not be in full.

The second amended disclosure statement explains that this expense is necessary to keep the horses alive and that the horses provide therapeutic benefit to the debtor.

(5) The disclosure statement says that the claim of BMW will be paid in full, with interest, under the plan. However, the plan provides for surrender of the collateral vehicle in satisfaction of the claim. Docket 75 at 12.

The second amended disclosure statement now provides, like the plan, that the vehicle will be surrendered in satisfaction of the claim.

(6) The disclosure statement does not include an actual liquidation analysis. For instance, with respect to the general unsecured claims, it says that in a chapter 7 liquidation, unsecured claims would receive $43,100. Docket 75 at 15. The disclosure statement explain how the debtor arrived at this figure.

The second amended disclosure statement now provides a liquidation analysis that is not conclusory.

(7) The disclosure statement says that the claim of Equiant ($16,200) will be satisfied by the surrender of collateral, a timeshare (valued at $300). There is no disclosure of this creditor's deficiency claim.

The second amended disclosure statement estimates a deficiency claim of $15,000.

(8) While the disclosure statement contains an expense of $359.48 for a vehicle, the debtor has not disclosed when it was purchased and its cost. Docket 75 at 6.

The second amended disclosure statement has **not clarified this information**. In addition, it does not state the dividend to general unsecured creditors.

2.	18-20608-A-11 PHL-2 BRAE86GEOPROP,	ANTIGUA CANTINA & GRILL, INC. L.L.C. VS.	MOTION FOR RELIEF FROM AUTOMATIC STAY 4-16-18 [37]

Tentative Ruling: The motion will be granted.

The movant, BRAE86GEOPROP, L.L.C., seeks the termination of the automatic stay as well as in rem relief as to a commercial real property in Sacramento, California (on O Street). See 11 U.S.C. § 362(d)(1), (d)(2) and 362(d)(4).

11 U.S.C. § 362(g) provides that:

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

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

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

In other words, the moving creditor has the burden of persuasion as to the value of and lack of equity in the property while the debtor has the burden of persuasion as to necessity to an effective reorganization. United Sav. Ass'n

of Texas v. Timbers of Inwwod Forest Assocs., Ltd., 484 U.S. 365, 375 (1988). The standard in a chapter 11 proceeding is a showing that "the property is essential for an effective reorganization that is in prospect." This means, that there must be "a reasonable possibility of a successful reorganization within a reasonable time." Timbers at 376.

The movant has produced evidence that the property has a value of $1,090,000, based on an appraisal, and it is encumbered by claims totaling approximately $1,534,930.38. Docket 41 at 4-7; Docket 43, Ex. K at 39. The movant's mortgage deed is in first priority position and secures a claim of approximately $1,205,405.79. Docket 41 at 4. There is no equity in the property.

While the debtor has submitted its own appraisal of the property, contending that its value is $1.8 million, that appraisal is inadmissible hearsay. It has not been authenticated. There is no declaration in the record from the appraiser, Robb Roberts. See Docket 58. For the same reason, the court rejects the debtor's request for an evidentiary hearing. By failing to submit a declaration from Robb Roberts, the debtor has not established the existence of a material disputed fact.

The movant has established also that the property is not necessary to an effective reorganization.

Over the last several years, various creditors have recorded liens against the property due to the debtor's failure to pay debts. This includes a lien for $135.11, recorded by the City of Sacramento on December 21, 2017 for unpaid utilities; a lien for $133.96, recorded by the City of Sacramento on November 19, 2015 for unpaid utilities; a lien for $1,632.75, recorded by the California Employment and Development Department on June 22, 2015 presumably for inability to pay unemployment benefits; a lien for $4,730.36, recorded by the California Franchise Tax Board on June 10, 2015; a lien for $14,138.65, recorded by U.S. Foods, Inc. on May 29, 2015; a lien for $1,632.87, recorded by the California Employment and Development Department on March 18, 2015, presumably for inability to pay unemployment benefits; inability to pay property taxes, precipitating a tax sale for the property, scheduled for February 26, 2018, etc. Docket 4 at 5-7; Docket 41 at 4-5.

The debtor's lack of a reasonable prospect of reorganization is evident also from its prior bankruptcy filing.

On December 14, 2015, the debtor filed a chapter 11 petition with this court. The court dismissed the case on May 16, 2017, on the motion of the United States Trustee. Docket 119. In dismissing the case, the court found and concluded:

"*The debtor does not appear to have paid property taxes and mortgage interest while it was marketing the property for sale because it was not generating income from the property;*"

"*[T]he debtor has been operating the real property in violation of the Bankruptcy Code and Rules;*"

"*[T]he debtor has not accounted for the dissipation of approximately $22,000 . . . ;*"

"*The court is at a loss of how the debtor could pay even the U.S. Trustee's*

quarterly fees. This amounts to substantial or continuing loss and diminution with no likelihood of rehabilitation."

Docket 120.

The debtor's prospects of reorganization have not improved with the filing of this case. The operating report for March 2018 states that the debtor has a total of $248 in its two bank accounts. Docket 35 at 3. As evident from the above-described liens, including liens recorded after the dismissal of the debtor's prior chapter 11 case, the debtor is unable to pay recurring operating expenses, such as utilities and food vendor costs.

In March 2018, the debtor received $58,562 in revenue from operating its business on the property. Docket 35 at 4. The secured creditors received none of those funds. Virtually all the funds were used to run the debtor's business. As such, there is no net income for the debtor to fund a chapter 11 plan or to pay the movant. Docket 35 at 5.

Finally, this case was filed on February 2, 2018. The County of Sacramento had set an auction sale of the property for February 26, 2018, for unpaid property taxes. To stop the sale, the movant had to advance $149,540.61 to the county. Docket 41 at 4-5.

Given the debtor's prior chapter 11 case, given the reasons for the dismissal of the prior case, given that nearly three years have passed since the dismissal of the prior case, given the debtor's ongoing inability to pay the secured creditor and pay property taxes, given the extra debt the debtor has incurred since the prior case, and given the debtor's current inability to service the debt on the property or pay property taxes, there is no reasonable possibility of a successful reorganization within a reasonable time. Timbers at 376.

The foregoing is also cause for the granting of prospective relief from stay. Thus, even if the movant does not satisfy 11 U.S.C. § 362(d)(2), prospective relief from stay is warranted under 11 U.S.C. § 362(d)(1).

The court concludes that there is no equity in the property and there is no evidence that it is necessary to a reorganization. Thus, the motion will be granted pursuant to 11 U.S.C. § 362(d)(1) and (2), to permit the movant to conduct a nonjudicial foreclosure sale and to obtain possession of the subject property following sale.

The court will grant relief under 11 U.S.C. § 362(d)(4), which prescribes that:

"*On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay . . .*

"*with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either-*

"*(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or*

"*(B) multiple bankruptcy filings affecting such real property.*"

The filing of this case was part of a scheme to delay, hinder or defraud creditors, involving multiple bankruptcy filings affecting the subject property. Specifically, the debtor filed a second case even though there is no demonstrable change in the debtor's financial circumstances. The debtor has unable to reorganize in the prior case and is unlikely to do so in this case. This case was filed without a realistic hope or expectation of reorganization. It was filed only to acquire the automatic stay in order to continue to stiff arm long suffering creditors. The filing of this case was part of a scheme by the debtor to delay and hinder the movant from enforcing its claim against the property. Section 362(d)(4) relief is warranted.

Other in rem relief will be denied because it is not appropriate under section 105 and it is not appropriate because it requires an adversary proceeding. Johnson v. TRE Holdings LLC (In re Johnson), 346 B.R. 190, 195 (B.A.P. 9th Cir. 2006).

The loan documentation contains an attorney's fee provision and the movant is an over-secured creditor. The motion demands payment of fees and costs. The court concludes that a similarly situated creditor would have filed this motion. Under these circumstances, the movant is entitled to recover reasonable fees and costs incurred in connection with prosecuting this motion. See 11 U.S.C. § 506(b). See also Kord Enterprises II v. California Commerce Bank (In re Kord Enterprises II), 139 F.3d 684, 689 (9th Cir. 1998).

Therefore, the movant shall file and serve a separate motion seeking an award of fees and costs. The motion for fees and costs must be filed and served no later than 14 days after the conclusion of the hearing on the underlying motion. If not filed and served within this deadline, or if the movant does not intend to seek fees and costs, the court denies all fees and costs. The order granting the underlying motion shall provide that fees and costs are denied. If denied, the movant and its agents are barred in all events from recovering any fees and costs incurred in connection with the prosecution of the motion.

If a motion for fees and costs is filed, it shall be set for hearing pursuant to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). It shall be served on the debtor, the debtor's attorney, the trustee, and the United States Trustee. Any motion shall be supported by a declaration explaining the work performed in connection with the motion, the name of the person performing the services and a brief description of that person's relevant professional background, the amount of time billed for the work, the rate charged, and the costs incurred. If fees or costs are being shared, split, or otherwise paid to any person who is not a member, partner, or regular associate of counsel of record for the movant, the declaration shall identify those person(s) and disclose the terms of the arrangement with them.

Alternatively, if the debtor will stipulate to an award of fees and costs not to exceed $750, the court will award such amount. The stipulation of the debtor may be indicated by the debtor's signature, or the debtor's attorney's signature, on the order granting the motion and providing for an award of $750.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be waived.

3. 17-26125-A-11 FIRST CAPITAL RETAIL, L.L.C.
GEL-21

MOTION TO APPROVE STIPULATION FOR REJECTION OF NON-ASSIGNED FRANCHISE AGREEMENTS
4-24-18 [397]

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the trustee, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the respondent creditor, the debtor, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted.

Pursuant to section 365(a), the trustee moves for approval of a stipulation for retroactive rejection to April 12, 2018 of non-assigned franchise agreements with (1) Auntie Anne's® store #CA-228 located in Santa Rosa Plaza in Santa Rosa, California; and (2) a combined Cinnabon® bakery #101916 and Auntie Anne's® store CA-235 to be located in the Century City Mall in Los Angeles, California.

Section 365(a) allows a trustee to assume or reject any executory contract or unexpired lease of the debtor. Section 365(d)(1) provides that "In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected."

The debtor is in a liquidation plan and does not need to fulfill these franchise agreements. Hence, rejection of the contracts is in the best interest of the creditors and the estate. Further, the franchisors have stipulated to the debtor's rejection of the subject contracts. See Docket 399, Ex. A.

The court will approve the stipulation to permit the rejection retroactively to April 12. See Pac. Shores Dev. v. At Home Corp. (In re At Home Corp.), 392 F.3d 1064, 1069, 1072 (9th Cir. 2004) (holding that bankruptcy courts have equitable authority to approve retroactive rejection of an unexpired nonresidential real property lease). The motion will be granted.

4. 17-26125-A-11 FIRST CAPITAL RETAIL, L.L.C.
GL-1
5060 MONTCLAIR PLAZA LANE OWNER, L.L.C. VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
10-17-17 [62]

Tentative Ruling: The motion will be dismissed without prejudice as moot. The parties have reached an agreement to revive the lease referred to in the motion and to allow the buyer to assume the lease.

5. 17-26125-A-11 FIRST CAPITAL RETAIL, L.L.C. RBS-2
18-2030 FIRST DATA MERCHANT SERVICES L.L.C. V. MCA RECOVERY, L.L.C. ET AL
MOTION TO DEPOSIT FUNDS INTO COURT REGISTRY
3-28-18 [6]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the defendants and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

As the plaintiff in this interpleader adversary proceeding, First Data Merchant Services, L.L.C. asks for permission to deposit the $214,932.33 funds at stake with the court.

Local Bankruptcy Rule 7067-1(a) and (b)(1) state:

"*(a) Registry funds maintained pursuant to 28 U.S.C. § 2041 and Rule 67 of the Federal Rules of Civil Procedure shall include, but shall not be limited to, monies to be held in escrow pending resolution of a particular dispute before the Court.*

"*(b) Receipt of Funds.*
"*1) No money shall be sent to the Court or its officers for deposit in the Court's registry without a court order signed by the presiding judge in the case or proceeding.*"

Fed. R. Civ. P. 67(a), as made applicable here by Fed. R. Bankr. P. 7067 provides that:

"*(a) Depositing Property. If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party—on notice to every other party and by leave of court—may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.*"

As the plaintiff has interpleaded the subject funds, given the dispute over the funds among the two defendants, First Capital Retail, L.L.C. and MCA Recovery, L.L.C., the court will permit their deposit with the court. The motion will be granted.

6. 17-26125-A-11 FIRST CAPITAL RETAIL, L.L.C. RBS-2
18-2030 FIRST DATA MERCHANT SERVICES L.L.C. V. MCA RECOVERY, L.L.C. ET AL
MOTION TO DISMISS AND DISCHARGE PLAINTIFF
4-13-18 [16]

Final Ruling: The motion will be dismissed without prejudice because it was filed in a piecemeal fashion. It violates Local Bankruptcy Rule 9014-1(d)(1) and (d)(3)(D) because the evidence accompanying the motion was not filed with

the motion. It was filed 10 days later, on April 23. Dockets 23, 24, 25. Because the motion was brought pursuant to Local Bankruptcy Rule 9014-1(f)(1), which requires at least 28 days' notice of the hearing and written oppositions are required at least 14 days prior to the hearing, parties in interest have not received sufficient notice of the evidence in support of the motion. The evidence was served on parties in interest on April 23, only 21 days prior to the May 14 hearing. Docket 25. As such, parties in interest received the evidence approximately seven days prior to the April 30 deadline to file opposition. This violates Local Bankruptcy Rule 9014-1(f)(1) and Local Bankruptcy Rule 9014-1(d)(1) and (d)(3)(D), which require evidence in support of the motion to be filed with the motion. Evidence in support of a motion, when necessary, is an indispensable part of the motion.

7. 17-23968-A-7 PATRICK/MICHELE PITTS — MOTION TO AMEND
17-2135 DBJ-2
ENGLAND ET AL V. PITTS ET AL — 3-21-18 [52]

Tentative Ruling: The motion will be granted.

The plaintiffs seek leave to file a second amended complaint, adding one additional paragraph to the statement of facts detailing the alleged commission of waste on the property.

The motion was continued from April 30, 2018 because counsel for the movant did not appear.

The initial complaint, filed July 24, 2017, seeks to determine the nondischargeability of a debt arising from the unapproved installation of solar panels on property owned by the plaintiffs and rented to the debtors/defendants. The plaintiffs filed a first amended complaint, as of right, on August 3, 2017. Docket 7. The defendants filed an answer on September 5, 2017. Docket 11.

Fed. R. Civ. Proc. 15(a)(1), as incorporated by Bankruptcy Rule 7015, provides that "[a] party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier."

Rule 15(a)(2) provides that "[i]n all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."

Absent undue delay, bad faith, dilatory motive, or prejudice to the opposing party, a presumption exists in favor of granting leave to amend. Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051-52 (9th Cir. 2003) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

Rule 15(a)(3) provides that "[u]nless the court order otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later."

The specific language included in the proposed second amended complaint states: "Defendants vacated the property in the fall of 2017. Upon doing so, they removed appliances, cabinets, countertops, doors, baseboards, trim, etc. causing great waste and damage to the property." Docket 54 at ¶ 11, Ex. A.

The purpose of the amendment is to allege that the defendants caused more property damage than was known when the complaint was originally drafted. Docket 52 at 2. The amendment pertains to property damage that took place in the fall of 2017. It appears that this is a typographical error. The year should be 2016.

In the their opposition, the debtors admit they vacated the property in September 2016. Docket 61 at ¶ 1. The chapter 7 petition was filed on June 14, 2017, ten months after the damage alleged to have occurred when the defendants vacated the property in September 2016.

The plaintiffs discovered the additional facts only recently during depositions taken on February 7, 2018. The plaintiffs originally filed a motion to make this amendment on February 22, 2018, well before the March 31 discovery deadline, with the hearing set for March 19, 2018. Docket 41. The motion was dismissed because of notice defects. Docket 51.

Amendment of the complaint to include the additional damages is not an undue prejudice to the defendants. It does not appear that the amendment is proposed in bad faith or intended to abuse the judicial process.

The proposed amendment relates to the same basic operative facts - the defendants' occupancy of the property and their alleged damage of it.

The opposition, while lengthy, hardly mentions the proposed amendment save for a sentence that asserts that removal of fixtures did not cause property damage. Docket 61 at ¶ 7. In general, the defendants dispute the facts alleged by plaintiffs.

As opposition to this motion, this is unpersuasive. It is not appropriate to litigate the facts of this case in this context. The court assumes the defendants do not agree with the facts alleged in the complaint or the amendment. But, whether the facts as alleged are true or not is not the issue.

The opposition is wholly ineffective as it fails to addresses Rule 15 or the standard for permitting an amendment.

For the forgoing reasons, the motion will be granted. This will require extending the discovery deadlines:

a. Discovery shall be completed by June 30, 2018.

b. Dispositive motions shall be filed and served no later than July 31, and heard by the court no later than September 15.

c. The continued status conference shall be conducted on October 17 at 9:30 a.m.

A responsive pleading to the second amended complaint shall be filed and served no later than May 28.

8. 17-23968-A-7 PATRICK/MICHELE PITTS — MOTION TO AMEND
17-2135 DBJ-3
ENGLAND ET AL V. PITTS ET AL — 4-30-18 [67]

Tentative Ruling: The motion will be dismissed. The movant withdrew the motion two days after it was filed.

9. 17-23968-A-7 PATRICK/MICHELE PITTS — MOTION TO COMPEL ABANDONMENT
RJ-2 — 4-30-18 [31]

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the debtor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the creditors, the trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be denied without prejudice.

The debtors seek an order compelling the trustee to abandon the estate's interest in claims related to real property located at 20 Pamela Jane Court in Oroville, California. According to the debtors, the entire equity in the property is exempt.

11 U.S.C. § 554(b) provides that on request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

The debtors have scheduled the value of the claims at $7,000 and claimed an exemption for that amount under Cal. Code Civ. Pro. § 703.7140(b)(5). In support of the motion, the debtors state that they claim equitable ownership of the property in addition to damages. The property has a scheduled value of $185,000 and is subject to encumbrances of approximately $50,000. Thus, there is potentially much more than $7,000 of nonexempt equity to be realized from the claims. On this record, the court cannot conclude that the claims are of inconsequential value and benefit to the estate.

10. 16-20774-A-12 TIMOTHY/JILL PEDROZO — MOTION TO DISMISS CASE
JPJ-1 — 4-5-18 [162]

Tentative Ruling: The motion will be conditionally denied.

The chapter 12 trustee moves for dismissal because the debtors are $8,423 delinquent under the terms of the chapter 12 plan. The debtors' delinquency includes default on 2.7 plan payments.

11 U.S.C. § 1208(c) provides that "on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including . . . (6) material default by the debtor with respect to a term of a confirmed plan."

The debtors state that they made two payments totaling $6,000 in early April and that they plan to cure the remaining deficiency by May 14, 2018. Further, the delinquency was due to a cheese distributor failing to pay the debtors timely. The debtors have approximately $55,000 of cheese in their cold room waiting to be sold.

The court concludes that the debtors are in material default for purposes of 11 U.S.C. § 1208(c)(6). This is cause for dismissal. However, this is the trustee's first motion to dismiss the case indicating that this is debtors' first significant delinquency since the plan was confirmed on September 19, 2016. Accordingly, provided the debtors are current by May 21, the case may remain pending. If not, the case will be dismissed on the trustee's ex parte application.

11. 16-21585-A-11 AIAD/HODA SAMUEL — MOTION TO USE CASH COLLATERAL AND FOR REPLACEMENT LIENS
FWP-6 — 1-8-18 [979]

Tentative Ruling: The motion will be granted.

The chapter 11 trustee seeks authority to use cash collateral generated from the rental of a shopping center in Rio Linda, California ($8,268.40 in rents monthly), for the period of May 1, 2018 through August 31, 2018. This center was brought into the estate in April 2017 via a substantive consolidation of the debtors with their limited liability company. See Docket 927.

The other three estate shopping centers have been sold. The sales closed in March 2017. Docket 727 at 2. The trustee seeks to use rental income to pay for, among other things, the maintenance, security, insurance, ground keeping, and utilities of the center. The trustee is currently marketing the center for sale. He believes its value exceeds its encumbrances. The property is encumbered by a single lien of the United States, in the approximate amount of $3,029,412.64. Docket 927 at 4.

The chapter 11 trustee also seeks permission to use cash collateral generated from the rent of the remaining two residential real properties (209 Prairie Circle (rented at $800 a month) and 148 Estes Way (rented at $1,000 a month)), for the period of November 1, 2017 through January 31, 2018. The other four residential properties were abandoned by the trustee months ago. The trustee proposes to use the rental income, of up to $2,000.00 a month per property, to maintain their condition.

Only the United States and JPMorgan Chase Bank are asserting interests in cash.

11 U.S.C. § 363(c)(2)(B), (c)(3), (e) provides that, when the secured claimants with interest in the cash collateral do not consent, after notice and a hearing, "the court . . . shall prohibit or condition such use [of cash collateral] . . . as is necessary to provide adequate protection of such interest."

The proposed use of cash collateral will preserve the going concern of the shopping center and two residential properties, allowing the trustee to continue operating them, pending further administration. This is especially true with respect to the shopping center at this time, given the substantial flood damages it sustained recently and the trustee's efforts to remedy such damages. The proposed use of cash collateral is in the best interests of the creditors and the estate.

The proposed budget here is similar to the budgets pursuant to which the court has authorized prior use of cash collateral. See, e.g., Dockets 109, 150, 174, 203, 794, 897, 925, 1021. The trustee proposes to grant the secured creditors replacement liens in further generated cash collateral and other cash of the

estate. This includes replacement liens to the United States on cash (approximately $99,000) from accounts against which the United States was attempting to satisfy its judgment on the petition date. The replacement liens, to the extent applicable, shall not attach to the part of the further cash collateral designated as a "carve-out" for administrative expenses.

Given that the secured creditors agree to the cash collateral use and given that the proposed budget is substantially similar to the budget of the estate's prior cash collateral requests, the motion will be granted as to the shopping center and residential properties.

By authorizing cash collateral use, the court is not approving the compensation of estate professionals, even if such compensation is accounted for in the cash collateral budget.