UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

September 28, 2017, at 2:00 p.m.

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1. **15-90811-E-7** **ASSN., GOLD STRIKE** **MOTION TO CONTINUE TRIAL AND**
15-9061 **HEIGHTS HOMEOWNERS** **TRIAL RE-SCHEDULING CONFERENCE**
ELG-3 **9-14-17 [147]**
INDIAN VILLAGE ESTATES, LLC V.
GOLD STRIKE HEIGHTS

APPEARANCE OF ALL COUNSEL FOR ALL PARTIES OR ANY PARTIES APPEARING IN *PRO SE*, AND EACH OF THEM, REQUIRED FOR THE SEPTEMBER 28, 2017 HEARING

TELEPHONIC APPEARANCES PERMITTED

The Motion is granted, and the trial date is continued to 9:30 a.m. on February xx, 2018.

Community Assessment Recovery Services ("CARS"), a defendant in Adversary Proceeding 15-9061, filed an Ex Parte Motion to Continue Trial on September 14, 2017. Dckt. 147. CARS requested that the court continue the scheduled trial from October 30, 2017, to February 5, 2018, for cause—CARS's attorney being subpoenaed to be available to testify in a criminal trial on October 31–November 1, 2017, in a Virginia state court. Dckt. 148.

CARS reports that all counsel in this matter have stipulated to continuing the trial date.

ORDER FOR HEARING

On September 19, 2017, the court entered an order setting CARS's request for hearing at 2:00 p.m. on September 28, 2017. Dckt. 150. The court noted that CARS's grounds are valid for a continuance. The court stated that a trial-setting conference would be conducted at the September 28 hearing, and the court ordered that all counsel for all parties or any parties appearing in *pro se* shall appear at the September 28, 2017 hearing, telephonic appearances permitted.

SEPTEMBER 28, 2017 HEARING

At the hearing, **xxxxxxxxxxxxxxxx**.

~~The court shall issue an Trial Setting in this Adversary Proceeding setting the following dates and deadlines:~~

~~A. Evidence shall be presented pursuant to Local Bankruptcy Rule 9017-1.~~

~~B. Plaintiff shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -------, **2017**.~~

~~C. Defendant shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -------, **2017**.~~

~~D. The Parties shall lodge with the court, file, and serve Hearing Briefs and Evidentiary Objections on or before ----------, **2017**.~~

~~E. Oppositions to Evidentiary Objections, if any, shall be lodged with the court, filed, and served on or before ---------, **2017**.~~

~~F. The Trial shall be conducted at ---**x.m. on** ---------, **2018**.~~

2. **17-90213-E-12 J & B DAIRY**
17-9006
BANK OF STOCKTON V. J & B DAIRY

CONTINUED STATUS CONFERENCE RE: COMPLAINT
6-12-17 [1]

NO APPEARANCE AT STATUS CONFERENCE IS REQUIRED IF PARTY CONCURS WITH THE DISMISSAL WITHOUT PREJUDICE OF THE COMPLAINT AND THE CLOSING OF THE FILE IN THIS ADVERSARY PROCEEDING

Tentative Ruling: The court states its tentative ruling below, and will consider the arguments, if any, of parties in interest at the status conference.

Plaintiff's Atty: Arthur A. Small
Defendant's Atty: unknown

Adv. Filed: 6/12/17
Answer: none

Nature of Action:
Dischargeability - willful and malicious injury

The Complaint is dismissed without prejudice, and the Clerk of the Court shall close the file in this Adversary Proceeding.

Notes:
Continued from 8/10/17. The court shall dismiss without prejudice this Complaint and close the Adversary Proceeding (if Plaintiff has not voluntarily dismissed this Complaint) if Plaintiff is not actively prosecuting this Adversary Proceeding by the continued status conference and can demonstrate the reason for prosecuting a nondischargeability action in light of the Defendant-Debtor's bankruptcy case having been dismissed.

SEPTEMBER 28, 2017 STATUS CONFERENCE

The J&B Dairy bankruptcy case was dismissed on August 16, 2017 (August 10, 2017 hearing). 17-90213, Dckt. 69. The Initial Status Conference in this Adversary Proceeding was conducted on August 10, 2017. No parties appeared at that Initial Status Conference to advise the court whether the Adversary Proceeding would be prosecuted in light of the court ordering the dismissal of the bankruptcy case. Nothing in the court's file indicates any effort by Plaintiff to prosecute this Adversary Proceeding.

The court continued the Status Conference to September 28, 2017, to afford the parties an opportunity to prosecute this Adversary Proceeding if they so desired. No action has been taken in this

Adversary Proceeding by the Plaintiff since the June 12, 2017 filing of the Complaint. If having determined not to prosecute this Adversary Proceeding, Plaintiff has failed to file a simple Federal Rule of Civil Procedure 41(a)(1)(A)(I), Federal Rule of Bankruptcy Procedure 7041 voluntarily dismissal without prejudice of the Complaint.

In its August 13, 2017 Order continuing this Status Conference (Dckt. 8), the court stated that if Plaintiff failed to prosecute the Adversary Proceeding and had not filed the voluntary dismissal, the court would dismiss without prejudice the Complaint, with no further notice or hearing required.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> the Continued Status Conference having been conducted by the court, and upon review of the pleadings, Plaintiff having shown no intention to prosecute this Adversary Proceeding, the court having ordered that this Complaint would be dismissed without prejudice if Plaintiff failed to prosecute this Adversary Proceeding, and good cause appearing,
>
> **IT IS ORDERED** that the Complaint is dismissed without prejudice.
>
> Plaintiff having taken no action to prosecute this Adversary Proceeding, the Clerk of the Court shall close the file in this Adversary Proceeding.

3. **13-91315-E-7** **APPLEGATE JOHNSTON, INC.** **CONTINUED STATUS CONFERENCE**
15-9032 **RE: AMENDED COMPLAINT**
MCGRANAHAN V. GRAYBAR ELECTRIC COMPANY, INC. **7-13-15 [7]**

ADVERSARY PROCEEDING
DISMISSED: 08/30/2017

Final Ruling: No appearance at the September 28, 2017 Status Conference is required.

The Adversary Proceeding having been dismissed by prior order of the court, the Status Conference is removed from the Calendar.

4. **17-90432-E-12** **CARLOS/BERNADETTE ESTACIO**
Peter Fear

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
5-23-17 [1]

Debtors' Atty: Peter L. Fear

The Status Conference is xxxxxxxxxxxxxxxxxxxxxxx.

Notes:
Continued from 6/29/17

[FW-2] Debtor's Application for Order Authorizing Employment of Accountant filed 7/25/17 [Dckt 24]; Order granting filed 7/26/17 [Dckt 30]

[FW-5] Chapter 12 Plan Dated August 21, 2017 filed 8/21/17 [Dckt 31]

[FW-5] Motion to Confirm Chapter 12 Plan Dated August 21, 2017 filed 8/23/17 [Dckt 32], set for hearing 9/28/17 at 2:00 p.m.

[FW-3] Motion to Approve Lease Agreement for Livestock Facilities filed 8/30/17 [Dckt 37], set for hearing 9/28/17 at 10:30 a.m.

[FW-4] Motion to Approve Residential Lease Agreement filed 8/31/17 [Dckt 45], set for hearing 9/28/17 at 10:30 a.m.

[FW-6] Motion to Approve Lease Agreement for Ranch Facilities filed 9/7/17 [Dckt 56], set for hearing 9/28/17 at 10:30 a.m.

5. **17-90432-E-12 FW-5** | **CARLOS/BERNADETTE ESTACIO** **Peter Fear** | **MOTION TO CONFIRM CHAPTER 12 PLAN** **8-23-17 [32]**

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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, Chapter 12 Trustee, creditors, and Office of the United States Trustee on August 23, 2017. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(8) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1) (requiring fourteen days' notice for opposition).

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

The Motion to Confirm the Plan is xxxxxxxxxxxx.

Carlos Estacio and Bernadette Estacio ("Debtor") seek confirmation of a Chapter 12 Plan filed on August 21, 2017. *See* Dckt. 31.

WELLS FARGO'S OBJECTION

Wells Fargo Bank, N.A., ("Wells Fargo") opposed confirmation on September 5, 2017. Dckt. 52. FN.1. Wells Fargo argues that the Plan cannot be confirmed because it was not filed in good faith, because Debtor will not be able to make all of the plan payments, and because the Plan does not provide present value for Wells Fargo's claim.

FN.1. Wells Fargo filed the "Opposition" and Proof of Service in this matter as one document. That is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Revised Guidelines for the Preparation of Documents § (III)(A). Counsel is reminded of the court's expectation that documents filed

with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9004(a).

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court (some running hundreds of pages). It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents that can then be used by the court.

Specifically, Wells Fargo argues that the Plan was not filed in good faith because it extends payments out for thirty years. Wells Fargo argues that Debtor will not be able to generate the required income from the farm for thirty years because they are in their fifties right now. Second, Wells Fargo argues that Debtor's proposed income is unreliable because Carlos Estacio intends to rely on $2,000.00 monthly commissions from real estate agent work, but he has not been an agent for several years, and the proposed $9,000.00 monthly payments from Debtor's parents is unreliable because they must be older than Debtor, but the Plan calls for them to make the monthly payments for thirty years, despite seeking approval of only a five-year lease.

Finally, Wells Fargo objects to the confirmation of the Plan on the basis that the Plan calls for adjusting the interest rate on its loan with Debtor to 5.00%. Wells Fargo's claim is secured by real property commonly known as 4413 S. Prairie Flower, Turlock, California. Wells Fargo argues that this interest rate is outside the limits authorized by the Supreme Court in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). In *Till*, a plurality of the Court supported the "formula approach" for fixing post-petition interest rates. *Id.* Courts in this district have interpreted *Till* to require the use of the formula approach. *See In re Cachu*, 321 B.R. 716 (Bankr. E.D. Cal. 2005); *see also Bank of Montreal v. Official Comm. of Unsecured Creditors (In re American Homepatient, Inc.)*, 420 F.3d 559, 566 (6th Cir. 2005) (*Till* treated as a decision of the Court). Even before *Till*, the Ninth Circuit had a preference for the formula approach. *See Cachu*, 321 B.R. at 719 (citing *In re Fowler*, 903 F.2d 694 (9th Cir. 1990)).

The court agrees with the court in *Cachu* that the correct valuation of the interest rate is the prime rate in effect at the commencement of this case plus a risk adjustment. Wells Fargo has not convinced the court that a monthly variable rate should be applied in this case, however, and the court fixes the interest rate as the prime rate in effect at the commencement of the case, 4.00%, plus a 1.25% risk adjustment, for a 5.25% interest rate. The objection to confirmation of the Plan on this basis is sustained. *See* 11 U.S.C. § 1325(a)(5)(B)(ii).

KHATRI'S OBJECTION

Khatri Brothers, LP, ("Khatri") opposed the Motion on September 7, 2017. Dckt. 63. FN.2. First, Khatri argues that this case should be dismissed because Debtor's aggregate debt exceeds the limits established by Congress in 11 U.S.C. § 101(18). As to the actual Motion, though, Khatri argues that the Plan is too speculative to be feasible, that the proposed payments on Khatri's claim do equal the value of the collateral, that the plan term grossly exceeds the original loan term, and that the Plan was proposed in bad faith.

FN.2. Khatri filed the "Opposition," Exhibits, and Proof of Service in this matter as one document. That is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Revised Guidelines for the Preparation of Documents § (III)(A). Counsel is reminded of the court's expectation that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9004(a).

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court (some running hundreds of pages). It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents that can then be used by the court.

As the court has addressed multiple times recently (and will address again below), there has been no legal authority presented for the proposition that a party can combine a request for dismissal with a responsive pleading to another motion—typically, a motion to confirm a plan. Nevertheless, Khatri argues that Debtor is not eligible for Chapter 12 relief because the aggregate debts of $1,804,056.91 listed on Form 106 exceed the limit of $1,500,000.00 from 11 U.S.C. § 101(18).

Khatri argues that the Plan is too speculative because it calls for $9,000.00 per month rent payments from Debtor's parents (who currently live on the property rent-free) without any information about the farming income that can be gained from the property and without any information about the parents' ages and farming experience.

Khatri argues that an assignee of deferred payments on a $1,200,000.00 debt amortized at 5% interest over 360 months would never pay $3,400,000.00 (the alleged value of collateral securing the debt). For that reason, Khatri argues that the Plan does not provide for the present value of Khatri's claim.

Khatri notes that its original loan was for two years, but the Plan now calls for thirty years of payments. Khatri argues that such a deferral deprives it of the benefit it bargained for with Debtor.

Finally, Khatri claims that the Plan was filed in bad faith because Debtor wanted to prevent Khatri from foreclosing, even though Debtor's debts exceed the statutory limit.

COLLINS'S OBJECTION

B. Brent Bohlender, as Successor Trustee, Irene B. Collins 2007 Trust, and as named Executor under the Last Will and Testament of Irene B. Collins ("Collins") opposed confirmation on September 13, 2017. Dckt. 65. FN.3. Collins echoes the prior oppositions and argues that the Plan was not filed in good faith and that Debtor's income is too speculative to support a feasible plan.

FN.3. Collins filed the "Opposition," Exhibits, and Proof of Service in this matter as one document. That is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Revised Guidelines for the Preparation of Documents § (III)(A). Counsel is reminded of the court's expectation that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9004(a).

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court (some running hundreds of pages). It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents that can then be used by the court.

Collins argues that a thirty-year plan for its original six-year loan is excessive and that the 5% interest rate does not cover the present value of its claim. Additionally, Collins questions Debtor's ability to re-enter the real estate agency market after being away for two years, and Collins doubts that Debtor's parents will be able to afford monthly rent payments because no evidence has been provided.

Finally, Collins argues that the Plan was not proposed in good faith because its sole purpose was to impose "a heavily discounted interest rate and grossly lengthened loan terms" on Collins's secured claim. Dckt. 65 at 7:23.5–24.5.

APPLICABLE LAW

If the Trustee or the holder of an allowed unsecured claim objects to confirmation of the Plan, then the court may not approve the Plan unless, as of the effective date of the Plan–

> (A) the value of the property to be distributed under the Plan on account of such claim is not less than the amount of such claim;
>
> (B) the Plan provides that all of Debtor's projected disposable income to be received in the three-year period, or such longer period as the court may approve under section 1222(c), beginning on the date that the first payment is due under the Plan will be applied to make payments under the Plan; or
>
> (C) the value of the property to be distributed under the Plan in the three-year period, or such longer period as the court may approve under section 1222(c), beginning on the date that the first distribution is due under the Plan is not less than Debtor's projected disposable income for such period.

(2) For purposes of this subsection, "disposable income" means income that is received by Debtor and that is not reasonably necessary to be expended–

(A) for the maintenance or support of Debtor or a dependent of Debtor or for a domestic support obligation that first becomes payable after the date of the filing of the petition; or

(B) for the payment of expenditures necessary for the continuation, preservation, and operation of Debtor's business.

IMPROPER REQUEST FOR DISMISSAL

In Khatri's Objection, Khatri requests in the prayer that the Chapter 12 case be dismissed. Dckt. 63 at 6:4–5. On page 3 of the Objection, Khatri advances the argument that the court should dismiss this bankruptcy case because Debtor's aggregate debt exceeds the limit imposed by Congress. *Id.* at 3:7–20.

Khatri does not provide the court with any argument or legal authority for including such a direction to the Court in the Objection. The Objection before the court is to confirmation of a Chapter 12 Plan, not a motion to dismiss. This request for relief by order of the court fails on several grounds. Relief in the form of an order must be sought by motion (or "application" when specially authorized) from the court. FED. R. BANKR. P. 9013. Federal Rule of Bankruptcy Procedure 1017(f) requires that a request for dismissal of a Chapter 12 case "shall be on motion filed and served as required by Rule 9013."

Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018 allowing for the joining of multiple claims for relief are not incorporated into the Contested Matter practice pursuant to Federal Rule of Bankruptcy Procedure 9014.

In this case, there has not been any pleading on the docket indicating that Debtor's case could be dismissed for cause. The court has not specified any grounds upon which the case would be dismissed, and Debtor has not been afforded the opportunity to respond to any grounds advanced by the court. Instead, Khatri has merely argued the legal conclusion that the court can dismiss a case, with no notice or grounds stated by the court, and no opportunity for Debtor to respond to grounds stated by the court. As advanced by Khatri, Debtor need not be afforded Due Process in having grounds stated by the court and being afforded the opportunity to respond to the grounds stated by the court. Rather, Khatri's procedure is one in which Khatri states the grounds and Debtor is not afforded the opportunity to respond.

RULING

Each responding creditor to this Motion complains both about the length of the proposed plan as opposed to the lengths of their original loans and about the questionable ability of Debtor and Debtor's parents to provide sufficient income to fund a plan for thirty years.

The court agrees with the creditors that the Plan is infeasible and cannot be confirmed as proposed. Debtor has not provided any evidence to the court that income from real estate commissions will be regular and sufficient to aid funding the Plan. Additionally, while the court is encouraged to see that Debtor has sought approval of lease agreements that can generate income for the Plan, the court is concerned that the lengths of the three proposed leases are month-to-month, one year, and five years. Debtor has not provided evidence that plan payments will be forthcoming freely if and when the leases end. Debtor has not

provided any information for Debtor's parents' ability to pay $9,000.00 per month in rent. As proposed, the Plan is infeasible, and it is not confirmed.

Additionally, while not dismissing the case, the issue has been presented to the court whether Debtor is eligible to seek relief under Chapter 12 of the Bankruptcy Code. The term "family farmer," the person entitled to file a Chapter 12 bankruptcy case, as defined in 11 U.S.C. § 101(18), includes the following:

> (18) The term "family farmer" means—(A) individual or individual and spouse engaged in a farming operation whose **aggregate debts do not exceed $ 4,153,150** and **not less than 50 percent of whose aggregate noncontingent, liquidated debts** (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, **arise out of a farming operation** owned or operated by such individual or such individual and spouse, and **such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for–**
>
> **(i) the taxable year preceding**; or
>
> (ii) each of the 2d and 3d taxable years preceding;
>
> the taxable year in which the case concerning such individual or such individual and spouse was filed; . . . .

The court is uncertain as to what in 11 U.S.C. § 101(18) Khatri Brothers is referencing in asserting that the debt limit is $1,500,000. Opposition, p. 3:8–12; Dckt. 63. Thus, it does not appear that there is an eligibility issue based on the amount of the debt.

However, there is the requirement that the Debtor received at least 50% of Debtor's gross income from the farming operation in the first tax year preceding the commencement of the case, or for both the second and third tax years prior to the commencement of the bankruptcy case.

As shown on the Statement of Financial Affairs, in 2016, the first year preceding the commencement of this case, Debtor had $108,089 income from farming and $4,000 income from wages. Statement of Financial Affairs Question 4, Dckt. 12 at 53. $108,809.00 is more than fifty percent of the $112,809.00 total income reported for the first year preceding the commencement of this bankruptcy case.

When a debtor proposes to extend a short-term loan over a substantially longer term, a court looks at the relevant plan provisions with close scrutiny. *CRE/ADC Venture 2013, LLC v. Rocky Mountain Land Co., LLC (In re Rocky Mountain Land Co. LLC)*, No. 12-21643 HRT, 2014 Bankr. LEXIS 1370, at *41 (Bankr. D. Colo. Apr. 3, 2014) (citing *Imperial Bank, Inc. v. Tri-Growth Centre City, Ltd. (In re Tri-Growth Centre City, Ltd.)*, 136 B.R. 848, 852 (Bankr. S.D. Cal. 1992); *F.H. Partners, L.P. v. Inv. Co. of the Southwest, Inc. (In re Inv. Co. of the Southwest, Inc.)*, 341 B.R. 298, 311 (B.A.P. 10th Cir. 2006)).

When analyzing a Chapter 12 plan that modifies the rights of a secured claim, a court looks to 11 U.S.C. § 1225(a)(5)(B)(ii), which "indicates that a plan is confirmable over the objections of secured claimants if proposed deferred payments will compensate the objectors for the resulting loss of use of their collateral and its present value." *In re Hochmuth Farms, Inc.*, 79 B.R. 266, 269 (Bankr. D. Md. 1987) (citing *In re Hugee*, 54 B.R. 676, 678 (Bankr. D.S.C. 1985)). A court considers several factors, including "(a) the amounts of proposed payments; (b) anticipated payment dates; (c) the effective date of the plan; and (d) the appropriate interest or "discount rate" for deferred and unpaid debts under the plan. *Id.* (citation omitted).

There is no set formula to "determine whether deferred payments are equivalent to the present value of an allowed secured claim," however. *Id.* Some factors include the current market rate as determined by the prime lending rate, federal funds reserve and average rate of interest on commercial paper, and certificates of deposit and United States treasury bills. *Id.* (citing 5 COLLIER ON BANKRUPTCY ¶ 1129.03 n.45 (15th ed. 1987); *In re Monnier Bros.*, 755 F.2d 1336, 1339 (8th Cir. 1985)). In *Hochmuth Farms*, the court found that the proposed Chapter 12 plan drastically altered a secured claim without satisfying the Code. *Id.* at 269–70.

At the hearing **xxxxxxxxxxxxxxxxxxxxxxxxx**.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 12 Plan filed by Carlos Estacio and Bernadette Estacio ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm is **xxxxxxxxxxxx**.

6. **17-90347-E-7** **MARJORIE SHAMGOCHIAN** **CONTINUED STATUS CONFERENCE**
Pro Se **RE: VOLUNTARY PETITION**
4-27-17 [1]

Debtor's Atty: Pro Se

Notes:
Continued from 8/24/17. Steve Shamgochian to appear at the continued status conference in person. No telephonic appearance permitted for Mr. Shamgochian.

[UST-1] Motion of the United States Trustee to Dismiss Case filed 8/30/17 [Dckt 33], set for hearing 10/19/17 at 10:30 a.m.

Trustee Report at 341 Meeting docketed 9/14/17

[MEL-1] Motion for Relief from Automatic Stay and Points and Authorities in Support Thereof [creditor MTGLQ Investors, L.P.] filed 9/14/17 [Dckt 39], set for hearing 10/19/17 at 10:00 a.m.

The Status Conference is xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

SEPTEMBER 28, 2017 STATUS CONFERENCE

As stated in prior rulings, the court set this Status Conference in the Chapter 7 case due to there being multiple bankruptcy cases being filed for an elderly debtor by her grandson using a power of attorney, which cases were not being prosecuted. Order, Dckt. 17; Civil Minutes (addressing the improper use of a power of attorney), Dckt. 19; Order to Continue and Steve Shamgochian to appear, Dckt. 20; Civil Minutes (continuance to allow Debtor and Steve Shamgochian to obtain counsel), Dckt. 28; and Order continuing Status Conference and Steve Shamgochian to appear, Dckt. 30.

Motion to Dismiss

Since that time, no attorney has appeared for Debtor, whom the court estimates is ninety-six years of age. The U.S. Trustee has filed a Motion to Dismiss (Dckt. 33), which is based on the abject failure of Steve Shamgochian to exercise his duties under the Power of Attorney to protect Debtor's rights and interests. The U.S. Trustee alleges that Mr. Shamgochian has repeatedly failed to attend the First Meeting of Creditors for this Chapter 7 case that he filed, exercising his powers and subject to his fiduciary duties, using the power of attorney.

Motion for Relief From Stay

On September 14, 2017, MTGLQ Investor, L.P. filed a Motion for Relief From the Automatic Stay. Dckt. 39. Unfortunately, the Motion fails to state with particularity the grounds upon which the requested relief is based. Instead, the Motion merely quotes the statutory language of 11 U.S.C. § 362(d)(1)

and (d)(2), and then instructs the court to go and find whatever grounds the court may believe that MTGLQ Investor, L.P. would have stated in the Motion (subject to the certifications of Federal Rule of Bankruptcy Procedure 9011, if it would have stated such grounds) in the following:

> This Motion is based on the Notice of Motion for Relief from Automatic Stay, the instant Motion for Relief from the Automatic Stay and Points and Authorities in Support Thereof, Declaration of Shellpoint Mortgage Servicing in Support of Motion for Relief from the Automatic Stay ("Declaration of Shellpoint"), Declaration of Broker in Support of Motion for Relief from the Automatic Stay ("Declaration of Broker"), and Lodgment of Exhibits in Support of Motion for Relief from the Automatic Stay filed concurrently herewith, the pleadings and papers on file herein, and on such oral and documentary evidence as may be presented by the parties at the hearing.

Motion, p. 1:24–28, 2:1–2. The court declines the opportunity to wade through the citations, arguments, speculation, contentions, and declaration testimony to assemble such grounds for MTGLQ Investor, L.P. Further, the court is unaware of any procedure by which MTGLQ Investor, L.P. could spring on the court and opposing party additional evidence at the time of the hearing. *See* LOCAL BANKR. R. 9014-1 (regarding contested matter practice).

In reviewing the Relief From Stay Summary Sheet (which is not evidence), it appears that MTGLQ Investor, L.P. is asserting that there have been thirty-five pre-petition defaults. Thus, it appears that those responsible for making Debtor's monthly mortgage payment have failed to do so for now more than three years. In the Declaration of Carrie Dockter, a Bankruptcy Case Manager with Shellpoint Mortgage Servicing, she testifies to there are now forty monthly payments in default. Declaration, p. 3:6–13; Dckt. 41.

Federal Court Proceedings

It appears that Debtor has been placed in this bankruptcy case and is now on the verge of losing her home. This is the second Chapter 7 case filed for her by Steve Shamgochian using the power of attorney—neither of which cases he, the holder of the power of attorney and fiduciary to Debtor, has attempted to prosecute beyond the mere filing of the petitions. With this second case, Steve Shamgochian may be forfeiting Debtor's rights to the automatic stay if she needs to actually prosecute such a case in good faith. *See* 11 U.S.C. § 362(c)(4).

As discussed by the Ninth Circuit Court of Appeal in *Dacannay v. Mendoza*, 573 F.2d 1075, 1079 (9th Cir. 1978):

> It is an ancient precept of Anglo-American jurisprudence that infant and other incompetent parties are wards of any court called upon to measure and weigh their interests. The guardian ad litem is but an officer of the court. Cole v. Superior Court, 63 Cal. 86, 89 (1883); *Serway v. Galentine*, 75 Cal. App. 2d 86, 170 P.2d 32 (1940). While the infant sues or is defended by a guardian ad litem or next friend, every step in the proceeding occurs under the aegis of the court. See generally

Solender, Guardian *Ad Litem*: A Valuable Representative or an Illusory Safeguard, 7 Tex.Tech.L.Rev. 619 (1976); Note, Guardians Ad Litem, 45 Iowa L. Rev. 376 (1960).

At the Status Conference, the court addressed with the U.S. Trustee and Steve Shamgochian whether this case had devolved to the point that adult protective services should be notified and the court request the designation of a person who can be appointed as a personal representative for Debtor in this case to assert her rights and the rights of the estate. That discussion included **xxxxxxxxxxxxxxxxxxxxxxxxx.**

7. **14-91565-E-7** **RICHARD SINCLAIR**
15-9007
KATAKIS ET AL V. SINCLAIR

CONTINUED STATUS CONFERENCE RE: COMPLAINT
2-20-15 [1]

ADVERSARY PROCEEDING
DISMISSED: 09/12/2017

The Adversary Proceeding having been dismissed by prior order of the court, the Status Conference is removed from the Calendar.

8. **12-92570-E-12** **COELHO DAIRY**
Thomas Gillis

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
9-28-12 [1]

Debtor's Atty: Thomas O. Gillis

The Status Conference is xxxxxxxxxxxxxxxxxxxxxxx.

Notes:
Continued from 6/8/17

[BMJ-1] Westamerica Bank's Motion for Relief from the Automatic Stay filed 6/20/17 [Dckt 637]; Order denying filed 8/16/17 [Dckt 664]

[BMJ-2] Notice of Substitution of Attorney and Request for Approval of Sale filed 8/10/17 [Dckt 660]

Status Report of Chapter 12 Trustee filed 9/12/17 [Dckt 665]

Debtor's Status Report filed 9/20/17 [Dckt 667]

SEPTEMBER 28, 2017 STATUS CONFERENCE

This Chapter 12 case is now five years old. The Chapter 12 Plan, confirmed on May 22, 2014, (it taking Debtor in Possession twenty-one months to confirm a plan) requires that unsecured claims will be paid within five years and the secured claim of WestAmerica Bank be paid in full in seven years.

As discussed by the court in the Civil Minutes from the August 10, 2017 hearing on the WestAmerica Bank Motion for Relief From the Stay (Dckt. 662), the conduct of the Plan Administrator/Debtor causes the court significant concerns. These include clearly inaccurate statements under penalty of perjury made by the principal of the Plan Administrator/Debtor that were prepared by the Plan Administrator/Debtor's counsel. Both the principal and counsel necessarily knew the statements were false. Further, the principal and counsel seek to absolve themselves from the apparent failure to perform the Plan by trying to blame the Chapter 12 Trustee. Such attempted blame appears to show an inability of the principal for the Debtor/Plan Administrator and counsel to prosecute the confirmed Chapter 12 Plan.

On September 20, 2017, the Plan Administrator/Debtor filed a Status Report. Dckt. 667. In that Report, the Plan Administrator/Debtor asserts that the Plan payments disbursed by the Trustee through the Debtor's Chapter 12 Plan were $100 per month "short." This led to late charges being assessed of "more than $100 a month." Plan Administrator/Debtor further states that to address this issue, "the parties have submitted a stipulation and proposed order to increase the monthly payment by about $100." Status Report, p. 1:20–25.5. No stipulation has been filed with the court and no proposed order has been lodged with the court.

The Report identifies a second "problem," that being WestAmerica Bank asserting that there is a $90,000 default in the payments required under the confirmed Chapter 12 Plan. The Plan Administrator/Debtor asserts that of this there is around $62,000 in legal fees that WestAmerica Bank asserts must be paid under the Plan. There is no resolution to this asserted default identified to the court.

The Report says that the CPA for the Plan Administrator/Debtor "believes" that the late fees are justified and that there might be "only" about a $12,000 default in payments under the Plan. However, there is nothing in the form of a simple accounting provided by such CPA to the court.

The Plan Administrator/Debtor requests that the Status Conference be continued for four months, now five years into the case and more than three years into the confirmed plan, and now three years after the "dispute" over what WestAmerica Bank was and should be paid first raised its ugly head (see Civil Minutes for Motion to Disgorge Payments, Dckt. 539). The court's Ruling on the Motion to Disgorge Payments raises some of the same issues and concerns of the principal's ability to prosecute this Plan:

> Exhibit A, the sole exhibit filed in support of this Motion, is titled the "Coelho Dairy Account by Transaction Report" and appears to be an Account Statement showing all payments made to Westamerica Bank, from the dates of August 31, 2012 through July 2, 2014. Exhibit A, Dckt. No. 525. The Exhibit does not shed any light, however, on the identity of the individual, principals of the Debtor, or the entity making allegedly making payments to satisfy the Creditor's claim.

The Declaration of Frank Coelho, the managing partner of the Debtor, Dckt. No. 524, merely repeats the factual contentions stated in the Motion to Disgorge, and provides no clarification on who made the payments, whether the "Transaction Report" is authentic and correctly reflects payments that were made to the Creditor, and whether the payments were going toward curing the post-petition arrearages owed to Westamerica Bank.

Simple evidence, such as cancelled checks and a ledger sheet showing the computation of what was due, the defaulted post-petition payments by the Debtor in Possession, the payments made by the Debtor in Possession, the payment(s) made by the Trustee, and the asserted proper computation of the arrearage to be cured under the confirmed Chapter 12 Plan have not been provided. The "evidence," Mr. Coelho's testimony is less than credible, and it appears that he merely affixed (or had affixed) his signature to a document put in front of him. Absent from his testimony are the actual, personal knowledge facts from which the court can determine that testimony is credible.

The Motion satisfies the court that if there has been an overpayment, the Chapter 12 Trustee is the proper party to demand and recover such monies, and if Westamerica Bank fails to voluntarily repay the overpayment, to then "sue the Bank." The Plan Administrator and its counsel can provide the Trustee with documentation of the payments made, what it asserts is the overpayment which the Trustee should recover. FN. 2.

FN.2. Such contested matter or adversary proceeding should be highly unlikely, and the Plan Administrator computing the overpayment, if any, unnecessary. Westamerica Bank should have already computed the amount which it should have properly been paid under the contract (Note + Confirmed Chapter 12 Plan), determined if there has been an overpayment, and have a "check cut" to pay the Trustee the erroneous over-disbursement, if any. As senior counsel for one of the Nation's largest bank commented to this judge many years ago, "we realize that we (the bank) appear before these bankruptcy judges much more than any debtor, and as such, cannot afford to play fast and loose in bankruptcy proceeding."

The present Motion has also convinced the court that it is not the Plan Administrator who is able to prosecute the recovery of an over disbursement, if any. The court denies the Motion as to the Plan Administrator. The Motion is denied without prejudice to the Chapter 12 Trustee.

Report of Chapter 12 Trustee

The Chapter 12 Trustee filed his Status Conference Report on September 12, 2017. Dckt. 665. The Chapter 12 Trustee reports that: (1) the Plan Administrator/Debtor has funded the plan with payments

totaling $826,889.11 to the date of the report; (2) forty months have passed since the Plan was confirmed; (3) the Trustee has disbursed $276,551.97 to WestAmerica Bank in monthly disbursements of $5,390.23 each; (4) several secured claims have been paid in full (New Holland Tractor and Dodge Ram as collateral); (5) there has been a 61.11% dividend disbursed to creditors holding general unsecured claims; and (6) there has been $87,763.00 disbursed to the attorney for Black Rock Milling, Co, LLC (prevailing party attorney's fee to Black Rock Milling, Co, LLC for objection to claim prosecuted by the Plan Administrator/Debtor).

The Chapter 12 Trustee further reports that he believes that the Plan Administrator/Debtor and WestAmerica Bank have met to discuss their "long standing dispute regarding post-petition payments and unpaid attorney's fees," but does not believe that such long standing dispute has been resolved.

Discussion at the September 28, 2017 Status Conference

Xxxxxxxxxxxxxxxxxxxxxxxxx