UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

September 21, 2023 at 10:00 a.m.

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1. 23-21407-E-11 BRL-1 | **BELLA VIEW CAPITAL, LLC** | **Peter Macaluso** | **MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION** | **8-16-23 [101]**

SCOTT CAPITAL MANAGEMENT FUND 1, LLC VS.

1 thru 3

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on September 21, 2021. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay or for Adequate Protection 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 the Automatic Stay is granted.

Scott Capital Management Fund 1, LLC ("Movant") seeks relief from the automatic stay with respect to Bella View Capital's ("Debtor") real property located at 7796 Laramore Way, Sacramento, California ("Property"). In the alternative, Movant seeks adequate protection of their interest. Movant has provided the Declaration of John Scott to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property. Declaration, Dckt. 103.

Movant is the current obligee of a promissory note and current beneficiary of a Deed of Trust in which the borrower is the Debtor. Dckt. 101. Movant argues Debtor has not made any post-petition payments. Declaration, Dckt. 103. Movant also provides evidence that there are 6 pre-petition payments in default, with a pre-petition arrearage of $17,681.28. *Id.*

DEBTOR IN POSSESSION'S OPPOSITION

Debtor in Possession filed an Opposition on September 7, 2023. Dckt. 118. Debtor in Possession asserts that cause does not exist for relief from the stay because Estate has equity of $21,755.00 in the Property, the Property is properly insured, and Debtor in Possession is willing and able to make Adequate Protection Payments.

The Debtor in Possession asserts that such equity exists based upon the following dollar amount analysis:

Value of Property.....$429,000.00

This is based on the hearsay statement of the Responsible Representative the Debtor in Possession stating that such was an FHA valuation in connection with the prior failed sale of the Property. No evidence of such expert opinion as to value has been provided.

Movant's Claim.....($407,245.00)

Computed Equity by Debtor in Possession.....$21,755.00

The court notes that on Schedule A/B the Responsible Representative of the Debtor states under penalty of perjury that the Property has a "Comparable Sale" value of $400,000. Dckt. 45 at 5.

Further, Debtor in Possession has recently increased the occupants of the Property to a total of four (4) with each making a payment of $800.00 per month, making the total possible Adequate Protection Payment $3,400 per month. Debtor in Possession asserts that this amount will allow for the proper marketing of the Property and will allow Debtor in Possession to pay off the claim within the next 12 months.

The Declaration of Debtor's President (the Debtor in Possession responsible representative) and 100% owner, Joly Gagni, provides testimony of the increased gross monthly rents total of $3,495.00 per month, with this rental increase to be achieved beginning in October 2023. Dckt. 119. However, the Declaration provides no testimony as to what is the monthly net rental income amount after the payment of costs and expenses - including maintenance, insurance, repairs, and taxes. [Fn.1.]

FN. 1. In the Declaration, Joly Gagni states being the 100% owner of the Debtor. Dec., p. 1:18-19; Dckt. 119. However, on the Amended Statement of Financial Affairs Joly Gagni is stated as owing 50% and

Shawn Bullard is stated as owing 50% of the Debtor. Dckt. 45 at 13. It is not clear whether there has been a change in ownership of the Debtor post-petition or that the 100% ownership statement is in error.

MOVANT'S REPLY TO DEBTOR'S OPPOSITION

Movant replied to Debtor in Possession's Opposition on September 11, 2023. Dckt. 126. Movant asserts that although Debtor owed $407,425.00 as of August 11, 2023, that debt increases by $155.73 per day, meaning Debtor will actually owe $413,187.00 by the hearing date of September 21, 2023. Debtor's own valuation in the Schedules puts the property at $400,000, contrary to the FHA valuation. Even if the FHA valuation were used, Debtor has little to no equity in the property due to a $13,000 credit to the buyer, as specified in the previous sale. See Exhibit D, Estimated Closing Statement, Dckt. 104, and Declaration, ¶ 12, Dckt. 103, which states that the Declarant was provided a copy of the Estimated Closing Statement, but does not state from whom and why.

Finally, Debtor has had long enough to market and sell the property and has been unable to do so, meaning relief from the stay should be granted.

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 $407,245.27 (Declaration, Dckt. 103), while the value of the Property is determined to be $400,000.00, as stated in Schedule D filed by Debtor. Of note, in May, 2023, the FHA determined the Property to be worth $429,000. Declaration, Dckt. 103.

On the question of value and whether there is equity in the Property for the Debtor and the Bankruptcy Estate, even if the Debtor in Possession's higher valuation based on the reported FHA appraisal, and even without accounting for possible repairs or credits (such as the $13,000.00) shown on the Estimated Closing Statement from the failed sale, it appears that the Debtor in Possession and the Bankruptcy Estate fall short:

Debtor in Possession Increased Valuation.....$429,000.00

Costs of Sale (6% Commission and 2% Closing Costs).....($ 34,320.00)

Movant's Secured Claim as of September 2023 (est.).....($413,000.00)

=========

Projected Equity for Debtor
and Bankruptcy Estate.....($ 18,320)

Thus, by the Debtor in Possession's valuation, and allowing for the reasonable, normal costs of sale as regularly presented to the court, there is no net value for the Debtor or the Bankruptcy Estate.

Though the Debtor in Possession has not provided an analysis of why the gross rental income from this Property could be used to make adequate protection payments and no repair, maintenance, insurance, tax, or other regular expenses need to be paid from the gross rental income, the Debtor in

Possession has provided the court with Monthly Operating Reports. The court has reviewed those to see if there is a substantial positive cash flow to fund the expenses for the Property.

The Monthly Operating Report for the Period Ending stated to be 07/01/2023 (with apparently no Monthly Operating Report having been filed for July or August 2023 as of the court's September 18, 2023 review of the Docket) provides the following post-petition economic information:

Cash Balance at Beginning of Month.....$800.00
Total Receipts.....$ 0.00

Disbursements Made by Third Party
for Benefit of the Bankruptcy Estate.....$286.00

Accounts Receivable.....$800.00

Dckt. 123. In Part 4 of the Monthly Operating Report, the Debtor in Possession states that the Bankruptcy Estate had no gross income, no expenses, no tax, and had a profit of $0.00 for the period ending July 1, 2023. *Id*., p. 2.

On the Monthly Operating Report the Debtor in Possession states that the Net Equity in the Estate's assets is ($4,307,111.00). *Id*., Part 2. It appears that the Debtor in Possession neglected to put in the asserted value of the assets of the Bankruptcy Estate on line "e" of Part 2 of the Monthly Operating Report. On Amended Schedule A/B the Responsible Representative for the Debtor states that the real property owned by the Debtor and now property of the Bankruptcy Estate had as of filing a gross aggregate value of $3,790,000.00. Dckt. 45 at 5.

Based on the information in the Monthly Operating Report for the period ending July 1, 2023 (thus, it appears to be for the month of May 2023) the Bankruptcy Estate generated no income and made no payments, other than ($286.00) in disbursements by a third-party.

The above information is consistent with the information on the Monthly Operating Report for the Period Ending June 1, 2023. Dckt. 122.

On the Amended Statement of Financial Affairs, the Responsible Representative for the Debtor states under penalty of perjury that:

A. In the first four months of 2023 (the case being filed on April 28, 2023), the Debtor had received gross rental income of $4,000 (which averages $1,000 a month). Additionally, the Debtor had no other income.

B. For 2022, the Debtor had gross rental income of $9,600 (which averages $800 a month).

1. For 2022 the Debtor had $1,550,000 in real property sales income.

C. For 2021, Debtor had no rental income, but $2,900,000 in "Gross Sales."

Dckt. 45; p. 8.

Based on the information provided under penalty of perjury by the Responsible Representative for the Debtor in Possession, the Bankruptcy Estate has not been generating any rental income from any source.

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

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

In this case, the Debtor in Possession has failed to make payments to Movant in the months before or after the commencement of this bankruptcy case. Debtor previously had a contract of sale for the Property in April, 2023, at a price of $460,000.00. This sale purportedly fell through due to the FHA valuation coming in at $429,000.00.

Even still, in the months since the failed sale of April 28, 2023, the Debtor in Possession has not filed any motions to employ a real estate broker and has not submitted evidence that efforts are being made toward a sale. Because Debtor has not been diligent in carrying out its duties in the bankruptcy case, including by not making payments, cause exists to grant relief from stay.

Debtor in Possession has requested that the court deny Movant's Motion for Relief from Stay and instead allow the Debtor in Possession to make adequate protection payments. Dckt. 118. Debtor in Possession suggests it will be able to make adequate protection payments of $3,400.00 per month due to a new tenant moving into the Property. *Id.*

If the court were to grant adequate protection payments, there must be evidence or documentation that shows the Debtor in Possession can afford to pay Movant alongside other regular bills. Instead, Debtor in Possession has suggested all of the money it generates from monthly rent will go to Movant, leaving no funds to pay for property taxes, general property maintenance fees, or insurance premiums. Thus, the court cannot approve adequate protection payments until the Debtor in Possession shows it can reliably afford such payments.

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, 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.

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 Scott Capital Management Fund 1, LLC, 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 7796 Laramore Way, Sacramento, California ("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.

2. **23-21407-E-11** **BELLA VIEW CAPITAL, LLC** **CONTINUED MOTION FOR RELIEF**
TRF-1 **Peter Macaluso** **FROM AUTOMATIC STAY**
7-19-23 [61]

CENTER STREET LENDING VIII SPE, LLC VS.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 19, 2023. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006).

The Motion for Relief from the Automatic Stay is xxxxxxx

Movant Center Street Lending VIII SPE, LLC ("Movant") seeks relief from the automatic stay with respect to Bella View Capital, LLC's ("Debtor") real property commonly known as 5425 Bacon Road, Oakland, California 94619 ("Property"). Movant has provided the Declarations of Luis Montero and Russell Enyart to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property. Declaration, Dckts. 63 & 65.

Movant asserts Debtor executed a note to Movant to borrow $2,555,695.00 secured by the Property on May 3, 2021. Declaration, Dckt. 63. The note's maturity date was on April 26, 2022. *Id.* Debtor subsequently defaulted on the note and Movant informed Debtor of its default on May 2, 2022, and again on October 3, 2022. Dckt. 61. Movant had scheduled a foreclosure sale on April 28, 2023. *Id.* Debtor filed its bankruptcy petition on that same day. *Id.*

Declaration of Russell Enyart

The Declaration of Russell Enyart has been filed in support of this Motion, with Mr. Enyart providing expert witness testimony as to the value of the Property. Dec.; Dckt. 65. In the Declaration Mr. Enyart provides testimony of how he conducted his review and concludes that the value is $2,199,000.00 due to the current state of the Property. He authenticates his Broker Price Opinion in which he provides the court with the information necessary to understand how he reached his opinion to assist the trier of fact in determining the value of the Property (not merely adopt the witnesses conclusion). See, Federal Rule of Evidence 702, which states:

> Rule 702. Testimony by Expert Witnesses
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Exhibit 1, the Broker Price Opinion, begins with the standard identification of comparable sales and then the expert's adjustments for differences between the subject property and the comparables. Here, the Expert identifies three comparable properties, with list prices of $1,565,000, $1,375,000, and $3,488,000. Exhibit 1; Dckt. 67 at 5. These three properties are listed to be in good or very good condition and are of substantial square footage. *Id*.

However, no information, other than the number of rooms, is provided for the Property that is the subject of this Motion. No adjustments are made for any differences in the location, condition, enhancements, and the like. The court is not provided with any information how the comparables are comparable to the subject Property.

In the Declaration Mr. Enyart does provide testimony of his investigation, including:

> 6. On or about April 29, 2023, I also walked the outside of the Bacon Property so that I could obtain exterior views. I also spoke with an occupant named Diarro Momar Foster, who came out of the Bacon Property. He expressed to me that the was living in the Bacon Property, in the downstairs portion of the property. He indicated that was the only section that was appropriate for occupancy and that the upstairs of the Bacon Property had been "gutted" and was not in good shape at the time of the visit.

Dec., ¶ 6: Dckt. 65. Most of the testimony in this paragraph is hearsay testimony about what Mr. Enyart heard the tenant say.

> 7. The Bacon Property was sold on May 7, 2021 for the price of $2,750,000.00. But now, based on my research, analysis, and work in generating the above two reports, in its current state, my opinion is that the Bacon Property has a market value of only $2,199,000 "as-is." This is due to its state of disrepair; the downstairs is original, and the entire upstairs has been gutted. The property is not move-in ready. Rather, my suggestion for the use of the property is that it is a fix-up project for potential investors looking for a project.

Id.; ¶ 7. The testimony is paragraph 6 is that Mr. Enyart only conducted an exterior review. The statements about the inside condition appear to be based on the hearsay that Mr. Enyart is repeating. While such hearsay can be something an expert considers, it is not credible evidence of the actual condition of the Property.

Mr. Enyart does not provide the court with any photographs of the Property.

The Expert's Declaration and Broker Price Opinion provide the court with little more than this is my opinion of value – take it or leave it.

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 $2,773,730.64 (Dckt. 61). However, from the evidence presented, the court, as the finder of fact, cannot determine the current value of the Property. The testimony of Mr. Enyart and his Broker Price Opinion does not provide the court with sufficient information to determine the issue of fact – the value of the Property. Debtor's valuation as stated in Debtor's Schedule D, as Debtor valued the property at $3,760,000.00. Schedule D, Dckt. 26.

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).

Here, Movant has not provided the court with "cause" to terminate the stay. This exists largely from the failure of Movant's expert witness' testimony (and lack thereof). There may well be a substantial equity cushion protecting Movant.

Movant also asserts that since the Debtor did not cure the default pre-petition and filed bankruptcy so that the automatic stay would prevent the foreclosure sale, such weighs in favor of terminating

the automatic stay. Debtor commenced a reorganization under Chapter 11 (the case was erroneously filed with the Chapter 7 box checked, the Motion to Convert to Chapter 11 filed four days after the case was filed, and the Order converting the case Chapter 11 entered (Dckt. 15) seventeen days after the case was filed). There is no assertion that Debtor has filed a series of cases or that Debtor transferred the property around to get the automatic stay. Debtor did what many debtors unfortunately do, bury their heads in the sand and not make the decision to obtain bankruptcy relief until the eve (or in this case the day) of foreclosure.

A debtor filing bankruptcy to obtain the automatic stay to stop a foreclosure sale from occurring itself, without other factors, is not cause to terminate the automatic stay.

11 U.S.C. § 362(d)(2): Grant Relief for Cause

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).

The burden of proof to establish that there is no equity in the Property falls on the moving party. 11 U.S.C. § 362(g). Here, as addressed above, Movant has failed to carry that burden of proof. The expert testimony and other "evidence" of value is not sufficient for this court to make the factual finding of value.

September 21, 2023

At the hearing, xxxxxxx

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 Center Street Lending VIII SPE, LLC ("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 Motion for Relief is xxxxxxx

3. 23-21407-E-11 TRF-2

BELLA VIEW CAPITAL, LLC
Peter Macaluso

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY
7-21-23 [73]

CENTER STREET LENDING VIII SPE, LLC 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, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 21, 2023. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

The Motion for Relief from the Automatic Stay is granted.

Movant Center Street Lending VIII SPE, LLC ("Movant") seeks relief from the automatic stay with respect to Bella View Capital, LLC's ("Debtor in Possession") real property commonly known as 1396 Summit Rd., Berkeley, California ("Property"). Movant has provided the Declarations of Michael Marshall and Russell Enyart to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property. Declaration, Dckts. 76 & 75.

Movant states that the loan matured on December 29, 2022 and has failed to make payments. Declaration, Dckt. 73.

The Motion requests prospective relief from the automatic stay so that Movant may conduct a non-judicial foreclosure sale based on the obligation secured by the Property.

Movant asserts that the amount of its Secured Claim is ($1,265,213) and that Alameda County asserts a Secured Claim in the amount of ($50,000). Debtor lists Alameda County having a ($50,000) claim secured by the Property on Amended Schedule D (Dckt. 44 at 3).

The Motion states several different grounds and legal theories upon which the relief is requested. The court summarizes the grounds and legal theories as follows:

A. Debtor and Bankruptcy Estate have no Equity in the Property

1. While the Debtor states in the Schedules the Property has a value of $1,400,000, Movant provides expert testimony of a Broker's Price Opinion that the Property has a current market value of $1,050,000. Motion, p. 4-5; Dckt. 73. It is stated that this Broker Price Opinion takes into account the state of disrepair of the Property, including foundational and engineering property due to the slope of the Property.

2. Based on the Broker's Price Opinion, there is no equity cushion for Movant's ($1,265,213) Secured Claim. *Id*., p. 5-6.

B. The Bankruptcy Case was Filed in Bad Faith.

1. It is asserted that the Debtor was attempting to unreasonably deter and harass creditors.

2. The only purpose in the filing of this Bankruptcy Case was to stall two foreclosure sales for real properties owned by the Debtor that were set for April 28, 2023. *Id*., p. 6-8.

3. The Bankruptcy Case is Essentially a Two-Party Dispute

a. The two-party dispute in stated to relate to a dispute over an asserted lien with another lender.

b. Movant is Debtor's largest creditor.

c. Thus, "Due to the above [recitation of Movant's Secured Claim] and dispute have no place being resolved in bankruptcy court; Debtor obviously filed the bankruptcy only as a method to evade one made creditor, who on April 29, 2023, was on the very cusp of foreclosing on Debtor's two largest assets. . . ." *Id*. p. 8-9.

Movant offers no authority for the assertion that resolution of disputed liens is improper in a bankruptcy case, outside the expansive grant of federal court jurisdiction provided in 28 U.S.C. § 1334, and that the almost everyday occurrence of federal bankruptcy judges determining the extent, validity, priority, and amounts of interests in property, including lien interests, is improper and invalid. This assertion causes the court some serious concern with respect to the Motion in the whole.

4. Debtor is not Attempting to Effect a Speedy, Efficient Reorganization on a Feasible Basis.

a. Though Debtor knew of the pending foreclosure sales, Debtor did not attempt to reorganize pre-petition. Movant states:

> Had Debtor truly wanted to reorganize (refinance) in a "speedy, efficient" manner, it would have sought to do so much earlier, instead of filing for bankruptcy on the very day of the foreclosure sale of the Summit Road and Bacon Road properties. Center Street is still in the dark about any purported refinance.

Id., p. 10:16-19.

b. Given Debtor's secured debts which exceed the values of the real properties in the Bankruptcy Estate, there can be no reorganization through the refinance or the sale of the properties. *Id*. p. 10-12.

C. The Property is not Necessary for an Effective Reorganization.

1. Debtor cannot show that the Property is necessary for an effective reorganization.

2. There is no equity in the Property for Debtor or the Bankruptcy Estate. The Property does not generate rental income for the Debtor upon which a reorganization could be based. *Id*., p. 12-13.

The Declaration of Russell Enyart is provided for the Broker Price Opinion as to the value of the Property. Dec.; Dckt. 75. The Declaration provides testimony as to how the Broker's Price Opinion was generated and authenticates the Broker Prior Opinion filed as Exhibit 1. *Id*.; ¶ 4. In reaching his Opinion as to a value of $1,050,000, Mr. Enyart testifies:

> 7. The Summit Property was last sold on January 10, 2022, for the price of $1,200,000.00. But now, based on my research, analysis, and work in generating the above two reports, in its current state, my opinion is that the Summit Property has a market value of only $1,050,000.00 "as-is." This is due to its state of disrepair; the property is demolished, there is no kitchen, no bathrooms, and no flooring. The Property also suffers from serious foundational and engineering problems owing to the severe slope on which the Property is located and a retaining wall which is breaking away downhill. The property is not move-in ready. Rather, my suggestion for the use of the property is that it is a fix-up project for potential investors or owner-occupants. Even if the Property was repaired – which it currently is not – it's upper value would be, at most, $1,450,000.00.

Id.; ¶ 7. Mr. Enyart also provides testimony as to his having conducted an interior and exterior inspection of the Property, concluding that it is "in a state of extreme disrepair." *Id*.; ¶ 6. No photographs of the Property are provided to the court.

The information provided in the Broker Price Opinion Movant has filed as Exhibit 1, Dckt. 78, includes the following:

A. The Property is "under improvement" as appropriate for the neighborhood in which it is located. Broker Price Opinion, § I; Dckt. 78.

B. Three comparable sales properties are identified. *Id*.; § III. However, the Broker Price Opinion does not state dollar adjustments for the various differences in the comparable sales properties and the Property that is the subject of the Motion. The three comparable sales properties sales prices are $1,160,000, $1,250,000, and $not stated. *Id*. No sales dates are show for the comparable sales properties.

C. The comments on the Broker Price Opinion are: "This property has been demolished and is in very rough shape. There are also footings and plans at the site. This property has a premium view." *Id*.; § IV.

Expert opinion testimony is provided to the finder of fact when "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; . . . ." Fed. R. Evid. 702(a). Here, the court is provided with a final opinion as to value, but no analysis of the comparable properties and what adjustments need to be made for the various differences listed on the Broker Price Opinion. This Broker Price Opinion is little more than just a realtor's statement of value for the court to either take or leave without understanding the evidence to determine the factual question as to value.

DEBTOR IN POSSESSION'S OPPOSITION

Debtor in Possession filed an Opposition on August 10, 2023. Dckt. 87. Debtor in Possession argues:

1. Movant conducted a Trustee's Deed Upon Sale which was in violation of the automatic stay.

2. There is no cause for relief since the Property has equity.

3. The Motion is procedurally deficient because it does not ask to annul the stay.

4. The post-petition foreclosure sale is void.

The Debtor in Possession further states that it seeks to obtain a post-petition refinance of the Property.

The Debtor in Possession cites to *In re Sanders*, 198 B.R. 326 (Bankr. S.D. Cal 1996) for the proposition that there was a post-petition nonjudicial foreclosure sale that is void for the May 17, 2023 recording of the Trustee's Deed. However, in *In re Sanders* it was the nonjudicial foreclosure sale itself that occurred at 1:00 p.m. on February 15, 1996, which was after the filing of the bankruptcy case at 10:00 a.m. on February 15, 1996, not "merely" the recording of the trustee's deed for such sale.

RESPONSE PLEADINGS BY MOVANT

In its Response Pleadings, Movant acknowledges that the foreclosure sale was conducted after the filing of the Bankruptcy Case, stating that it did not learn of the bankruptcy filing on the day of the foreclosure sale until after the sale had been conducted. That upon learning of the recording of the Trustee's Deed from the Sale, a rescission of the Trustee's Deed was recorded. Reply, p. 1:8-21, Dckt. 108; and Dec., ¶¶ 5,6, Dckt. 111. Additionally, citing other bankruptcy court decisions from the Central District of California, Movant asserts that the recording of a trustee's deed following a nonjudicial foreclosure sale after the filing of a bankruptcy case does not violate the stay. [Fn.1.] Movant provides testimony of Luis Monetro, an employee of Movant, that the nonjudicial foreclosure sale occurred at 12:16 p.m. on April 28, 2023. The court's flies list the filing time of the Petition being 3:31 p.m. on April 28, 2023. Dckt.1.

FN. 1. While citing to two Bankruptcy Court decisions, Movant does not direct the court to the statutory provisions enacted by Congress in 11 U.S.C. § 362 upon which decisions are based. One such provision is 11 U.S.C. § 362(b)(3), which provides that the filing of the bankruptcy case does not operate as a stay of:

> (3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title; . . .

11 U.S.C. § 546(b) provides that the trustee's ability to avoid a post-petition transfer are subject to any generally applicable law that:

> (A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or
>
> (B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.

As stated by Movant, California Civil Code § 2924h(c) provides for the perfection of title relation back to 8:00 a.m. on the day of a nonjudicial foreclosure sale to the time of the sale so long as the trustee's deed is recorded within twenty-one (21) days after the foreclosure sale. The Trustee's Deed was recorded on May 17, 2023, which is within twenty-one days after the April 28, 2023 nonjudicial foreclosure sale.

The Bankruptcy Appellate Panel Decision *In re Bebensee-Wong v. Fammie Mae (In re Bebensee-Wong)*, 248 B.R. 820 (B.A.P. 9th Cir. 2000), addresses the application of California Civil Code § 2924 h(c) [which then had a fifteen day relation back perfection period], and that as provided in 11 U.S.C. § 546(b) and § 362(b)(3) the automatic stay is not violated by the post-petition recording of the Trustee's Deed so long as done in compliance with California Civil Code § 2924h(c).

Here, Movant elected to rescind the Trustee's Deed and is now seeking relief to proceed with conducting a nonjudicial foreclosure sale.

REQUEST FOR CONTINUANCE

On August 11, 2023, Debtor in Possession filed a request for continuance, as Debtor in Possession's Counsel was out of town and unavailable to attend the hearing. The court construes the document to be an *Ex Parte Motion* (as required by Fed. R. Bankr. P. 9013) to continue the hearing. This continuance is consistent with one agreed to between Debtor and Movant for another Motion for Relief From the Stay (TRF-1) in this case.

Upon consideration of the *Ex Parte* Motion, the court continues the hearing on the Motion for Relief to September 21, 2023 at 10:00 a.m.

DISCUSSION

In opposing this Motion, Debtor in Possession asserts that the value of the Property is $2,100,000. Opposition, ¶ 13; Dckt. 1. This is based on the "Appraisal of Real Property" (quotation marks in original), which is filed as Exhibit 1 by Debtor in Possession. The Appraisal Report is provided by Jason Cosetti of the Colfax Group. Exhibit 1, p. 1; Dckt. 89. No Declaration of Jason Cosetti is provided for testimony of Mr. Cosetti as to the value of the Property.

The Declaration of Joly Gagni, the Responsible Representative of the Debtor in Possession states that this Appraisal Report was made by Joly Gagni as a licensed appraiser for Sean Bullard (who is listed as a 50% owner of the Debtor on the Amended Statement of Financial Affairs) on June 30, 2023. Dec., p. 1:17-19; Dckt. 88.

The above statement under penalty of perjury by Joly Gagni conflicts with the Opinion of Value which states that it is given by "Jason Cosetti Colfax Group" and is signed by "Jason Cosetti," who is identified as the licensed appraiser. Opinion of Value; Dckt. 89 at pgs. 3, 4, 11, 14, 30 (the court identifies the page numbers of the document filed at Dckt. 89 given that the pages of the Opinion of Value and its attachments are not consecutively numbered).

While the Opinion of Value report prepared by Mr. Cosetti provides detailed factual information, shows Mr. Cosetti's analysis, and could provide the court with valuable information in determining the value of the Property, it is hearsay "testimony" of Mr. Cosetti's opinion and various facts considered by Mr. Cosetti.

If the court uses the non-testimony, hearsay, not authenticated Opinion of Value, the Schedules, and Movant's Expert's statements of value, the possible equity cushion and equity for the Bankruptcy Estate and Debtor could be:

Debtor in Possession Cosetti Hearsay Value Calculation		Schedule A/B Value Calculation		Movant's Expert Enyart's Conclusion	
Value	$2,100,000	Value	$1,400,000	Value	$1,050,000
Sales Commissions and Fees (Est. 8%)	($168,000)		($112,000)		($84,000)

Movant's Secured Claim	($1,265,231)		($1,265,231)		($1,265,231)
	----------		----------		----------
Possible Equity Cushion	$666,769		$22,769		($299,231)
County Taxes	($50,000)		($50,000)		($50,000)
	=====		=======		=======
Potential Equity for Debtor and Bankruptcy Estate	$616,769		($27,231)		($349,231)

Under two of the three possible calculations, there is no significant equity cushion and ultimately no equity for the Debtor or the Bankruptcy Estate.

In the unauthenticated Cosetti Opinion of Value there are pictures of the interior and exterior of the property included. Exhibit 1, p. 17-20. These pictures date from December 2022 through July 6, 2023. The July 6, 2023 pictures show that the interior of the home is gutted with studs, pipes, and wiring showing/hanging down. There appears to be some debris in the house. There appears to be little, if any flooring. The house appears to be in the beginning of substantial repairs or remodeling. These appear to be consistent with several interior pictures dated December 23, 2023. *Id*., at 19-20.

The Appraisal Report portion of the Opinion of Value does not make any downward adjustments for the condition of the Property (the interior being gutted), but instead marks up the values of the comparable, indicating that the gutted condition of the interior is superior to those of the comparable, by +$96,750, +$200,000, +$170,000, +$126,000, and +86,250. *Id*. at 6-7. This appears, based on the hearsay information provided in the hearsay Opinion of Value, to be grossly wrong. The values of the comparable, unless they too are in a gutted interior condition, should be substantially reduced.

The Appraisal Report states that the Property was purchased December 30, 2021 of $1,200,000. With an asserted value of $2,100,000 in the unauthenticated Opinion of Value, Debtor in Possession and Mr. Cosetti are asserting that the value has increased by $900,000 in the last eighteen (18) months. That is a seventy-five percent (75%) increase over the last eighteen months.

No testimony or other information is provided as to why there is such a substantial increase in the Property for which the interior of the home is gutted.

Based on the evidence presented, the court concludes that the value of the Property is not greater than $1,200,000 and that there is no equity cushion for Movant and there is no equity for either the Debtor nor the Bankruptcy Estate in the Property. Even if the court uses the $1,400,000 value stated in the Amended Schedules, there is no equity for the Debtor or the Bankruptcy Estate, and there is no significant

equity cushion for Movant on its claim of ($1,265,231). An equity cushion of $22,769 (assuming the $1,400,00 value), is only one and eight tenths percent (1.8%) of Movant's secured claim.

Exhibit 10 filed by Movant is the Payoff Notice for this secured claim computed to August 31, 2023, in the amount of $1,265,231.75. Dckt. 80. The principal amount of the obligation is stated to be $1,016,400, and the interest rate on the obligation is stated to be eighteen percent (18%). If interest is computed just on the principal balance (and not other substantial advances and unpaid interest), this would be an additional interest accrual of ($182,952) annually, which is $15,246 per month. That would wipe out a $22,769 equity cushion in less than two months after August 31, 2023.

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

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432. Additionally, there is no adequate equity cushion to protect Movant's interests going forward.

11 U.S.C. § 362(d)(2) Relief Due to No Equity for Debtor or Bankruptcy Estate and No Showing the Property is Necessary for an Effective Reorganization

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 in Possession 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). Based upon the evidence submitted, the court determines that there is no equity in the Property for either Debtor or the Estate. 11 U.S.C. § 362(d)(2).

Additionally, the Debtor in Possession has not show a colorable basis why this Property is necessary for an effective reorganization in this Bankruptcy Case. The burden of proof is on the Debtor in Possession to establish that the Property is necessary for an effective reorganization. 11 U.S.C. § 326(g).

September 21, 2023

At the hearing, xxxxxxx

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.

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 Center Street Lending VIII SPE, LLC ("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 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 1396 Summit Rd., Berkeley, California (the "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.
>
> No other or additional relief is granted.

4. **22-20913-E-7** **ZACHARIAH DORSETT** **CONTINUED MOTION FOR RELIEF**
HSM-1 **George Burke** **FROM AUTOMATIC STAY**
12-27-22 [37]

GLENDA AZEVEDO, 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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on December 27, 2022. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Relief from the Automatic Stay is xxxxxxxxxxxxx

Glenda Azevedo and Randall Azevedo ("Movant") seek relief from the automatic stay with respect to Zachariah Tesfaye Dorsett's ("Debtor") real property located in Lassen County, California, with APN's 139-030-2011, 139-030-21-11, 139-030-22-11, 139-030-23-11, 139-030-24-11, 139-030-25-11 ("Property"). Movant has provided the Declaration of Randall Azevedo 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 made any payments since September of 2020. Declaration, Dckt. 40. Movant also provides evidence that as of the petition date, the amount due under the Note through April 12, 2022 was $112,863.56. *Id*. Movant argues that interest continues to accrue as of the date of Debtor's filing of petition, April 13, 2022. *Id.*

Movant asserts that Debtor caused title to the Property to be transferred into his name on April 12, 2022, and then filed bankruptcy on April 12, 2022 to prevent a foreclosure sale that Movant had set for that day.

Movant further asserts that through this bankruptcy case was filed in 2022, no Chapter 13 Plan has been confirmed.

DEBTOR'S OPPOSITION

Debtor's counsel filed an Opposition on January 10, 2023. Dckt. 47. Debtor asserts that the Movant will receive preference to the detriment of the other priority and unsecured creditors and the court should issue and order the court finds just, necessary and proper. The basis for this is stated as:

> If the Court Grants the Motion then Movant will receive a preference to the detriment of the other priority and unsecured creditors. Debtor estimates market value of the subject land (collateral) at $600,000 whereas Movant estimates collateral value at $250,000 with a $112,000 secured claim.

Opposition, p. 1:24-27; Dckt. 47.

The Opposition further notes that Debtor had ceased communicating with his counsel. *Id*. at 2:1-2.

Debtor also notes that there is a hearing on a Motion to Convert this case to one under Chapter 7 that has been filed by the Chapter 13 Trustee, which is set for hearing on February 22, 2023.

CONVERSION TO CHAPTER 7

On February 9, 2023, the court entered the order converting this case to one under Chapter 7.

DEBTOR'S POST-CONVERSION OPPOSITION PLEADINGS

On March 16, 2023, the Declaration of the Debtor was filed. Dckt. 70. The Declaration provides a summary of the Property and an **"information and belief"** statement that former owners invested more than $1,000,000 in improvements to the Property. Debtor then states his opinion that the Property is worth $600,000.

OPPOSITION OF CHAPTER 7 TRUSTEE

On March 23, 2023, Nikki Farris, the Chapter 7 Trustee filed her Opposition to the Motion for Relief. Dckt. 83. The Trustee believes that there is a recoverable equity in the Property for the Bankruptcy Estate and is moving forward with hiring a broker and listing the Property for Sale.

DISCUSSION

While the Chapter 7 Debtor has provided a declaration with his opinion that the Property is worth $600,000, no opposition to the Motion has been filed by the Chapter 7 Trustee. At the hearing, Trustee's counsel reported that the Trustee is moving forward to hire a real estate broker to market the Property.

Movant also asserts that Debtor caused title to the Property to be transferred into his name on April 12, 2022, and then filed bankruptcy on April 12, 2022 to prevent a foreclosure sale that Movant had

set for that day. Exhibit 7, Dckt. 39, is a copy of a Grant Deed by which the Debtor, as the president of Ruckus Ranch, LLC, transferred title to the Property from Ruckus Ranch, LLC to Debtor. The Grant Deed states:

> The undersigned Grantor(s) declare(s) Documentary Transfer Tax is $0.00. Grantor and Grantees are comprised of the same parties and their proportional interest remains the same immediately following the transfer. Rev & TC § 11925.

The Grant Deed is dated April 12, 2022 and has an 11:35 a.m. recording time. *Id*.

The Property was transferred to Ruckus Ranch, LLC by Anthony Cole Woloscsuk, James Kirk, and Braeden M. Keena, as the three owners of undivided one-third interests by a Grant Deed recorded on April 12, 2022, at 11:35 a.m. Exhibit 6; Dckt. 39. This Grant Deed contains the same statement as above that the Transfer Tax is $0.00 because the grantors and grantees are comprised of the same parties and that they each have a one-third interest in the property when owned by the Transferee, Ruckus Ranch, LLC. *Id*.

This transfer to Ruckus Ranch, LLC was recorded at the same time and the transfer from Ruckus Ranch, LLC to Debtor.

On Schedule A/B Debtor states that he owned 100% of the interests in Ruckus Ranch, LLC as of the April 12, 2022 filing of this Bankruptcy Case. It is not clear how by the transfer from Woloscsuk, Kirk, and Keena recorded at 11:35 a.m., as the owners of 1/3 of the interest in the Property, into Ruckus Ranch, LLC did not require the payment of transfer taxes because they each held a 1/3 interest in Ruckus Ranch, LLC, because a 100% interest for Debtor to transfer the Property out of Ruckus Ranch, LLC seconds later so that no Transfer Tax was owed.

Exhibit 8 filed by Movant, Dckt. 39, is the California Secretary of State Statement of Information for Ruckus Ranch, LLC. It was filed on September 20, 2020. The sole managing member is identified as the Debtor. Michael Mapes is identified as an attorney who certifies the information in the Statement is correct.

Looking at the Grant Deed executed by Woloscsuk, Kirk, and Keena purporting to transfer the Property into Ruckus Ranch, LLC, in which they state they hold the same 1/3 interests in the Property as they did as individual owners (so no Transfer Tax was due) states that they signed the Grant Deed on August 26, 2016. Exhibit 6; Dckt. 39.

Seeing this great disparity between the purported transfer date from Woloscsuk, Kirk, and Keena into Ruckus Ranch, LLC and the delay in recording until April 12, 2022, six years later, and the April 12, 2022 filing of bankruptcy by Debtor, the court consulted the public record of the California Secretary of State as to Ruckus Ranch, LLC and whether it was a legal entity in the State of California.

From the Secretary of State's Official Website, the Secretary of State Reports that with respect to Ruckus Ranch, LLC, that it initially filed as an limited liability company on April 8, 2016, and:

RUCKUS RANCH, LLC
(201610510472)

Request Certificate

Initial Filing Date	04/08/2016
Status	Suspended - FTB
Standing - SOS	Good
Standing - FTB	Not Good
Standing - Agent	Good
Standing - VCFCF	Good
Inactive Date	08/02/2021
Formed In	CALIFORNIA
Entity Type	Limited Liability Company - CA
Principal Address	448-450 US HIGHWAY 395 MILFORD, CA 96121
Mailing Address	448-450 US HIGHWAY 395 MILFORD,CA96121
Statement of Info Due Date	04/30/2022
Agent	1505 Corporation 2366 CALIFORNIA REGISTERED AGENT INC 1401 21ST STREET SUITE 370 SACRAMENTO, CA 95811

https://bizfileonline.sos.ca.gov/search/business.

Thus, it appears that Ruckus Ranch, LLC ceased operating as a limited liability company and became inactive due to a Franchise Tax Board suspension on August 2, 2021.

The Grant Deed purporting to transfer Ruckus Ranch, LLC to Debtor is dated December 12, 2018, but not recorded until April 12, 2022. Exhibit 7; Dckt. 39. While dated December 12, 2018, the Notary Public Acknowledgment attached to the Grant Deed is dated April 12, 2022. It is unclear why a deed, if it was to transfer title states it is signed in 2018 but not notarized until four years later to be recorded the day Debtor filed his bankruptcy case.

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 $112,863.56 (Declaration, Dckt. 40), while the value of the Property is determined to be $600,000.00, as stated in Schedules A/B and D filed by Debtor.

While asserting that there are hundreds of thousands of dollars of value in the Property, Debtor was not been able to prosecute a Plan in this Chapter 13 case. Nor did Debtor higher a Realtor and seek to preserve any of the asserted value for the Bankruptcy Estate. The court ordered the conversion of this bankruptcy case to one under Chapter 7 in part due to Debtor's failure, as the fiduciary of the Bankruptcy Estate, to act to preserve value of property for the Bankruptcy Estate

Looking at the Proofs of Claim filed in this case, with a value of $600,000, the following liens encumber the Property:

270 Acres in Milford, CA	$600,000	
Movant Deed of Trust	($125,000)	
Lossman Deed of Trust	($112,500)	Sch D, POC 9-2
Kirk Deed of Trust	($ 50,000)	Sch D, POC 8-1
Internal Revenue Service Lien	($ 30,631)	Amd POC 11-2

If the Property has a value of $600,000, then there would be approximately $283,869 in net proceeds (after 8% for costs of sale) recoverable for the Bankruptcy Estate. In the ten months from the filing of this case to it being converted to Chapter 7, Debtor, as the fiduciary of the Bankruptcy Estate, did nothing to recover the purported quarter of a million dollars of value for the Bankruptcy Estate. This is contrary to Debtor stating the Property has a value of $600,000.

Continuance of Hearing to February 7, 2023.

At the hearing, the court addressed the issues concerning the administration of this case and the apparent substantial equity for the estate, which can be used to pay unsecured claims.

The hearing is continued to 1:30 p.m. on February 7, 2023, for the court to allow the administration of the Estate issues to be addressed in conjunction with the Trustee's Motion to Convert or Dismiss the case.

February 7, 2023 Hearing

At the hearing, the court addressed with the Parties the prosecution of this Motion in light of the court having ordered the case converted to one under Chapter 7 so that a Trustee may step in and administer the property of the Bankruptcy Estate in which there appears to be substantial non-exempt equity for the estate and creditors.

The court continues the hearing on Motion for Relief to assist the court in managing these proceedings and for Movant maintain this Motion in the event that the Chapter 7 Trustee were to determine that there is not value in the Property sufficient for it to be administered by the Trustee.

DECISION

March 23, 2023 Hearing

The Motion requests relief from the stay pursuant to 11 U.S.C. § 362(d)(1), the "for cause," grounds, and § 362(d)(2), the lack of equity in the Property and that it is not necessary for an effective reorganization.

At the hearing, Trustee's counsel and Movant's counsel agreed to continue the hearing to allow the Trustee time to market and sell the Property.

July 20, 2023 Hearing

No Status Report has been filed prior to the July 20, 2023 hearing. Additionally, no Motion to Sell has been filed regarding the Property. At the hearing, counsel for the Trustee reported that the Trustee is actively marketing the Property. The Parties have stipulated to a continuance. Dckt. 103.

September 21, 2023 Hearing

At the hearing, xxxxxxxxxxx

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 Glenda Azevedo and Randall Azevedo ("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 the Automatic Stay is xxxxxxxxxxxxx

5. 23-21822-E-12 GB-4 | **RUSSELL LESTER** **Brian Haddix** | **CONTINUED MOTION TO DISMISS CASE** **6-15-23 [60]**

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)(3) 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, Trustee, creditors, and Office of the United States Trustee on June 16, 2023 By the court's calculation, 13 days' notice was provided. 14 days' notice is required. The court set the hearing for June 29, 2023. Dckt. 45.

The Motion to Dismiss Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, 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. Opposition has been filed.

The Motion to Dismiss is xxxxxxx

The court also orders that the deadline for filing the Chapter 12 Plan is extended to and include October 6, 2023, which deadline may be extended further by the court.

The Motion to Dismiss the Chapter 12 bankruptcy case of Russell Lester ("Debtor in Possession"), for Contempt of Court, and for Compensatory Sanctions has been filed by Creditor First Northern Bank of Dixon ("Movant").

DOCUMENT FILING REQUIREMENTS
AND JOINDER OF MULTIPLE CLAIMS FOR RELIEF IN ONE MOTION

The present Motion filed by Movant, by there very experienced attorneys in this District, requests that the court first dismiss this bankruptcy case and then also impose sanctions. The Motion is ten pages in length, including extensive citation of authorities and legal arguments. In requesting sanctions, Movant

provides the court with the inherent power of the court as the basis for sanctions, as well as 11 U.S.C. § 105(a) for the violation of an order of the court.

Federal Rules of Bankruptcy Procedure 9011 requires that a motion for sanctions shall be made separately from other motions or requests.

> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.
>
> (1) How initiated.
>
> (A) By motion. A **motion for sanctions under this rule** shall be made **separately from other motions or requests** and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. **The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion** (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.
>
> (B) On court's initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

Fed. R. Bankr. P. 9011(c)(1)(A) [emphasis added]. The conduct constituting grounds for the Rule 9011 sanctions is stated in Federal Rule of Bankruptcy Procedure 9011(b) as (emphasis added):

> (b) Representations to the court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances[,]—
>
> (1) **it is not being presented for any improper purpose**, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other **legal contentions therein are warranted by existing law** or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

The court's inherent powers to issue sanctions is not limited by Federal Rule of Civil Procedure 11, for which Federal Rule of Bankruptcy Procedure 9011 is its counterpart, with the Supreme Court stating in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50-51 (1991), cited by Movant :

> There is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct. This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules. A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees, *see Roadway Express, supra*, at 767. Furthermore, **when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power**. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.
>
>]Like the Court of Appeals, we find no abuse of discretion in resorting to the inherent power in the circumstances of this case. It is true that the District Court could have employed Rule 11 to sanction Chambers for filing "false and frivolous pleadings," 124 F.R.D. at 138, and that some of the other conduct might have been reached through other Rules. **Much of the bad-faith conduct by Chambers, however, was beyond the reach of the Rules; his entire course of conduct throughout the lawsuit evidenced bad faith and an attempt to perpetrate a fraud on the court, and the conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address**. In circumstances such as these in which all of a litigant's conduct is deemed sanctionable, requiring a court first to apply Rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the Rules themselves. See, e. g., Advisory Committee's Notes on 1983 Amendment to Rule 11, 28 U. S. C. App., pp. 575-576.

Chambers v. NASCO, Inc., 501 U.S. 32, 50-51 (1991) [emphasis added]. The Motion makes no assertion that the alleged sanctionable conduct is not within the scope of Federal Rule of Bankruptcy Procedure 9011.

Applicable Local Rules

The Local Bankruptcy Rules in this District, which are well known to experienced bankruptcy counsel, impose specific pleading requirements which are consistent with the Federal Rules of Bankruptcy Procedure.

Local Bankruptcy Rule 9014-1(d)(5)(A) states that "[e]very application, motion, contested matter or other request for an order, shall be filed separately from any other request, except (1) that relief in the alternative based on the same statute or rule may be filed in a single motion; and (2) as otherwise provided by these rules." For the Local Rule 9014-1, the types of relief which may be combined in one motion (unless otherwise authorized by the court) are stated to be:

> B) Notwithstanding the foregoing, the following requests for relief may be joined in a single motion, Fed. R. Civ. P. 18, incorporated by Fed. R. Bankr. P. 7018, 9014(c):
>
> > (i) relief in the alternative based on the same statute or rule;
> >
> > (ii) authorization for sale of real property and allowance of fees and expenses for a professional authorized by prior order to be employed for the sale of such property, 11 U.S.C. §§ 327, 328, 330, 363, Fed. R. Bankr. P. 6004;
> >
> > (iii) authorization to employ a professional, i.e., auctioneer, for sale of estate property at public auction, and allowance of fees and expenses for such professional, 11 U.S.C. §§ 327, 328, 330, 363, Fed. R. Bankr. P. 6004-6005;
> >
> > (iv) motion for stay relief and/or abandonment of property of the estate, 11 U.S.C. §§ 362, 554, Fed. R. Bankr. P. 4001, 6007;
> >
> > (v) approval of compromise and compensation of special counsel previously authorized to be employed relating to the underlying compromise, Fed. R. Bankr. P. 9019; 11 U.S.C. §§ 327, 328, 330; and
> >
> > (vi) as otherwise expressly provided by these Rules.

L.B.R. 9014-1(f)(5)(B). Combining a request for sanctions with a request for relief form the automatic stay are not included in the forgoing.

The Local Bankruptcy Rules also require that the motion, notice, points and authorities, documentary evidence, exhibits, and proof of service are to be filed as separate documents. LBR. 9004-2(c)(1), 9014-1(d)(4). There is an exception to having to file a separate points and authorities, and a motion and points and authorities may be combined into one pleading so long as that single pleading does not exceed six (6) pages in length. LBR 9014-1(d)(4). Here the Mothorities (combined motion and points and authorities) is ten (10) pages in length.

With respect to imposition of sanctions, the Local Bankruptcy Rules Provide that failure to comply with the Local Bankruptcy Rules may be grounds for imposing sanctions on the violating party. *See*, LBR 1001-1(g), 9004-1(a), 9014(f),

Movant has combined two different types of relief in the one Motion. The request for additional relief of sanctions is denied without prejudice.

DISCUSSION

Movant filed this Motion seeking dismissal of the Chapter 12 case pursuant to 11 U.S.C. §1208(c).

The Motion states the following with particularity (FED. R. BANKR. P. 9013):

1. The case was filed on June 2, 2023 ("Chapter 12 Case").

2. Debtor in Possession has a pending Chapter 11 case that was filed on August 27, 2020 ("Chapter 11 Case"). *See* Bankr. E.D. Cal. No. 20-24123.

3. The Chapter 11 Case has a confirmed Plan that continues to govern the reorganization of debts between Debtor in Possession and his creditors, including Movant.

To support this, Movant provides in the Motion the following cases:

I. *In re Oakhurst Lodge, Inc.*, 582 B.R. 784 (Bankr. E.D. Cal. 2018) ("Confirmation of a chapter 11 plan binds the debtor, creditors, and equity security holders. . . . Moreover, the confirmation order has *res judicata* effect on issues that were raised in conjunction with plan confirmation or could have been raised at that time.");

II. *Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir. 1995) ("Once a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to *res judicata* effect.");

III. *Caviata Attached Homes*, LLC v. U.S. Bank, N.A. (*In re Caviata Attached Homes, LLC*), 481 B.R. 34, 46 (B.A.P. 9th Cir. 2012) ("Under § 1141(a), the terms of a confirmed plan are binding on all parties.");

IV. *Hillis Motors v. Haw. Auto. Dealers' Ass'n* (*In re Hillis Motors*), 997 F.2d 581, 588 (9th Cir. 1993);

V. *Rosenstein & Hitzeman, AAPLC v. Eliminator Custom Boats, Inc.* (*In re Eliminator Custom Boats, Inc.*), Nos. CC-19-1003-KuFL, 2:14-bk-19226-DS, 2019 Bankr. LEXIS 2998 (B.A.P. 9th Cir. Sep. 23, 2019); In re A. Hirsch Realty, LLC, 583 B.R. 583, 603-04 (Bankr. D. Mass. 2018) ("A bankruptcy court's order confirming a reorganization plan is a final judgment, which binds the

debtor, any creditor, and equity security holder to the terms and effect of a confirmed plan. . . . the agreement and order of confirmation are binding in a subsequent bankruptcy case . . . .”); and

VI. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784-85 (9th Cir. 2001) (“In the bankruptcy context, a party is judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements.”).

The court notes that these authorities address the legal principle of *Res Judicata* as applying to issues that were or could have been raised when the prior bankruptcy plan was confirmed. Such items can include the validity of a creditor’s lien that is provided for in the plan and the amount of the claim provided for in the plan. However, subsequent events which occurred and the legal rights asserted based thereon do not appear to be “ issues that were raised in conjunction with plan confirmation or could have been raised at that time.”

The law is well established that with the confirmation of a Chapter 11 (or other) Plan, it is construed as the modified contractual terms between the debtor and creditors. Looking at the *Hillis Motors* case cited by Movant, the Ninth Circuit Court of Appeals states:

> A reorganization plan resembles a consent decree and therefore, should be construed basically as a contract. *See The Official Creditors Committee of Stratford of Texas, Inc. v. Stratford of Texas, Inc. (In re Stratford of Texas, Inc.)*, 635 F.2d 365, 368-69 (5th Cir. Unit A Jan. 1981); *see also Rufo v. Inmates of Suffolk County Jail*, 116 L. Ed. 2d 867, 112 S. Ct. 748, 757 (1992) (a consent decree has elements of both a judgment and a contract). Although a confirmed bankruptcy plan is a judgment rendered by a federal court in a case arising under federal law, because there is little need for a nationally uniform body of law regarding the interpretation of Chapter 11 plans and because state law is regularly incorporated into bankruptcy law, state law constitutes the federal rule of decision here and governs our interpretation of Hillis' plan. *See Kamen v. Kemper Financial Serv. Inc.*, 114 L. Ed. 2d 152, 111 S. Ct. 1711, 1717 (1991); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-29, 59 L. Ed. 2d 711, 99 S. Ct. 1448 (1979); *Stratford*, 635 F.2d at 368-39.

Hillis Motors v. Hawaii Auto. Dealers' Ass'n (In re Hillis Motors), 997 F.2d at 588. This language takes one down the path of the confirmed Chapter 11 Plan being a “contract,” which like every other contract is subject to modification under the Bankruptcy Code. However, issues and disputes that were, or could have been addressed through or at the time of the prior confirmed plan cannot be subsequently raised and litigated.

6. Debtor in Possession is attempting to reorganize the same assets and claims that is currently being reorganized under the Chapter 11 Plan.

The court notes, Debtor in Possession has not yet filed their schedules or proposed a plan. It is not clear which assets and claims Debtor in Possession is attempting to reorganize.

7. The Chapter 12 Case was filed to hide their financial activities from the state court and the receiver, who is investigating the misappropriation of

cash that should have been paid to Movant under Debtor in Possession's Chapter 11 Case.

8. Dismissal is required pursuant to 11 U.S.C. § 1208(c)(9) because *res judicata* and judicial estoppel makes Debtor in Possession's Chapter 11 Plan controlling in this case. Therefore, Debtor in Possession has no likelihood of any reorganization in this case.

9. Dismissal is required because the case was filed in bad faith and for an improper purpose, violating court orders and unfairly manipulating bankruptcy laws. By filing the Chapter 12 Case, Debtor in Possession is modifying the Confirmed Chapter 11 Plan without notice and hearing.

DISCUSSION

The Supreme Court has addressed whether multiple filings of bankruptcy cases are *per se* invalid. In *Johnson v. Home State Bank*, 501 U.S. 78 (1991), the Court addressed a situation where the debtor first filed a Chapter 7 case, obtained the benefits of that case as it applied to creditors, and then filed a Chapter 13 case to modify the rights and interests of creditors that remained after the Chapter 7 case. The court found that Congress has expressly prohibited various forms of serial filings under the Code provisions of 11 U.S.C. § § 109(g), 727(a)(8), and 727(a)(9). *Id.* at 87. The Court found that the absence of a provision prohibiting serial filings of Chapter 7 and 13 petitions, "combined with the evident care with which Congress fashioned these express prohibitions," Congress did not intend to preclude a Chapter 13 reorganization to a debtor who has previously filed for Chapter 7 relief. *Id.*

The Fifth Circuit has applied the Supreme Court's reasoning to subsequent Chapter 11 filings. *In re Elmwood Dev. Co.*, 964 F.2d 508 (5th Cir. 1992). In *Elmwood*, the Fifth Circuit found, "the mere fact that a debtor has previously petitioned for bankruptcy relief does not render a subsequent Chapter 11 petition 'per se' invalid." *Id.* at 511. Rather, *Elmwood* states that the good faith inquiry test should focus on whether the second petition was filed to contradict the first petition's proceedings. *Id.* Unanticipated changed circumstances may justify a valid successive request for Chapter 11 relief and require a second plan to accomplish the goals of bankruptcy relief. *Id.* at 511-12. Thus, merely there being a prior bankruptcy case with a confirmed Chapter 11 plan does not result in the forfeiture of a right to file a subsequent Chapter 11 case in the future.

The Ninth Circuit Bankruptcy Appellate Panel ("B.A.P.") has also found that a second filing and plan may be considered if unforeseeable or unanticipated changes in circumstances have affected the debtor's ability to perform under its confirmed plan. *Caviata Attached Homes, LLC v. U.S. Bank, N.A. (In re Caviata Attached Homes, LLC*), 481 B.R. 34, 47 (B.A.P. 9th Cir. 2012). The Ninth Circuit B.A.P. provided several examples of these circumstances, including lost crops due to hail, cattle and pasture lost due to fire, and more. *Id.*

There is no *per se* prohibition of a good faith Chapter 11 filing of a subsequent Chapter 11 case merely because there is a prior case with a confirmed Chapter 11 plan in the Bankruptcy Code. *In re Jartran, Inc.*, 886 F.2d 859, 869 (7th Cir. 1989). [Fn.1.]

Courts have allowed a debtor to file a second Chapter 11 reorganization case after failing in the first Chapter 11 reorganization plan if the debtor is acting in good faith. *In re Adams*, 218 B.R. 597, 601

(Bankr. D. Kan. 1998) (citing *CFC 78 Partnership B v. Casa Loma Assocs.* (*In re Casa Loma Assocs.*), 122 B.R. 814, 818 (Bankr. N.D. Ga. 1991); *Integon Life Ins. Corp. v. Mableton-Booper Assocs. (In the Matter of Mableton-Booper Assocs.*), 127 B.R. 941, 943 (Bankr. N.D. Ga. 1991); *Security Pacific Credit Corp. v. Savannah, Ltd.* (*In the Matter of Savannah, Ltd.*), 162 B.R. 912, 915 (Bankr. S.D. Ga. 1993); *In re Woodson*, 213 B.R. 404, 405 (Bankr. M.D. Fla. 1997); *In re Henke*, 127 B.R. 255 (Bankr. D. Mont. 1991)). Successive filings of bankruptcy petitions do not constitute bad faith per se, and to determine whether there is good faith, the court must apply the totality of circumstances test. *In re Metz*, 820 F.2d 1495, 1498 (9th Cir. 1987).

FN. 1. The court recognizes that this second case is filed under Chapter 12 of the Bankruptcy Code. However, the legal logic as discussing in Chapter 11 cases also applies to a subsequent reorganization under Chapter 12.

As the Bankruptcy Court in the Southern District of Georgia noted in *Lincoln Nat'l Life Ins. Co. v. Bouy, Hall & Howard & Assocs.* (*in re Bouy, Hall & Howard & Assocs.*), 208 B.R. 737, 743 (Bankr. S.D. Ga. 1995):

> A debtor should not be permitted to routinely file a successive Chapter 11 reorganization where it has defaulted on a confirmed, substantially consummated plan of reorganization, because such an effort would, in effect, constitute an impermissible attempt to modify a substantially consummated plan. However, when the facts if the second case are significantly distinguishable from the first so as not to offend traditional notions of res judicata, a permissible exception exists.

However, foreseeable risks of doing business should not be grounds to relieve the debtor of the terms of its confirmed plan. *In re Adams*, 218 B.R. 597, 601 (Bankr. D. Kan. 1998). Only unanticipated and unforeseeable changed circumstances can warrant a subsequent filing.

Here, Debtor in Possession has a pending Chapter 11 case and filed this subsequent Chapter 12 case. The Bankruptcy Code does not provide that post-confirmation modifications to plans are the exclusive remedy if there is a default in the modified contract under the confirmed plan. No provision in the Bankruptcy Code nor any law cited by Movant states that once a debtor confirms a Chapter 11 plan, they forfeit their right to seek relief due to defaults under the modified contract. As numerous courts have found above, the question for whether this second petition is proper should be a good faith analysis and whether there were unanticipated circumstances that caused the first plan to be infeasible, or if the second petition was filed to contradict the first petition's proceedings.

Here, Movant states this case was filed in bad faith because the Debtor in Possession is "trying to escape compliance with the state court's orders on the appointment and authority of the receiver." Motion, Dckt. 60 at 8. Additionally, Movant states by filing this Chapter 12 case, Debtor in Possession is modifying the confirmed Chapter 11 Plan and *res judicata* and judicial estoppel rules make the Chapter 11 Plan as controlling. *Id.* Movant's assertion that there is an absolute bar on filing of a subsequent reorganization is not supported by the law which has been presented to the court.

Must the Debtor Seek Modification of the Prior Chapter 11 Plan

Movant argues that once the Chapter 11 plan has been confirmed, the only relief available is to seek modification of 11 U.S.C. § 1127(b), which states (emphasis added):

> (b) The proponent of a plan or the reorganized debtor may modify such plan at any time **after confirmation of such plan and before substantial consummation of such plan**, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

Movant does not address the "substantial consummation" limitation imposed by 11 U.S.C. § 1127(b). Though Movant may argue that "it's for the Debtor to bring that requirement/limitation to the court's attention," it is Movant's burden to show that the grounds exist upon which the relief is request. The issue of substantial consummation is not mentioned in the Mothorities. [Fn.2.]

FN. 2. The court notes that in the Debtor's Chapter 11 Case he as filed a Motion to Reopen the Case (which was reopened pursuant thereto), in which it is stated by counsel for the Reorganized Debtor that:

> 11. The sale of the Conservation Easement closed on August 15, 2022.
> . . .
> 13. As set forth in the final Estimated Seller's Settlement Statement attached hereto, on April 27, 2023, the SPE Independent Manager, Hank Spacone, closed the sale of the McCune Ranch for a sale price of $14,925,302.50, resulting **in the payment in full of Reorganized Debtor's obligations to Prudential**; partial payment of his obligations to FNB; **payment in full of the Voluntarily Deferred Allowed Administrative Claims**; payment in full of all remaining General Unsecured Claims; and **payment in full of then-outstanding fees of the Independent SPE Manager and his attorney**, in addition to other closing costs as set forth in the attached closing statement.
>
> 14. On May 4, 2023, Reorganized Debtor tendered, and FNB accepted, certified checks in the aggregate amounts of $338,679.04, which amounts were required by FNB to reinstate the remaining three FNB loans secured by Reorganized Debtor's real property and his inventory, equipment, and other personal property.
>
> 15. **On May 4, 2023, FNB acknowledged receipt and reinstated the three FNB loans**.
>
> 16. Notwithstanding Reorganized Debtor's full reinstatement of the FNB loans under California Civil Code section 2924c, FNB on May 5, 2023 took the position that under California Commercial Code section 9604(a)(3)(C), FNB may continue enforcement of its liens on Reorganized Debtor's inventory, equipment, and other personal property by sale through the receivership, despite the absence of any further payment defaults.

20-24123; Motion to Reopen, Dckt. 905.

While the court does not accept such "mere" allegations in the Motion to Reopen, it does appear that substantial payments have been made. The Motion also expressly states that Movant obtained the appointment of a receiver in State Court on March 21, 2023, based on payment defaults on its claim under the Confirmed Chapter 11 Plan. Further, as noted above, notwithstanding the alleged curing of all defaults in plan payments on Creditor's claim under the Plan, Creditor asserts that right to continue with the imposition of the receivership citing to California Civil Code § 2924c, which relates to notices of default under deeds of trust and the curing of such defaults.

Debtor in Possession has not yet filed their schedules nor have they filed a proposed plan. Although they have a confirmed Chapter 11 Plan in a prior case, courts have been clear that Debtor in Possession may file a subsequent petition absent Congress's explicit prohibition of the second petition. If Debtor in Possession can demonstrate unforeseeable changed circumstances caused them to default under their Confirmed Plan, the second Chapter 12 Plan appears permissible. [Fn.3.]

FN. 3. As the Supreme Court states in *United Student Air Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), while the court has to rely on the parties to present sufficient evidence, the court is not bound by the parties incompletely or incorrectly stating the law. The Parties may want to consider the provisions of 11 U.S.C. § 1127(e), which applies to individual Chapter 11 debtors, which Congress added to § 1127 in 2005.

Opposition Stated, Briefing Schedule, and Question re Whether There is a Default On the Obligation as Modified by the Confirmed Chapter 11 Plan

At the initial hearing, counsel for the Debtor in Possession stated an opposition to the Motion, including that it is necessary to proceed with a reorganization in this case in light of Movant asserting that there exists a default in the amended obligation as provided in the confirmed Chapter 11 Plan and therefore Movant may proceed with liquidating Debtor's personal property that is collateral for it amended obligation as provided for in the Chapter 11 Plan.

In the oral argument, what came to light was an interesting legal question concerning the prior case, the Confirmed Chapter 11 Plan, and whether or not a default exists on the obligation of owed to Movant as modified by the Chapter 11 Plan.

Movant does not dispute that the default, as stated in the Notice of Default given for its obligation as modified by the Chapter 11 Plan , has been cured, but citing to the California Commercial Code Movant asserts that there exists a default by which it can proceed to enforce its rights against personal property collateral.

In the Motion, Movant discusses how under the Confirmed Chapter 11 Plan if a default occurs, then if it is not cured within a specified number of days, then the Plan injunction is terminated and the Movant may proceed against its collateral. Such default occurred, was not cured, and Movant acted to enforce its rights, including obtaining the appointment of a receiver in State Court.

Prior to foreclosure under the Deed of Trust, Debtor cured the default as Noticed. As of this point in time there appears to be no dispute that the Debtor has not cured the default in payments as provided on Movant's obligation as modified by the Plan. Debtor under the Plan has further, future payments coming due.

However, Movant asserts that California Commercial Code § 9604 (which addresses the rights of a creditor who has real and personal property collateral) allows Movant to proceed to liquidate the personal property collateral securing its obligation as modified under the Confirmed Chapter 11 Plan. This argument presents the court with an interest, and as of yet unaddressed, legal question.

California Commercial Code § 9604 states that if a party has a right to proceed against both real and personal property collateral, then it may do so in the specified says. § 9604 does not grant a right to proceed against such collateral.

What Movant and Debtor/Debtor in Possession have not made clear is whether there is a non-curable default under Movant's obligation as modified by the Chapter 11 Plan, without regard to whether the default as noticed and under California Civil Code § 2924c was "cured," and if so, whether that resulting from a post-confirmation event: (1) can be cured or (2) can be addressed through a modification of the Confirmed Chapter 11 Plan.

From the court's limited review of the 84 page Confirmed Chapter 11 Plan (20-24123; Order Confirming and Plan attached, Dckt. 724), the court could not identify a provision altering the default and cure provisions for Movant's obligation as provided in the contract(s) and applicable State Law.

With respect to California Civil Code § 2924c, the court notes that this section expressly provides that all amounts asserted to be in default must be cured for the Notice of Default to be rescinded. This section provides (the court reorganizing the long narrative paragraph for better ease in reading and court's emphasis added):

> **2924c. Curing default; Notice of default; Limitation on costs and expenses; Trustee's or attorney's fees; Reinstatement of default**
>
> **(a)**
> **(1)** Whenever all or a portion of the principal sum of any obligation secured by deed of trust or mortgage on real property or an estate for years therein hereafter executed **has, prior to the maturity date fixed in that obligation, become due or been declared due by reason of default in payment of interest or of any installment of principal**,.or . . ., the trustor or **mortgagor** or their successor in interest in the mortgaged or trust property or any part thereof, . . ., at any time within the period specified in subdivision (e), if the power of sale therein is to be exercised, or, otherwise at any time prior to entry of the decree of foreclosure, **may pay to the beneficiary** or the mortgagee or their successors in interest, respectively, the **entire amount due, at the time payment is tendered, with respect to**
>
> > (A) **all amounts of principal, interest**, taxes, assessments, insurance premiums, or advances **actually known by the beneficiary to be, and that are, in default and shown in the notice of default**, under the terms of the deed of trust or mortgage and the obligation secured thereby,

(B) **all amounts in default on recurring obligations not shown in the notice of default**, and

(C) **all reasonable costs and expenses, subject to subdivision (c), that are actually incurred in enforcing the terms of the obligation**, deed of trust, or mortgage, and trustee's or attorney's fees, subject to subdivision (d) other than the portion of principal as would not then be due had no default occurred

and thereby cure the default theretofore existing, and thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and deed of trust or mortgage shall be reinstated and shall be and remain in force and effect, the same as if the acceleration had not occurred.

. . . .

This is discussed in WITKIN SUMMARY OF CALIFORNIA LAW, CH VIII § 232, that the § 2924c cure includes all amounts due at the time the cure payment is tendered.

Thus, it appears that upon confirming that the default had been cured for California Civil Code § 2924c, Movant is stating that the default has been cured, there is no default. The provisions of California Commercial Code § 9604 relate to how a creditor may resort to its personal and real property collateral when there is a default. *See* Cal. Com. § 9601(a), addressing rights of a secured party after default, stating, "(a) After default, a secured party has the rights provided in this chapter and, except as otherwise provided in Section 9602, those rights provided by agreement of the parties."

What is unclear to the court is what "default" exists by which Movant would be exercising its lien rights against personal property collateral after it has confirmed that the default as provided for in California Civil Code § 2924c has been cured.

Debtor's Response

Debtor in Possession filed a Response on August 2, 2023. Dckt. 124. Debtor in Possession states:

1. Movant provides no evidence that there is a continuing loss or diminution of the estate. The Monthly Operating Report shows the Debtor is within budget and able to pay Movant.

2. Movant provides no authority that Debtor in Possession's only remedy after Chapter 11 Confirmation is to seek relief from the confirmation order or seek modification of the Chapter 11 Plan.

3. Movant provides no authority that filing a Chapter 12 petition modifies a confirmed Chapter 11 Plan.

AUGUST 23, 2023 HEARING

This court is presented with an interesting situation concerning the filing of this Bankruptcy Case, starting with whether the proper action for the Debtor, who is serving as the Reorganized Debtor in the place of a plan administrator under the confirmed Chapter 11 Plan and his counsel in the Chapter 11 case should be seeking modification of the Chapter 11 Plan in light of Congress giving an individual debtor the ability to modify a Chapter 11 plan notwithstanding substantial consummation of the plan. This statutory provision may well demonstrate the Congressional intent to create a "simple," straightforward, cost effective way to address minor or modest tweaks to a Chapter 11 plan in light of subsequent events rather than new "reorganization war" in a second case.

Additionally, there is an active dispute between the Reorganized Debtor in the Chapter 11 Case and Movant as to whether the there is a default or whether the default has been cured. This appears to include a factual dispute as to whether Movant stated a cure amount, which the Reorganized Debtor then paid, or whether such cure was only limited to the then pending nonjudicial foreclosure sale and cure the default as applies to other collateral.

Further, the Parties may have a dispute as to what the Modified Amended Chapter 11 Plan confirmed in the prior case provides for defaults and cure of defaults, and what balances are due and owing if there is a monetary default and such monetary default is cured.

The Debtor has stated that he is not intending to delay the payment in full dates for Movant, but to have the full period provided in the Chapter 11 Plan to make those payments, having cured, by Debtor's calculation, any default under the Chapter 11 Plan that existed. At the initial hearing, the Parties indicated that this deadline will occur in the next two or three years.

It may well be that Debtor, as the Reorganized Debtor in the Chapter 11 Case has a clear(er), cost effective, more straightforward, fast lane created by Congress and provided in the Chapter 11 Plan (allowing for disputes to be determined by motion) to address the asserted Plan default issues rather than the time, cost, and expense of this new Chapter 12 case. [Fn.4.]

FN. 4. Though the Reorganized Debtor and Richard Lapping, Esq, the Reorganized Debtor's attorney in the Chapter 11 Case, reopened the Chapter 11 Case on May 24, 2023 (Motion to Reopen Filed), and stated that the Reorganized Debtor would seek a modification of the Chapter 11 Plan or other proceeding to resolve the dispute concerning the asserted default under the Plan, no action was taken by the Reorganized Debtor and his counsel. No action having been taken, the Chapter 11 Case was re-closed on June 30, 2023. 20-24123.

At the hearing, counsel for the respective parties and the court had an extensive discussion of the dispute concerning this Chapter 12 case filing, alternative corrective action that could be taken in the Chapter 11 Case, and the possible agreement to a simple modification of the Chapter 11 Plan.

The court continues the hearing on this Motion to afford the Parties to focus their time and efforts on resolving the default dispute in the Chapter 11 case (or how to cost effectively litigate that issue in the Chapter 11 case) rather than a "Motion to Dismiss War" in this case and to avoid more substantial, extensive attorney's fees being incurred and drawn from the payments to creditors.

To allow the Parties to focus on resolving their disputes and moving forward with the Confirmed Chapter 11 Plan, the court extends the deadline for filing the Chapter 13 plan from August 31, 2023, to October 6, 2023, with further extensions possible.

September 21, 2023 Hearing

A review of the Docket for this case first discloses the Chapter 12 Trustee's September 14, 2023 Docket Entry Report that the Debtor and Debtor's counsel did not appear at the September 14, 2023 § 341 Meeting of Creditors. The Meeting of Creditors has been continued to October 13, 2023.

On September 14, 2023, the Debtor in Possession filed the Monthly Operating Report for August 2023. Dckt. 181. The information in this Monthly Operating Report includes that of the Estate's $671,905 in pre and post-petition accounts receivable, $43,895 are thirty (30) days or less and $453,190 are thirty-one (31) to sixty (60) days aged.

At the hearing, xxxxxxxxxxxxxxx

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 Dismiss filed by Creditor First Northern Bank of Dixon ("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 Motion to Dismiss is xxxxxxxxxxxxx
>
> **IT IS FURTHER ORDERED** that the deadline for filing the Chapter 12 Plan in this Bankruptcy Case is extended to and include October 6, 2023, which deadline may be extended further by the court.