

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Modesto, California

July 12, 2018, at 2:00 p.m.

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|---|---|
| 1. <u>16-90500-E-11</u> ELENA DELGADILLO Len ReidReynoso | CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 6-9-16 <u>1</u> |
|---|---|

Debtor's Atty: Len ReidReynoso

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|--|
| The Status Conference is XXXXXXXXXX. |
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Notes:

Continued from 5/31/18, Debtor having filed a Motion to Dismiss case.

Trustee Monthly Reports filed: 6/21/18 [Apr], 6/21/18 [May]

[HSM-21] Order granting Motion for Allowance of Administrative Expense filed 6/3/18 [Dckt 341]

[HSM-22] *Ex Parte* Application to Allow Certain Matters to Be Set for Hearing in Sacramento filed 6/7/18 [Dckt 342]; Order granting filed 6/7/18 [Dckt 346]

[HSM-23] *Ex Parte* Application for Amended Order Granting Motion for Allowance of and Authorization to Pay Administrative Income Tax Obligations of Estate filed 6/12/18 [Dckt 348]; Order granting filed 6/15/18 [Dckt 359]

[JES-2] Final Application for Allowance of Professional Fees and Expenses of Accountant for Trustee filed 6/13/18 [Dckt 352], set for hearing 7/19/18 at 10:30 a.m.

[HSM-24] Second and Final Application for Allowance of Compensation and Reimbursement of Expenses to Counsel for the Chapter 11 Trustee filed 6/28/18 [Dckt 367], set for hearing 7/19/18 at 10:30 a.m.

[HSM-25] First and Final Application for Allowance of Compensation and Reimbursement of Expenses for the Chapter 11 Trustee filed 7/6/18 [Dckt 380], set for hearing 7/19/18 at 10:30 a.m.

July 12, 2018, at 2:00 p.m.

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2. [18-90204](#)-E-12 LYNN/DONNA PORTER
David Johnston

CONTINUED STATUS CONFERENCE
VOLUNTARY PETITION
3-29-18 [\[1\]](#)

Final Ruling: No appearance at the July 12, 2018 status conference is required.

Debtor's Atty: David C. Johnston

The Status Conference is continued to 2:00 p.m. on August 2, 2018, to be conducted in conjunction with the hearing on the Motion to Confirm a Plan in this case.

Notes:

Continued from 4/26/18

[DCJ-1] Debtors' Motion to Confirm Chapter 12 Plan filed 6/27/18 [Dckt 21], set for hearing 8/2/18 at 2:00 p.m.

JULY 12, 2018 STATUS CONFERENCE

On June 27, 2018, Debtor in Possession filed a Motion to Confirm a Chapter 12 Plan in this case. The hearing on that Motion is set for August 2, 2018.

APRIL 26, 2018 STATUS CONFERENCE

At the Status Conference, Counsel for Debtor in Possession reported that this time Debtor in Possession will be proceeding with a productive plan.

INITIAL STATUS CONFERENCE SUMMARY

This bankruptcy case was commenced on March 29, 2018. The court notes that Debtor has filed three other recent bankruptcy cases, summarized as follows:

Chapter 13 Case 17-90808—David C. Johnston, Esq., Counsel for Debtor

Filed.....October 3, 2017

Dismissed.....March 28, 2018

Grounds for Dismissal.....The court ordered Debtor to confirm a Chapter 13 Plan by March 6, 2018, or the case would be dismissed. No Chapter 13 Plan was confirmed.

Relief From Stay.....The court granted relief from the automatic stay to Deutsche Bank National Trust Company. The relief is to foreclose on the 4249 Ellenwood Property.

Chapter 12 Case 16-91155—David C. Johnston, Esq., Counsel for Debtor

Filed.....December 30, 2016
Dismissed.....August 16, 2017

Grounds for Dismissal, as stated in the Civil Minutes for the hearing on the Motion to Dismiss the Chapter 12 case:

The current case was filed on December 30, 2016. The Chapter 12 Plan was filed on March 30, 2017, with confirmation denied on May 9, 2017. Order, Dckt. 44. In denying confirmation, the court determined that Debtor in Possession failed to provide the court with credible evidence showing an ability to perform the proposed Plan. Civil Minutes, p. 7; Dckt. 41. The testimony provided by one debtor was merely that persons personal findings of fact and dictating to the court that person's conclusions of law. Id. The court also noted that the expenses asserted to be reasonable as stated on Schedule J appeared to be a fiction, with Debtor purporting to state that the two adults have no home maintenance expenses, no clothing expenses, no medical expenses, no entertainment expenses, no health insurance expenses, and never pays any taxes (including self-employment taxes). Id. at 8.

The court also put into question Debtor's veracity and good faith, stating:

Debtor and Debtor in Possession appear to be filing and prosecuting a Chapter 12 case and plan built on misinformation, inaccurate, and undisclosed information. Take at face value, Debtor and Debtor in Possession have and know of significantly more income than disclosed - readily having at hand an "extra" \$400 to produce when "caught" by the Chapter 12 Trustee in having underfunded the Chapter 12 Plan. Debtor and Debtor in Possession appear to have whatever "extra" money they need to funnel to the creditor having a lien on Debtor's home.

16-91555; Dckt. 54 at 9.

Chapter 12 Plan No. 16-90113—David C. Johnston, Esq., Counsel for Debtor

Filed.....February 16, 2016
Dismissed.....March 8, 2016

Grounds for Dismissal.....Failure to Timely File Documents

REVIEW OF SCHEDULES AND STATEMENT OF FINANCIAL AFFAIRS

On Schedule A/B, Debtor lists the following major assets:

| | |
|-------------------------------------|-----------|
| Ellenwood Road Ag Property..... | \$300,000 |
| Deposit Accounts..... | \$ 13,500 |
| 186 Bee Hives..... | \$ 27,900 |
| Swinger Forklift..... | \$ 15,000 |
| Hand Tools, Business Equipment..... | \$ 10,000 |

For secured debt, on Schedule D Debtor's creditors include

| | |
|--|-------------|
| Select Portfolio Servicing - Ellenwood Property..... | (\$396,244) |
| ATTN Farm Loan Program - Ellenwood Property..... | (\$213,541) |
| ATTN Farm Loan Program - Bee Hives..... | (\$ 27,900) |

For income, on Schedule A Debtor lists monthly gross income of \$4,050.00, with only \$100 of withholding for state and federal income taxes, Medicare taxes, and Social Security taxes. On Schedule J, Debtor's stated monthly expenses of \$3,950 exhausts all of Debtor's income.

On the Statement of Financial Affairs, Question 4, Debtor lists the following gross income for 2018, 2017, and 2016:

| | |
|----------------------------|----------|
| 2018 (Three Months) | |
| Business Gross Income..... | \$15,000 |
| Wage Gross Income..... | \$ 2,500 |
| 2017 | |
| Business Gross Income..... | \$39,000 |
| Wages Gross Income..... | \$14,141 |
| 2016 | |
| Business Gross Income..... | \$41,701 |
| Wages Gross Income..... | \$26,470 |

3. [17-90320-E-7](#) **JESUS ALVARADO RODRIGUEZ** **CONTINUED STATUS CONFERENCE**
[17-9014](#) **AMENDED COMPLAINT**
12-22-17 [26]

EDMONDS V. SALINAS ET AL

Plaintiff's Atty: Steven S. Altman
Defendants' Atty: Randall K. Walton

Adv. Filed: 9/21/17
Answer: Alejandra A. Alvarado 10/31/17 [same document filed twice]
Joanna Salinas 11/27/17
Amd. Cmplt. Filed: 12/22/17
Answer: Joanna Salinas, Alejandra Alvarado 1/3/18
Jose Juarez, Aline Alvarado 1/3/18

Nature of Action:
Approval of sale of property of estate and of a co-owner

The Status Conference is XXXXXXXXXX.

Notes:
Continued from 4/26/18

Plaintiff's Status Report filed 7/3/18 [Dckt 39]

JULY 12, 2018 STATUS CONFERENCE

On July 3, 2018, Plaintiff-Trustee filed an updated Status Report. Dckt. 39. She reports that the settlement previously approved could not be consummated as originally planned.

At the Status Conference, counsel for Plaintiff-Trustee reported XXXXXXXXXX.

4. [18-90428](#)-E-11 **RANDHAWA TRUCKING, LLC** **STATUS CONFERENCE RE:**
Brian Haddix **VOLUNTARY PETITION**
6-7-18 [1]

Debtor's Atty: Brian S. Haddix

The Status Conference is xxxxxxxxxxxx.

Notes:

Trustee Report at 341 Meeting filed 7/5/18

JULY 12, 2018 STATUS CONFERENCE

This Chapter 11 case was filed on June 7, 2018. The Schedules and Statement of Financial Affairs were filed on June 29, 2018. Dckt. 29. The major asset of the Bankruptcy Estate is real property located at 1200 G Street, which is stated to have a value of \$1,300,000. *Id.* at 6. The Estate has no significant assets other than \$6,000 in Lottery Tickets and a 2017 Mercedes GLE 350 with a stated replacement value of \$45,000. *Id.* at 3–6.

The secured claims on Schedule D include \$1,100,000 encumbering the real property (two deeds of trust) and a \$40,000 claim secured by the \$45,000 2017 Mercedes Benz.

The U.S. Trustee's Report from the First meeting of Creditors is that the representative of Debtor in Possession and Debtor did not appear, but counsel for Debtor in Possession did appear. No motion to employ counsel has been filed.

At the Status Conference **XXXXXXXXXXXXXXXXXX**.

5. [18-90033](#)-E-7 SHIMON/DORIS KHAMO
[18-9004](#)

STATUS CONFERENCE RE:
COMPLAINT
5-2-18 [1](#)

REDLINE AUTO SALES, INC. V.
KHAMO ET AL

Plaintiff's Atty: Steven S. Altman
Defendant's Atty: unknown

Adv. Filed: 5/2/18
Answer: none

Amd. Cmplt. Filed: 6/1/18
Answer: none

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud
Dischargeability - willful and malicious injury

The Status Conference is XXXXXXXXXX.

Notes:
Plaintiff's 26 F Statement filed 6/25/18 [Dckt 12]

Plaintiff's First Status Conference Statement filed 7/5/18 [Dckt 14]

JULY 12, 2018 STATUS CONFERENCE

On July 5, 2018, Plaintiff Redline Auto Sales, Inc. filed its Status Report. Dckt. 14. Plaintiff advises the court that on June 8, 2018, the Summons and Complaint were filed, with the time to answer not expiring until after the Report was filed.

As of the court's July 11th review of the Docket, no answer or other responsive pleading was filed with the court.

At the Status Conference XXXXXXXXXXXXXXXXXXXXXX.

6. [17-90346-E-7](#) ENRIQUEZ/LISA SANCHEZ
[17-9011](#)

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
8-21-17 [\[1\]](#)

SANCHEZ V. SANCHEZ ET AL

Plaintiff's Atty: Mahanvir S. Sahota
Defendant's Atty: Len ReidReynoso

Adv. Filed: 8/21/17
Answer: 9/18/17

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud
Dischargeability - fraud as fiduciary, embezzlement, larceny
Dischargeability - willful and malicious injury

The Status Conference is XXXXXXXXXX.

Notes:
Continued from 3/8/18 to allow the Parties to continue their settlement efforts.

JULY 12, 2018 STATUS CONFERENCE

At the Status Conference, the Parties reported XXXXXXXXXXXXXXXXXXXXXXXXXXXX.

MARCH 8, 2018 STATUS CONFERENCE

No further pleadings have been filed in this Adversary Proceeding. At the Status Conference, it was reported that a settlement is being worked on with the Chapter 7 Trustee, which would resolve this Adversary Proceeding.

OCTOBER 19, 2017 STATUS CONFERENCE

SUMMARY OF COMPLAINT

Maria Sanchez ("Plaintiff") has filed a Complaint seeking a determination of nondischargeability of the debt owed to her by Defendant-Debtors. Dckt. 1. The Complaint alleges that Defendant-Debtors' conduct constitutes nondischargeable fraud pursuant to 11 U.S.C. § 523(a)(2). There is pending a state court action for fraud and to quiet title to the property to which the contentions of fraud relate.

It is also asserted that Defendant-Debtors' conduct also renders the obligation nondischargeable pursuant to 11 U.S.C. § 523(a)(4) [fraud or defalcation in a fiduciary capacity, embezzlement, or larceny].

It is further alleged that the conduct renders the obligation nondischargeable pursuant to 11 U.S.C. § 523(a)(6) [willful and malicious injury].

SUMMARY OF ANSWER

Enriquez and Lisa Mona Sanchez (“Defendant-Debtors”) have filed an Answer admitting and denying specific allegations in the Complaint. Dckt. 7.

REQUIRED PLEADING OF CORE AND NON-CORE MATTERS, CONSENT OR NON-CONSENT TO NON-CORE MATTER

The basic pleading requirements of Federal Rule of Civil Procedure 8 for a complaint, including that the complaint “[m]ust contain: (1) a short and plain statement of the grounds for the court's jurisdiction...,” apply to complaints in Adversary Proceedings. In addition to incorporating Rule 8, Federal Rule of Bankruptcy Procedure 7008 adds the additional pleading requirement concerning whether the matters in the complaint are core or non-core:

Rule 8 F. R. Civ. P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy court, **the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy court.**

FED. R. BANKR. P. 7008 (emphasis added).

For a responsive pleading, Federal Rule of Bankruptcy Procedure 12(b) applies in adversary proceedings. FED. R. BANKR. P. 7012(b). The Bankruptcy Rules add a further responsive pleading requirement concerning whether the matters are core or non-core, as well as the consent or non-consent for non-core matters by the responding party:

“(b) Applicability of Rule 12(b)-(I) F.R.Civ.P. Rule 12(b)-(I) F.R.Civ.P. applies in adversary proceedings. A responsive pleading **shall include a statement that the party does or does not consent** to entry of final orders or judgment by the bankruptcy court.”

FED. R. BANKR. P. 7012(b) (emphasis added).

FINAL BANKRUPTCY COURT JUDGMENT

Plaintiff alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334, 523 and 727 (no claim for relief under 11 U.S.C. § 727 is pled in the Complaint). Complaint ¶ 5, Dckt. 1. Plaintiff does not allege, as required in Federal Rule of Bankruptcy Procedure 7008

whether this is a core proceeding. The court notes that the claims for relief arising pursuant to 11 U.S.C. § 523(a)(2)(A), (a)(4), and (a)(5) are claims arising under the Bankruptcy Code and are statutorily and Constitutionally core proceedings. 28 U.S.C. § 157(b)(i).

In its Answer, Enriquez and Lisa Mona Sanchez, Defendant-Debtors admit the allegations of jurisdiction. Answer ¶ 5, Dckt. 7. Defendant-Debtors do not affirmatively plead whether this is a core proceeding, and if not, whether they consent to the bankruptcy judge issuing the final orders and judgment herein.

At the hearing, the Parties confirmed that the Complaint seeking relief pursuant to 11 U.S.C. § 523(a)(2)(A), (a)(4), and (a)(6) asserts claims for which these are core matters.

To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this Adversary Proceeding are “related to” matters, the parties consented on the record to this bankruptcy court entering the final orders and judgment in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

JOINT DISCOVERY PLAN

The Parties filed their Joint Discovery Plan on October 11, 2017. Dckt. 9. In the Joint Discovery Plan, the Parties request that the court stay these proceedings for four months in light of the actions being taken by the Chapter 7 Trustee in Defendant-Debtors’ case to recover property for the bankruptcy estate. The Parties believe that such recoveries may be sufficient to produce an adequate dividend for Plaintiff on her claim in the bankruptcy case, rendering this Adversary Proceeding unnecessary.

ISSUANCE OF ORDER CONTINUING INITIAL STATUS CONFERENCE AND STAYING THIS ADVERSARY PROCEEDING

The court shall issue an Order staying this Adversary Proceeding and Continuing the Initial Status Conference to 2:00 p.m. on March 8, 2018.

7. [12-93049](#)-E-11 **MARK/ANGELA GARCIA**
Mark Hannon

CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
11-30-12 [1](#)

Debtor's Atty: Mark J. Hannon

Notes:

Continued from 1/11/18

Quarterly Operating Reports filed: 6/22/18 [ending Dec 2017], 6/22/18 [ending Mar 2018]

[GRF-2] First Interim Application for Compensation of Gary R. Farrar, Plan Administrator filed 4/25/18 [Dckt 973]; Order granting filed 6/3/18 [Dckt 984]

[RHS-1] Order to Show Cause Why Case Should Not be Converted to One Under Chapter 7 and Order Requiring the Personal Attendance of (No Telephonic Appearances Permitted For): Mark Anthony Garcia, Angela Marie Garcia, Mark Hannon, Esq. filed 6/29/18 [Dckt 992], set for hearing 8/2/18 at 10:30 a.m.

JULY 12, 2018 STATUS CONFERENCE

The court has issued an Order to Show Cause why this case should not be converted to one under Chapter 7. The hearing on that is set for 10:30 a.m. on August 2, 2018. Dckt. 992.

On June 22, 2018 (prior to the issuance of the Order to Show Cause), the Replacement Plan Administrator filed a Status Report. Dckt. 990.

At the July 12, 2018 Status Conference, **XXXXXXXXXX**.

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|----|---------------------------------------|--|--|
| 8. | <u>18-90149</u> -E-11 | SOUZA PROPERTIES, INC. David Johnston | CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 3-8-18 <u>1</u> |
|----|---------------------------------------|--|--|

Debtor's Atty: David C. Johnston

Notes:

Continued from 4/12/18

Operating Reports filed: 4/14/18, 5/14/18, 6/14/18, 7/9/18

U.S. Trustee Report at 341 Meeting filed 4/17/18

[FWP-1] Motion for Relief from Automatic Stay filed 6/7/18 [Dckt 42]; heard 6/21/18 and continued to 7/12/18 at 2:00 p.m.

[DCJ-3] Application of Debtor in Possession for Authority to Employ Real Estate Broker filed 7/9/18 [Dckt 62]; order pending

JULY 12, 2018 STATUS CONFERENCE

On July 9, 2018, Debtor in Possession filed a motion for Authorization to Hire a Real Estate Broker. Dckt. 62. This is to sell two parcels of property in Turlock, California, one listed for \$1,100,000 and the other listed for \$1,400,000. The broker is PMZ Real Estate.

A limited objection to the motion has been filed by Judith Anshin, Trustee et al., asserting that because it has a lien on both properties to secure its claim, the court could not order the sale of one property unless it could provide for payment of this creditor's claim in full. Creditor directs to a non-controlling decision of the Bankruptcy Appellate Panel for the proposition that a creditor with liens on all of the estate property can block the orderly liquidation of that property.

The court can fully address that issue when and if a motion to sell one parcel is filed and creditor opposes the sale based on its demand to force the simultaneous liquidation of its multiple parcels of real property. The parties can also address the provisions of 11 U.S.C. § 506(a) that expressly address the “value” of a secured claim as it relates to the collateral that secures it, as well as review applicable California law concerning when a creditor may be “forced” to accept payment from the liquidation of collateral that does not pay the debt in full.

At the Status Conference **XXXXXXXXXXXXXXXXXXXX**.

JUDITH ANSHIN VS.

No 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 in Possession, Debtor in Possession’s Attorney, creditors holding the twenty largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on June 7, 2018. By the court’s calculation, 14 days’ notice was provided. 14 days’ notice is required.

The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor in Possession, creditors, 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, -----
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| <p>The Motion for Relief from the Automatic Stay is XXXXXXXXXXXXXXXXXXXXX.</p> |
|--|

Judith Anshin as Trustee of the Judith Anshin Family Trust; Robert H. Baker and Lynette R. Raisbeck as Trustees of the RHB and LRR Trust dated July 7, 2011; Alan E. Bartholemy, Jr. as Trustee of the amended Alan E. Bartholemy, Jr. Living Trust dated April 25, 1996; Polycomp Trust Company as Custodian FBO Christopher T. Cleland Roth IRA Acct. No. 044251; Carol Ann Cleland; IRA Services Trust Company as Custodian FBO David T. Christensen IRA Acct. No. 030016; Charles E. Dorn and Mary G. Dorn as Trustees of the Dorn Family Trust; and Jack W. Klassen and Myrna L. Klassen as Trustees under the Klassen Trust Agreement dated December 5, 1997 (“Movant”) seek relief from the automatic stay with respect to Souza Properties, Inc.’s (“Debtor”) real property commonly known as the northeast corner of North Golden State Boulevard and West Canal Drive in Turlock, California, containing Debtor in Possession’s business, a warehouse, and five houses (“Property”). Movant has provided the Declaration of William Watson to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Watson Declaration states that there are two notes held by Movant on the Property. For the first note, there are three post-petition defaults in the payments on the obligation secured by the Property, with a total of \$6,343.47 in post-petition payments past due. For the second note, there are also three post-petition defaults totaling \$30,234.39.

The Declaration also provides evidence that there are eleven pre-petition payments in default on each note, with a pre-petition arrearage of \$18,676.13 on the first note and \$110,859.43 on the second note.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be \$1,598,256.15 secured by Movant's first and second deeds of trust, as stated in the Watson Declaration and Schedule D. The value of the Property is determined to be \$1,800,000.00, as stated in Schedules A and D. The Watson Declaration presents testimony that there are various problems with the Property that may lower its value—such as structural deficiencies, electrical wiring, and plumbing—but the Declaration does not present any testimony about what the value is currently or about how much the value listed on Schedule A should be reduced. *See* Dckt. 44 at 4–5.

Aside from missed payments, the Watson Declaration also states that Debtor in Possession has not achieved certain benchmarks in this case (related to sales of real property) that had been negotiated as conditions for post-petition use of cash collateral. *Id.* at 5.

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay. A senior lienor is entitled to full satisfaction of its claim before any subordinate lienor may receive payment on its claim. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][d][I] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Therefore, a senior lienor may have an adequate equity cushion in the property for its claim, even though the total amount of liens may exceed a property's equity. *Id.*

For this Motion, Movant has not provided any evidence as to the Property being a value other than as stated on Schedule A. Instead, Movant has argued that prospective purchasers value the Property at less than \$1.8 million and there are necessary repairs that reduce the value. Despite those allegations, Movant has not presented the court with anything more than allegations; that is insufficient.

JUNE 21, 2018 HEARING

At the hearing, the parties requested that the court set a briefing schedule and final hearing. Dckt. 51. The court set a final hearing for 2:00 p.m. on July 12, 2018, and ordered supplemental pleadings to be filed by June 25, 2018, with opposition due by July 2, 2018, and any replies due by July 6, 2018. Dckt. 54.

SUPPLEMENTAL DECLARATION OF WILLIAM WATSON

William Watson, as President of The Money Brokers, Inc., and agent for Movant, filed a Supplemental Declaration on June 22, 2018. Dckt. 52. Mr. Watson reviews the facts leading to this Motion including how he negotiated a loan with Debtor's principal, Lawrence Souza. He testifies that he negotiated on behalf of Movant for a partial release of Movant's lien to permit a pre-petition sale of property to cure part of the obligation owed to Movant. He testifies that Movant agreed to Debtor using cash collateral if

Debtor filed timely monthly operating reports, provided additional information about income and expenses upon request, and if Debtor and Movant agreed about benchmarks by April 30, 2018.

Mr. Watson states that Debtor has not suggested any benchmarks for performance to Movant, and accordingly, Movant withdrew consent for the use of cash collateral on May 7, 2018.

SUPPLEMENTAL DECLARATION OF LAWRENCE SOUZA

Lawrence Souza filed a Supplemental Declaration on July 2, 2018. Dckt. 55. Mr. Souza testifies that there were two breaches of lease in the related Chapter 11 case of Souza Propane, Inc., leading to loss of \$11,000.00 in monthly income. Mr. Souza then describes entering into a contract to sell property in August 2017 while making forbearance payments to Movant. Mr. Souza states that all conditions of sale had been met but that the purchasing party breached the contract.

Mr. Souza states that a second offer was received from another buyer for \$975,000, which Debtor's broker countered with \$1,200,000. Debtor states that currently, there are two proposed sales with listing prices totaling \$2,500,000.

Mr. Souza proposes a series of benchmarks:

- A. Bona fide sale of a portion of the real property to be in escrow by September 30, 2018;
- B. Bona fide sale of remaining portion of the real property to be in escrow by October 31, 2018;
- C. Close of escrow of a portion of the real property by December 31, 2018;
and
- D. Close of escrow of the remaining portion of the real property by January 31, 2019.

MOVANT'S REPLY

Movant filed a Reply on July 6, 2018. Dckt. 57. Movant maintains that relief is warranted because the Property value is overestimated, because this case is not being prosecuted, and because Movant is not willing to consent to a partial sale of property unless paid fully. Nevertheless, Movant states that if the court agrees with Debtor's proposed benchmarks, then Movant requests that Debtor have only until September 30, 2018, to have in escrow a bona fide sale of the Property that will pay Movant in full and includes a significant earnest money deposit and that if such a sale is in escrow by September 30, 2018, that Debtor have only until November 30, 2018, to close escrow on the sale.

DISCUSSION

Movant not having presented the court with counter evidence, the court begins with the \$1,800,000 of value provided by Debtor in the Schedules. A calculation of the value and the debts secured by the Property, for purposes of this summary proceeding Contested Matter only, proceeds as follows:

| | |
|--|--------------------------------|
| FMV..... | \$1,800,000 |
| Claim Secured by First Deed of Trust..... | (\$ 215,000) [rounded] |
| Claim Secured by Second Deed of Trust..... | (\$1,350,000) [rounded] |
| Est Costs of Sale, Commercial Property..... | (\$ 108,000) [estimated at 6%] |
| | |
| Projected Net Sales Proceeds Value for Movant..... | \$127,000 (7% equity cushion) |

William Watson, the President of Money Brokers, Inc. has provided his declaration in support of the Motion. Dckt. 44. He testifies that he is the “agent” for Movant. Mr. Watson does not describe the scope of his duties and authority as such “agency.” No document evidencing such agency engagement is provided with Movant’s exhibits. Dckt. 45.

In his Declaration, Mr. Watson testifies that all of his testimony (he actually merely states that the “fact,” possibly not recognizing that his declaration is his testimony under penalty of perjury) is based on his personal knowledge—Except information provided to him by: (1) people who report to him, (2) other persons, or (3) such “facts” as are his personal opinions. Declaration, ¶ 2; Dckt. 44. It appears that Mr. Watson’s testimony is based substantially on repeating merely what he is “told by others.” FN.1.

FN.1. Movant’s counsel are very well-experienced, well-respected attorneys. Their initial response could well be, “we would never present anything as testimony if we had any thought that it was not 100% truthful.” Such a statement would well be concurred with by many in the legal community. However, as this court recently commented to another well-known, experienced attorney in the community, “the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, Federal Rules of Evidence, and Local Bankruptcy Rules are not optional, when convenient, mere ‘suggestions, as opposed to rules of conduct.’” Such failures cause the court to question the credibility of a witness who signs such a declaration, even in the light of the failure of an opposing party to interpose the proper evidentiary objections. As the Supreme Court admonished federal trial judges, relief is to be granted only when it is warranted based on the evidence and the law—not merely because a party demands it and the other party fails to oppose. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 L. Ed. 2d 158, 173 n.14 (2010); *see also Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.)*, 293 B.R. 489, 499 (B.A.P. 9th Cir. 2003) (citing *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1213 (9th Cir. 1994)).

However, the key testimony of Mr. Wilson goes to the debt, the amount of debt, and default, which based on the testimony, Mr. Wilson would know or be in the books and records of Money Brokers, Inc., which appears to be providing services as a loan servicer (or possibly the loan originator who placed Movant in these loans for which they assert the current complaints that Debtor is unable to repay the loans).

The equity cushion (which computation does not take into account foreclosure costs) of \$127,000 in some circumstances could appear to be substantial, however, here it is a mere 7%, less than one year of interest. It does provide some protection, to give a creditor some interest while a debtor in possession diligently prosecutes the bankruptcy case. As experienced bankruptcy practitioners know, adequate protection does not require there being an equity cushion, but merely that the collateral is not decreasing in value (at least during the first year of the case). *United Savings Association of Texas v. Timbers of Inwood Forest*, 484 U.S. 365 (1988).

Movant also points the court to the cash collateral use consent and the benchmarks agreed to by Debtor in Possession, alleging in the Motion:

Post-petition, Creditors consented to Debtor's use of cash collateral conditioned upon Debtor and Creditors reaching an agreement by April 30, 2018, regarding Benchmarks for various actions to occur in Debtor's case. Creditors have been patient with Debtor, in part due to health and other personal issues with Debtor's counsel. However, as of the filing of this Motion, and despite repeated requests from Creditors, Debtor has not provided any proposed Benchmarks.

Based on Debtor's failure to provide proposed Benchmarks, Creditors withdrew their consent to use of cash collateral as of May 7, 2018. To date, Debtor has not sought or obtained Court approval of its continued use of Creditors' cash collateral and continues to use cash collateral without consent or Court permission.

Motion ¶ B,1; Dckt. 42. No copy of any consent agreement or withdrawal of consent has been provided to the court. Exhibits, Dckt. 45. In his Declaration Mr. Watson testifies to various "facts" about the consent and the withdrawal of the consent, but he fails to demonstrate how he has any personal knowledge of such events. These possibly are events that he has been told by others and now seeks to parrot the statements of others to the court.

Movant also complains that Debtor in Possession has not obtained authorization to employ a property manager for the several residences on the Property. In the Points and Authorities, the legal authority for such court "authorization" is explained as follows by Movant:

Based on Debtor's monthly operating reports and testimony at the 341 meeting, Debtor is renting four of the residences located on the Property and paying a property manager. However, in the three months that its chapter 11 bankruptcy case has been pending, Debtor has not applied to this Court to employ a property manager. Debtor's failure to employ a property manager is further cause to grant relief from stay.

Points and Authorities, Dckt. 46 at 8:14–18. It appears that Movant has no legal authorities for such contention, but is merely a conclusion that Movant dictates to the court.

Movant also complains that Debtor in Possession has engaged the services of a real estate broker (professional) to market the Property for sale. However, it is further reported that Debtor in Possession has

not obtained an order to employ such professional. Movant asserts that the failure to obtain such authorization is grounds for relief from the stay. In reality, the failure to obtain such authorization and the real estate broker having agreed to provide such service may well work to increase the equity in the property for the bankruptcy estate. Failure to obtain such authorization does not excuse such professional from fulfilling obligations and duties to the bankruptcy estate (as a fiduciary to the estate), but results in the professional “volunteering” to help the creditors and provide such services for free. 11 U.S.C. § 327; *Atkins v. Wain*, 69 F.3d 970, 973 (9th Cir. 1995); see 3 COLLIER ON BANKRUPTCY ¶ 327.03.

However, the failure to obtain such authorization by Debtor in Possession (fiduciary to the bankruptcy estate) raises serious questions of the ability of Debtor in Possession to prosecute this case. Such employment is routinely obtained, a well-known requirement, and not something that would be “missed” by a fiduciary of the bankruptcy estate prosecuting a case in good faith. (The court notes that counsel for Debtor in Possession ensured that his application to be employed as a professional was filed and an order obtained thereon. Motion, Dckt. 23; Order, Dckt. 26.)

A review of the docket in this case reveals that, though having been tipped off by Movant two weeks prior to the hearing, Debtor in Possession has failed to act to remedy this shortcoming. Such failure to act may evidence a belief by Debtor in Possession that no prosecution of this case can be done and nothing remains to be done but allow Movant to foreclose.

Debtor in Possession’s Status Report

In its Status Report filed on March 29, 2018, Debtor in Possession reported that Aasim Propane Gas Corporation has breached its obligation to lease the commercial property of the bankruptcy estate. Dckt. 21 at 3–10. It is asserted that this “breach” of the “obligation” to lease the property led to this bankruptcy case being filed. A review of the docket does not disclose any action being taken by Debtor in Possession to enforce its rights arising from the “breach” of the “obligation” to lease this Property.

From a review of the docket, the court cannot see Debtor in Possession taking any action to prosecute this case.

Additional Arguments Presented at Hearing

At the hearing, XXXXXXXXXXXXXXXXXXXXXXXXXXXX

~~————— In this case, the equity cushion in the Property for Movant’s claim provides/not provides adequate protection for such claim at this time. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004). Movant has not sufficiently established an evidentiary basis for granting relief from the automatic stay for “cause” pursuant to 11 U.S.C. § 362(d)(1).~~

~~————— A debtor has no equity in property when the liens against the property exceed the property’s value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. 11 U.S.C. § 362(g)(2); *United Sav. Ass’n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988). As the court~~

has noted, there ~~appears/does not appear~~ to be sufficient equity at this time, which defeats the first element of 11 U.S.C. § 362(d)(2).

—————The Motion is ~~XXXXXXXXXX~~.

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 Judith Anshin as Trustee of the Judith Anshin Family Trust; Robert H. Baker and Lynette R. Raisbeck as Trustees of the RHB and LRR Trust dated July 7, 2011; Alan E. Bartholemy, Jr. as Trustee of the amended Alan E. Bartholemy, Jr. Living Trust dated April 25, 1996; Polycomp Trust Company as Custodian FBO Christopher T. Cleland Roth IRA Acct. No. 044251; Carol Ann Cleland; IRA Services Trust Company as Custodian FBO David T. Christensen IRA Acct. No. 030016; Charles E. Dorn and Mary G. Dorn as Trustees of the Dorn Family Trust; and Jack W. Klassen and Myrna L. Klassen as Trustees under the Klassen Trust Agreement dated December 5, 1997 (“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 is ~~XXXXXXXXXXXXXXXXXXXX~~.

10. [13-92058-E-7](#) SHERI HIEMSTRA
[17-9016](#)

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
10-9-17 [1]

NELSON V. HIEMSTRA

Final Ruling: No appearance at the July 12, 2018 status conference is required.

Plaintiff's Atty: David C. Johnston
Defendant's Atty: Michael R. Germain

Adv. Filed: 10/9/17
Answer: none

Nature of Action:
Validity, Priority or Extent of Lien, Injunctive Relief, Declaratory Judgment

The Status Conference is continued to 2:00 p.m. on August 23, 2018. The Parties having filed a stipulation for judgment in this Adversary Proceeding on July 11, 2018 (Dckt. 30), the court continues the Status Conference for the parties to implement settlement and conclude this Adversary Proceeding.

Notes: Continued from 5/31/18

11. [18-90375](#)-E-11 **Y&M RENTAL PROPERTY
MANAGEMENT, LLC
David Johnston** **STATUS CONFERENCE RE:
VOLUNTARY PETITION
5-22-18 [\[1\]](#)**

Debtor's Atty: David C. Johnston

The Status Conference is XXXXXXXXXX.

Notes:

Operating Report filed: 6/16/18

Debtor's Chapter 11 Status Report filed 6/15/18 [Dckt 19]

U.S. Trustee Report at 341 Meeting filed 6/20/18

JULY 12, 2018 STATUS CONFERENCE

This Bankruptcy Case was filed on May 22, 2018. In its Status Report filed on June 15, 2018 (Dckt. 19), Debtor in Possession states that the bankruptcy case was filed when it discovered that tenants had improperly purported to use one of the Estate's properties to obtain credit from Wells Fargo Bank, N.A.,

At the Status Conference, XXXXXXXXXX.

| | | | |
|-----|---------------------------------------|--|---|
| 12. | <u>18-90196</u> -E-11 | BARRENO ENTERPRISES, LLC David Johnston | CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 3-26-18 <u>1</u> |
|-----|---------------------------------------|--|---|

Debtor's Atty: David C. Johnston

Notes:

Continued from 4/26/18

Trustee Report at 341 Meeting filed 5/2/18

[LAJ-1] Motion for Relief from Stay by Verducci Enterprises, LP [800 Broadway Ave., Suites C-1 and C-2, Seaside, CA 93955] filed 5/24/18 [Dckt 33]; heard 6/21/18 at 10:00 a.m., order to be prepared by Movant

U.S. Trustee Report at 341 Meeting filed 6/14/18

JULY 12, 2018 STATUS CONFERENCE

This bankruptcy case was filed on March 26, 2018. Debtor in Possession and Creditor Verducci Enterprises, Inc., have stipulated to relief from the stay to allow Creditor to obtain possession of one of the Estate's restaurant locations.

At the Status Conference **XXXXXXXXXX**.