

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge
Sacramento, California

October 3, 2024 at 11:30 a.m.

1. <u>19-22025</u> -E-12 <u>CAE-1</u>	JEFFREY DYER AND JAN WING-DYER	CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 4-1-19 <u>1</u>
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Debtors' Atty: Stephen M. Reynolds

Notes:

Continued from 1/11/24

Operating Reports filed: 1/16/24; 2/8/24; 3/15/24; 4/15/24; 5/25/24; 6/14/24; 9/16/24 [ending 7/31/24];
9/16/24 [ending 8/31/24]

[RLC-25] Motion to Modify Confirmed Chapter 12 Plan filed 8/7/24 [Dckt 482], set for hearing 10/3/24 at
11:30 a.m.

[RLC-25] Chapter 12 Plan of Reorganization Dated August 7, 2024 filed 8/7/24 [Dckt 487]

The Status Conference is xxxxxxx
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OCTOBER 3, 2024 STATUS CONFERENCE

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 Not Provided. No Certificate of Service was filed, so the court is unable to determine which interest parties were served and when. At the hearing, **XXXXXXX**

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.

<p>The Motion to Confirm the Modified Plan is denied.</p>
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Review of Minimum Pleading Requirements for a Motion

Before addressing the substance of the Matter before the court, the court first addresses the pleading filed by the Debtor in Possession titled Motion to Modify Confirmed Chapter 12 Plan. Dckt. 482. The grounds stated with particularity in the Motion are:

- A. Debtor in Possession seeks to modify the prior confirmed plan, which was last modified by order of the court entered on October 31, 2024. Motion, p. 1:20-22; Dckt. 482.
- B. The Motion is based on the Notice, Offer of Proof, and Memorandum in Support of Plan Confirmation, and the Declaration of Jeffrey Dyer, as well as everything filed in the bankruptcy case or what may be subsequently argued to or presented to the court. *Id.*; 2:1-4.
- C. The Debtor in Possession seeks to extend the time to make the Plan payments to June 30, 2024, by selling the Lamb Ranch. *Id.*; 2:4-6.

The forgoing are the grounds stated with particularity upon which the Debtor in Possession seeks to have this court modify the prior confirmed Modified Chapter 12 Plan or confirm a further Modified Chapter 12 Plan.

The Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. FED. R. BANKR. P. 9013. The Rule does not allow the motion to merely be a direction to the court to “read every document in the file and glean from that what the grounds should be for the motion.” That “state with particularity” requirement is not unique to the Bankruptcy Rules and is also found in Federal Rule of Civil Procedure 7(b).

Consistent with this court’s repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. *See In re Weatherford*, 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. *See* 556 U.S. 662 (2009).

Federal Rule of Bankruptcy Procedure 9013 incorporates the “state with particularity” requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the “short and plain statement” standard for a complaint.

Law and motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law and motion process. These include sales of real and personal property, valuation of a creditor’s secured claim, determination of a debtor’s exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from the automatic stay, motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact to other parties in a bankruptcy case and to the court, holding,

The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

In re Weatherford, 434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ind. 2009) (holding that a proper motion must contain factual allegations concerning requirements of the relief sought, not conclusory allegations or mechanical recitations of the elements).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the pleading with particularity requirement in a motion, stating:

Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, “shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought.” The standard for “particularity” has been determined to mean “reasonable specification.”

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

Not stating with particularity the grounds in a motion can be used as a tool to abuse other parties to a proceeding, hiding from those parties grounds upon which a motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Federal Rule of Bankruptcy Procedure 9013 may be a further abusive practice in an attempt to circumvent Bankruptcy Rule 9011 by floating baseless contentions to mislead other parties and the court. By hiding possible grounds in citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were “mere academic postulations” not intended to be representations to the court concerning any actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such “postulations.”

The Motion states that grounds are found in:

- A. The Notice of Motion;
- B. Memorandum of Points and Authorities; and
- C. Debtor in Possession’s Declaration.

The court generally declines an opportunity to do associate attorney work and assemble motions for parties. It may be that Movant believes that the Points and Authorities is “really” the motion and should be substituted by the court for the Motion. That belief fails for multiple reasons. One is that under Local Bankruptcy Rule 9014-1(d)(4), a motion and a memorandum of points and authorities are separate documents, even though they may be filed as one document when not exceeding six pages. *See* Local Bankruptcy Rule 9014-(d)(4). The court has not waived that Local Rule for Movant.

At the hearing, **XXXXXXX**

THE MOTION

Chapter 12 Debtor in Possession, Jeffrey E Dyer and Jan E Wing-Dyer (“Debtor in Possession”) seek confirmation of the Modified Plan. The Modified Plan seeks to extend the time to make payments to June 30, 2025, and using proceeds from the sale of the Lamb Ranch (real property located at 10973 Cranmore Road, Meridian, California) to pay all allowed claims in full. Mot. 2:4-6, Docket 482. Mr. Dyer testifies in his Declaration in support:

1. The Modified Plan seeks to sell the Lamb Ranch Property and use payments from the sale to complete the Chapter 12 Plan. Decl. 2:8-12, Docket 484.
2. Walnuts are grown on the Lamb Ranch. Prices for walnuts have been historically low, but Mr. Dyer believes the price is at its floor. Buyers will become more interested in this type of agricultural property when the floor has been reached. Indeed, the prices for walnuts are projected to be between \$.70 and \$.90 cents per pound in 2024, up from \$.24 and \$.50 cents per pound in 2022 and 2023. *Id.* at 2:14-3:4.
3. Mr. Dyer is a real estate broker who specialized in agricultural properties and has determined the price of \$4,400,000 is reasonable for the Lamb Ranch. Mr. Dyer has been marketing the Lamb Ranch for three months now. Mr. Dyer will not be seeking a broker's commission for himself related to the sale. *Id.* at 3:5-14.
4. 11 U.S.C. § 1225(a) and (b) are being complied with.
5. Debtor in Possession has made all payments required under the confirmed Plan except for the July 31, 2024 payment.

Debtor in Possession offers no reason for the proposed modification and offers no justification in missing the July 31, 2024 payment.

CREDITOR RABO AGRIFINANCE LLC'S OPPOSITION

Rabo Agrifinance LLC ("Rabo") filed a n Opposition on September 19, 2024. Docket 492. Rabo states:

1. Debtor in Possession has never made a plan payment on time, this time failing to make the \$266,630.55 payment due to Rabo on July 30, 2024. *Id.* at 2:2-5. Debtor in Possession instead proposes a sixth Modified Plan.
2. Debtor in Possession has shown no unanticipated change in circumstances to justify their failure to make the final plan payment and request to delay such payments for almost another year, while making payments to junior priority lenders outside the Fifth Amended Plan. *Id.* at 2:10-12. Rabo asserts that this is particularly brazen because the Fifth Amended Plan, and its predecessors, provide for the sale of the Lamb Ranch in the event of a default.
3. Debtor in Possession should not be allowed to further extend the deadline to repay creditors and avoid the inevitable sale of the Lamb Ranch. *Id.* at 2:15-16.

4. Debtor in Possession's currently confirmed Plan calls for the Chapter 12 Trustee to market and sell the Lamb Ranch in the event of a default. The default has occurred. *Id.* at 6:10-21.
5. Post-confirmation changes should only be warranted when there has been an unanticipated change in circumstances. No such circumstances are present here. *Id.* at 7:16-26.
6. 11 U.S.C. § 1229(c) requires Debtor in Possession to show cause for modification in this case, and Debtor in Possession has not met this burden. *Id.* at 8:11-27.
7. Debtor in Possession is not committing all of their projected disposable income to the Plan, the Monthly Operating Reports showing Debtor in Possession is servicing unauthorized postpetition debt, in violation of 11 U.S.C. § 1225(b)(1). *Id.* at 9:6-26.

CREDITOR CITIZENS BUSINESS BANK'S RESPONSE IN SUPPORT OF A MODIFICATION TO THE PLAN

On September 19, 2024, Creditor Citizens Business Bank ("Citizens") filed an Opposition. Docket 494. Citizens opposes on the following grounds:

1. Citizens supports a sale of the Lamb Ranch, but Debtor in Possession has not shown cause to extend time for plan payments through June 30, 2025, as required by 11 U.S.C. § 1229(c). Opp'n 1:25-26, Docket 494.
2. The court should extend the deadline for the final plan payment to December 31, 2024, without prejudice to Debtor in Possession's right to seek a further extension. *Id.* at 2:28-3:1.
3. Citizens supports Debtors' decision to sell Lamb Ranch and, for the moment, believes that having Debtors sell Lamb Ranch is preferable to having the Chapter 12 Trustee employ a broker for the sale (as would be permissible under the existing Plan, given Debtors' payment defaults). *Id.* at 3:18-21.
4. However, as Debtor in Possession has been marketing the Lamb Ranch since May of 2024, it should not take over a year to complete the sale and pay creditors as proposed under the Modified Plan.
5. Debtor in Possession should provide the parties with more concrete evidence of the status of the sale, including a copy of the appraisal referenced in the proposed modified Plan, information about the comparable sale which Mr. Dyer testifies also supports the listing price for Lamb Ranch, and copies of any offers received and counter-offers made. *Id.* at 4:4-7.

CREDITOR SUTTER COUNTY TAX COLLECTOR'S RESPONSE

Sutter County Tax Collector ("Sutter") filed a Response on September 19, 2024. Docket 496. Sutter states:

1. During the term of the Confirmed Plan, the 2023 real property taxes have accrued and have been billed for the Lamb Ranch. The second installment for these 2023 real property taxes is past due. The current payoff for the past due 2023 taxes good through September 30, 2024, is \$14,380.59. *Id.* at 2:6-10.
2. Sutter assumes the Modified Plan includes its past due 2023 taxes and files the Response in an abundance of caution to preserve its rights with respect to payment and related liens for the Past Due 2023 Taxes and any other unpaid real property taxes that have accrued post-confirmation, and for taxes on the Debtors' other real properties that will continue to accrue in the future, including but not limited to taxes that have accrued but have not yet been billed or that will accrue during the term of the Modified Plan. *Id.* at 2:19-24.

DEBTOR IN POSSESSION'S REPLY

On September 30, 2024, Debtor in Possession filed a Reply to the creditors' oppositions. Docket 500. Debtor in Possession states:

1. Cause exists to allow a plan modification in this case. Projected income was not sufficient to make the Plan payments due under the existing plan. Reply 2:1-2, Docket 500.
2. The proposed Plan contemplates paying all creditors in full. While this case has required modifications over time Debtors have also paid \$1,383,012.98 to the Chapter 12 Trustee, creditors of the estate received \$761,766.03 from the sale of 1575 Bay Flat Road, Bodega Bay, California and \$789,037.78 from the sale of 175 West Main Street, Woodland, California for a total of \$2,945,814.38 paid to creditors to date. *Id.* at 2:4-7.
3. Debtors will pay the outstanding Sutter County property taxes from 2024 crop proceeds in December 2024. *Id.* at 2:8-9.
4. The increases in the price for walnuts and the reduction in interest rates all support the feasibility of the proposed plan modifications. An extension to June 30, 2025 is reasonable under the circumstances, especially as marketing reports will be provided to Rabo AgriFinance and the Trustee. *Id.* at 2:9-11.

Mr. Dyer submits a Declaration in support of the Reply. Docket 501. He states he is actively marketing the Lamb Ranch, and the market is trending upward. He also states the payments he made to

Jason Bryson and Megan Cearley in December 2023 were repayments of short-terms loan made to support the farming operation.

DISCUSSION

11 U.S.C. § 1229(a) permits modification of a Chapter 12 Plan, stating (emphasis added):

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, on request of the debtor, the trustee, or the holder of an allowed unsecured claim, to—

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) **extend or reduce the time for such payments;**

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or

(4) provide for the payment of a claim described in section 1232(a) that arose after the date on which the petition was filed.

(b)

(1) Sections 1222(a), 1222(b), and 1223(c) of this title and the requirements of section 1225(a) of this title apply to any modification under subsection (a) of this section.

(2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

(c) **A plan modified under this section may not provide for payments over a period that expires after three years after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.**

(d) A plan may not be modified under this section—

(1) to increase the amount of any payment due before the plan as modified becomes the plan;

(2) by anyone except the debtor, based on an increase in the debtor's disposable income, to increase the amount of payments to unsecured creditors required for a particular month so that the aggregate of such payments exceeds the debtor's disposable income for such month; or

(3) in the last year of the plan by anyone except the debtor, to require payments that would leave the debtor with insufficient funds to carry on the farming operation after the plan is completed.

Modification of Chapter 12 Plans is discussed in the Collier on Bankruptcy treatise, providing the following insight:

Although the confirmation requirements for a modified plan are essentially the same as those applicable to the initial confirmation of a plan, **the plan may not provide for payments extending beyond three years after the date of confirmation of the original plan unless the court for cause approves a longer period.** In no event, however, can the term for payments extend beyond five years after confirmation of the original plan.

...

Although section 1229 explicitly authorizes modification of the plan, it contains no indication of the circumstances under which modification may be requested or the standards for determining whether to grant such a request other than the limitations imposed by section 1229(d). **At a minimum, the party requesting modification should show some change in circumstances from the date of the original confirmation hearing.** If the debtor's net income was less than projected, and the debtor is not able to meet the debtor's payment obligations under the plan, the debtor may seek a modification to reduce the amount of the debtor's payments under the plan. Conversely, if the debtor's net income was greater than that projected by the plan, modification may be sought by the trustee or a creditor to increase the amount of payments to be made under the plan so long as such modification complies with section 1229(d).

8 COLLIER ON BANKRUPTCY ¶ 1229.01[1] & [3] (emphasis added).

The court appreciates creditors' concerns regarding the Modified Plan. The numerous modified plans call into question the feasibility of the currently proposed Modified Plan. Here, Debtor in Possession is now proposing to sell the Lamb Ranch.

The currently confirmed Plan explicitly states the Chapter 12 Trustee will market and sell the Lamb Ranch in the event of a default. Plan § 2.01.(b), Docket 407. A default has occurred. Debtor in Possession makes no mention of this provision whatsoever, instead opting to take it upon themselves to market and sell the Lamb Ranch seemingly in violation of the terms of the confirmed Plan. Although Debtor in Possession states land prices are trending upward, Debtor in Possession offers no evidence of any offers it has received in the months that Debtor in Possession has been marketing the Lamb Ranch.

The Debtor in Possession may face a stumbling block for the requested modification – the time limitations imposed by 11 U.S.C. § 1229(c). For the present case, the court computes the 11 U.S.C. § 1229(c) time limitations as follows:

(c) A plan modified under this section may not provide for payments over a period that:

- A. Expires after three years after the time that the first payment under the original confirmed plan was due -

1. The Second Amended Chapter 12 Plan, which is the original plan confirmed in this Bankruptcy Case, was confirmed by order entered on December 10, 2019. Order; Dckt. 173, with a copy of the Second Amended Plan attached to the Order.
 2. Exhibit 1 to the Second Amended Chapter 12 Plan provides for the plan payments to be made by the Debtor. *Id.*; Second Amd Plan; ¶ 1.02. The first Plan payment of \$144,766.02 was due to be paid by Debtor in July 2020. Exhibit 1; *Id.* at p. 20.
 3. The proposed extension to June 30, 2025, is more than three years after July 2020.
- B. Unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.
1. The June 30, 2025 proposed payment date is exactly five years after the original Plan payment date of July 2020.

Such an extension may be granted, but it must be for cause. Here, the evidence of cause begins with debtor Jeffrey Dyer's testimony that during the last two years walnut prices had been lower than they are now. With this increase, the value of the Lamb Ranch should increase. Dec., p. 1:14 - 2:4; Dckt. 484. In his Declaration, Mr. Dyer provides testimony of the walnut prices for the 2018 though projected 2024, with 2022 being the aberration at \$0.24 per pound. *Id.*; p. 3:20-22.

He further testifies that he, as a licensed real estate broker, has been marketing the Lamb Ranch for three months, and based on a comparable property believes that the current \$4,400,000 asking price for which he has listed the Lamb Ranch is reasonable. *Id.*; 3:5-14.

In the Declaration Mr. Dyer does not explain how he is marketing the Lamb Ranch.

In the Points and Authorities, though not stated as grounds in the Motion, the Debtor in Possession states that so far in this Bankruptcy Case Plan payments of \$1,383,012.98 have been made to the Chapter 12 Trustee. In addition, through the sale of assets creditors have been paid \$1,418,453.10 directly from the sale escrows. P&A, p. 3:11-12. It also states that the Debtor has been making the direct payments as provided in the most current Confirmed Modified Chapter 12 Plan (Dckt. 442, attached to Confirmation Order) for the Class 6 secured claim of Banner Bank and the Class 6 claim of Yolo County Realty. *Id.*, p. 13.

This is not a bankruptcy case where the debtor merely promises creditors will be paid, but keeps delaying the payment.

However, in the Rabo Bank Opposition, it is noted that the Debtor in Possession has been unable to timely perform prior Chapter 12 Plan and there have been multiple modified Plans in this Bankruptcy Case.

In reviewing the present Motion, the point not addressed by the Debtor in Possession is why the Lamb Ranch property has not been timely marketed and sold under the terms of the current Confirmed

Modified Plan (Dckt. 442). The Confirmed Modified Plan provides in § 2.01(b) for the sale of the Lamb Ranch, stating:

2.01.(b) In the event Debtors fail to make any payment required by this Plan, the Chapter 12 Trustee shall market and sell 10973 Cranmore Road, Meridian, California ("Lamb Ranch"). Trustee shall use his best business judgment with regard to employing professionals to market and sell the Property, determining a listing price and bringing a Motion to Approve Sale pursuant to 11 U.S.C. §§ 363 and 1206. . . Sale of Lamb Ranch is to occur within six months of the missed payment, which deadline may be extended on stipulation of the Trustee and the senior secured lienholder, Rabo Agrifinance LLC ("RaboAG") or further court order.

Rabo Bank states that the default, failure of Debtor to make a payment required by the Confirmed Modified Plan, occurred on July 20, 2024 - approximately two month prior to the hearing on this Motion.

At the hearing, **XXXXXXX**

~~_____ The Modified Plan does not comply with 11 U.S.C. §§ 1222, 1225(a), and 1229 and is not confirmed.~~

~~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 Confirm the Chapter 12 Plan filed by Jeffrey E Dyer and Jan E Wing-Dyer ("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 the Motion is denied.~~

3. [21-21429-E-7](#) **JAMIE HOWELL**
[22-2099](#)
CAE-1
FARRIS V. HOWELL

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
7-26-22 [1]

Plaintiff's Atty: J. Russell Cunningham; Benjamin C. Tagert
Defendant's Atty: Stacie L. Power

Adv. Filed: 7/26/22
Answer: 8/4/22

Nature of Action:
Recovery of money/property

Notes:
Continued from 8/14/24 to allow for the Debtor to focus on vacating the Property.

The Status Conference is XXXXXXX
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OCTOBER 3, 2024 STATUS CONFERENCE

As of the court's October 2, 2024 review of the Docket, no updated status reports had been filed.
At the Status Conference, XXXXXXX

AUGUST 14, 2024 STATUS CONFERENCE

Pursuant to the Stipulation of the Parties (Dckt. 30), the court entered Judgment for the turnover of property on July 31, 2024 (Judgment; Dckt. 31). The Judgment affords Debtor forty five (45) days from notice of entry of the Judgment to vacate the Property.

The court continues the Status Conference to allow for the Debtor to focus on vacating the Property.

The Status Conference is continued to 11:30 a.m. on October 3, 2024.

Debtor's Atty: Robert S. Gimblin

Notes:

Trustee Report at 341 Meeting lodged: 9/16/24; 9/20/24

Application for Pro Hac Vice and Proposed Order filed 9/24/24 [Dckt 34]

[AOS-2] Motion to Convert Chapter 12 Case to Chapter 11 Case filed 9/24/24 [Dckt 36]

The Status Conference is XXXXXXXX

OCTOBER 3, 2024 STATUS CONFERENCE

This voluntary Chapter 12 Case was filed by Debtor Kamaljit Kalkat on August 19, 2024. On September 24, 2024, the court entered its order substituting Ameet O'Rattan Sharma, Esq., as attorney for the Debtor in Possession. Order; Dckt. 33. On September 24, 2024, the Debtor in Possession filed an Ex Parte Motion to Convert this Case to One Under Chapter 11 pursuant to 11 U.S.C. § 1208. Motion; Dckt. 36. The Motion has not been set for hearing.

Congress provides in 11 U.S.C. § 1208 for the conversion or dismissal of a Chapter 12 case, stating (emphasis added):

§ 1208. Conversion or dismissal

(a) The **debtor may convert a case under this chapter to a case under chapter 7 of this title at any time**. Any waiver of the right to convert under this subsection is unenforceable.

(b) **On request of the debtor at any time**, if the case has not been converted under section 706 or 1112 of this title, **the court shall dismiss a case under this chapter**. Any waiver of the right to dismiss under this subsection is unenforceable.

(c) **On request of a party in interest, and after notice and a hearing, the court may dismiss a case** under this chapter **for cause**, including—

(1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees and charges required under chapter 123 of title 28;

- (3) failure to file a plan timely under section 1221 of this title;
- (4) failure to commence making timely payments required by a confirmed plan;
- (5) denial of confirmation of a plan under section 1225 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;
- (6) material default by the debtor with respect to a term of a confirmed plan;
- (7) revocation of the order of confirmation under section 1230 of this title, and denial of confirmation of a modified plan under section 1229 of this title;
- (8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan;
- (9) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation; and
- (10) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

(d) On **request of a party in interest**, and after notice and a hearing, **the court may dismiss a case under this chapter or convert a case under this chapter to a case under chapter 7** of this title upon a showing that the debtor has committed fraud in connection with the case.

(e) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

While providing that the court may dismiss or convert to Chapter 7 a Chapter 12 bankruptcy case, it does not provide for conversion of a Chapter 12 case to one under Chapter 11. A review of the cases addressing whether a Chapter 12 case can be converted to one under Chapter 11, the decisions are split and there does not appear to be any Circuit level authority on this point. The difference appears to be between the courts that read the plain language of the statute and the courts that conclude a liberal reading should be warranted and within the general discretion (sounding in the nature of an 11 U.S.C. § 105(a) argument) of the court.

The Debtor in Possession has filed a very detailed Status Report, noting that a request to convert the case to one under Chapter 11 has been filed. Dckt. 38. The Status Report includes the following concerning the filing of this case by Debtor's prior counsel:

Ms. Kalkat filed for Bankruptcy unplanned. Counsel she retained to make initial filings was unwilling to represent her beyond the initial filings. He filed under the wrong chapter among other things. Ms. Kalkat has been searching for replacement

counsel over the last few weeks. Having called dozens of attorney's she has had difficulty finding one that can handle and understand the Agricultural related issues and is not conflicted out.

Status Report, p. 2:23 - 3:7; Dckt. 38.

At the Status Conference, **XXXXXXX**

5. [24-23666-E-12](#) **DIAMOND K, LLC**
[CAE-1](#)

**STATUS CONFERENCE RE:
VOLUNTARY PETITION
8-19-24 [1]**

Debtor's Atty: Justin K. Kuney

Notes:

Trustee Report at 341 Meeting lodged: 9/20/24

Substitution of Attorney for Diamond K. LLC filed 9/17/24 [Dckt 22]; Order granting filed 9/24/24 [Dckt 25]

Application for Pro Hac Vice and Proposed Order filed 9/24/24 [Dckt 26]

[AOS-2] Motion to Convert Chapter 12 Case to Chapter 11 Case filed 9/24/24 [Dckt 27]

The Status Conference is XXXXXXX
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OCTOBER 3, 2024 STATUS CONFERENCE

This voluntary Chapter 12 Case was filed by Debtor Diamond K, LLC on August 19, 2024. On September 24, 2024, the court entered its order substituting Ameet O'Rattan Sharma, Esq., as attorney for the Debtor in Possession. Order; Dckt. 25. On September 24, 2024, the Debtor in Possession filed an *Ex Parte* Motion to Convert this Case to One Under Chapter 11 pursuant to 11 U.S.C. § 1208. Motion; Dckt. 28. The Motion has not been set for hearing.

Congress provides in 11 U.S.C. § 1208 for the conversion or dismissal of a Chapter 12 case, stating (emphasis added):

§ 1208. Conversion or dismissal

(a) The **debtor may convert a case under this chapter to a case under chapter 7 of this title at any time**. Any waiver of the right to convert under this subsection is unenforceable.

(b) **On request of the debtor at any time**, if the case has not been converted under section 706 or 1112 of this title, **the court shall dismiss a case under this chapter**. Any waiver of the right to dismiss under this subsection is unenforceable.

(c) **On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause**, including—

- (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors;
- (2) nonpayment of any fees and charges required under chapter 123 of title 28;
- (3) failure to file a plan timely under section 1221 of this title;
- (4) failure to commence making timely payments required by a confirmed plan;
- (5) denial of confirmation of a plan under section 1225 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;
- (6) material default by the debtor with respect to a term of a confirmed plan;
- (7) revocation of the order of confirmation under section 1230 of this title, and denial of confirmation of a modified plan under section 1229 of this title;
- (8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan;
- (9) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation; and
- (10) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

(d) **On request of a party in interest**, and after notice and a hearing, **the court may dismiss a case under this chapter or convert a case under this chapter to a case under chapter 7** of this title upon a showing that the debtor has committed fraud in connection with the case.

(e) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

While providing that the court may dismiss or convert to Chapter 7 a Chapter 12 bankruptcy case, it does not provide for conversion of a Chapter 12 case to one under Chapter 11. A review of the cases

addressing whether a Chapter 12 case can be converted to one under Chapter 11, the decisions are split and there does not appear to be any Circuit level authority on this point. The difference appears to be between the courts that read the plain language of the statute and the courts that conclude a liberal reading should be warranted and within the general discretion (sounding in the nature of an 11 U.S.C. § 105(a) argument) of the court.

The Debtor in Possession has filed a very detailed Status Report, noting that a request to convert the case to one under Chapter 11 has been filed. Dckt. 38. The Status Report includes the following concerning the filing of this case by Debtor's prior counsel:

Ms. Kalkat filed for Bankruptcy unplanned. Counsel she retained to make initial filings was unwilling to represent her beyond the initial filings. He filed under the wrong chapter among other things. Ms. Kalkat has been searching for replacement counsel over the last few weeks. Having called dozens of attorney's she has had difficulty finding one that can handle and understand the Agricultural related issues and is not conflicted out.

Status Report, p. 2:23 - 3:7; Dckt. 29.

At the Status Conference, **XXXXXXX**

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 court set the hearing for October 3, 2024. Dckt. 11. The court served the U.S. Trustee, Chapter 13 Trustee, and creditors.

The Motion was set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing -----.

The Motion is XXXXXXX.
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OCTOBER 3, 2024 HEARING

On September 27, 2024, Debtor Kenneth Gene Wilkinson commenced this voluntary Chapter 13 Bankruptcy Case (“Current Bankruptcy Case”). On September 27, 2024, the Debtor also filed a pleading titled: “Motion to Stay Foreclosure Proceedings, Void Potential Sale, and Challenge Creditor's Standing.” Dckt 10. The court summarizes the Motion as follows:

1. The Debtor’s prior bankruptcy case, 24-22193 (“Prior Bankruptcy Case”) was dismissed by the court on September 16, 2024. Motion, ¶ 1; Dckt. 10.
2. PHH Mortgage Corporation and Western Progressive LLC claim to hold a security interest in the Debtor’s primary residence. *Id.*; ¶ 3.
3. The Creditors have initiated foreclosure proceeding against the residence property, which was scheduled for September 26, 2024. *Id.*, ¶ 4.

4. The Debtor requests that:
 - a. Any foreclosure sale be undone; and
 - b. Any foreclosure sale be until a civil case, identified as 24-CV-01416-TLN-AC (an action in the District Court for the Eastern District of California) has been properly adjudicated. *Id.*; ¶ 5.
5. The District Court Action challenges the validity of any alleged mortgage of Creditor upon which the foreclosure of Debtor's residence is based. *Id.*
6. While the prior bankruptcy case was dismissed, the automatic stay would not be lifted until the District Court Action is fully adjudicated. *Id.*; ¶ 6.
7. The Debtor intends to seek a temporary restraining order in the District Court Action. *Id.*; ¶ 7.
8. The automatic stay arising in the Current Bankruptcy Case should remain in full force and effect until "this case is fully adjudicated and closed." *Id.*; ¶ 8.
9. Debtor has filed a Motion to Vacate the order dismissing Debtor's Prior Bankruptcy Case. *Id.*; ¶ 12.
10. Debtor challenges the standing of the Creditors to foreclose on the residence. Debtor also asserts that the Creditors have materially breached the contract which they allege to exist. *Id.*; ¶ 15.
11. Debtor requests that if a foreclosure sale occurred, that the court order that any such purported sale is void *ab initio* based on the automatic stay, the lack of standing, and the absence of a valid, enforceable contract. *Id.*; ¶ 17.
12. Debtor requests an expedited hearing on this Motion. *Id.*; ¶ 20.

**Review of Prior and Current Bankruptcy Cases,
Automatic Stay, and Requirements of Fed. R. Bankr. P. 7001**

Debtor's Prior Bankruptcy Case was filed on May 21, 2024, and dismissed on September 16, 2024. 24-22193; Order Dismissing, Dckt. 48. On September 27, 2024, the Hon. Fredrick E. Clement, the Bankruptcy Judge to whom the Prior Bankruptcy Case is assigned entered an Order Denying Motion to Vacate Dismissal of the Prior Bankruptcy Case. *Id.*; Dckt. 53.

The court's record show that before the Prior Bankruptcy Case, the most recent bankruptcy case filed by Debtor that was pending and dismissed is Chapter 13 Case 18-21452 which was dismissed on April 2, 2018.

11 U.S.C. § 362(a) Automatic Stay

Congress provides in 11 U.S.C. § 362(a) that an automatic stay (injunction) goes into effect that protects the debtor with respect to certain act and protects the bankruptcy estate (which includes the property of the bankruptcy estate). Congress provides certain exceptions to the automatic stay, with ones that relate to multiple filings of bankruptcy cases by a debtor stated in 11 U.S.C. § 362(c)(3), if there was a prior bankruptcy case that was pending and dismissed within one year of the case then before the court being filed, and 11 U.S.C. § 362(c)(4) if there were two or more prior bankruptcy cases that had been pending and dismissed within one year of the bankruptcy case then before the court being filed.

Here, Debtor has one bankruptcy case, 24-22193, that was pending and dismissed on September 16, 2024, which was within the one-year period preceding the filing of the Current Bankruptcy Case now before the court that was filed on September 27, 2024.^{FN.1} As provided in 11 U.S.C. § 362(c)(3)(A):

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) —

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

FN. 1. The court has only checked the records for cases filed in the Eastern District of California, using the name of the Debtor. If cases were filed in other Districts or under other names by the Debtors, and those cases were pending and dismissed during the one-year period prior to the filing of this current Bankruptcy Case, they will be included in the 11 U.S.C. § 362(c)(3)(A) calculation.

In 11 U.S.C. § 362(c)(3)(A), Congress provides for the termination of the automatic stay, as to the debtor, thirty-days after the filing of the bankruptcy case filed after the prior dismissed bankruptcy case. As this court has addressed in prior rulings (though not all judges agree and there is no controlling appellate rulings on this point), 11 U.S.C. § 362(c)(3)(A) provides for termination of the automatic stay as to the debtor, but does not terminate the stay as to the bankruptcy estate and the property of the bankruptcy estate.

Congress provides in 11 U.S.C. § 362(c)(3)(B) for the court to extend the automatic stay as to the debtor, and not have it terminate 30 days after the filing of the bankruptcy case, which states:

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

It may be that the Debtor, having been told about the Bankruptcy Code providing for a limitation on the automatic stay when successive cases are filed, believed that there was no stay in this case filed after the one prior case, 22-22193, had been pending and dismissed in the one-year period prior to the commencement of this Current Bankruptcy Case.¹

Enforcement of Adversary Proceeding, and
Adjudication of Contract Disputes and Determination of
Interests in Property

In the Motion, Debtor seeks to enforce the stay and have the court determine that actions taken in violation thereof are void. The automatic stay, and violations thereof, can be enforced through the bankruptcy case law and motion practice, those proceedings being in the nature of contempt proceedings. 3 Collier on Bankruptcy P 362.12; see 11 U.S.C. § 362(k).

However, in the Motion Debtor seeks to have the court determine the extent and validity of any interest that Creditors may have in the residence, determine that there is no such interest, and to enjoin further attempted foreclosure efforts. Federal Rule of Bankruptcy Procedure 7001(2) requires that actions to determine the extent, validity, priority, of a lien or interest in property must be sought by adversary proceeding.

SETTING INITIAL HEARING ON MOTION

Debtor in prosecuting this Current Bankruptcy Case has filed a pleading requesting relief, which may or may not be necessary, may not be clearly stated, and does not appear to have been served on all parties in interest in this Current Bankruptcy Case.

It appears that there may be some action that Debtor may want to take in connection with the Current Bankruptcy Case (including possible 11 U.S.C. § 362(c)(3)(B) extension of the stay as to the Debtor), which are not clearly requested in the Motion.

Under the facts and circumstances of this Motion, the court sets an expedited Initial Hearing on the Motion. The appearance of Debtor at the hearing is necessary for the Debtor to address for the court the prosecution of this Bankruptcy Case, the Motion, what relief will be sought, and how Debtor will proceed.

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.

¹ When two or more prior bankruptcy cases were pending and dismissed within one-year of the filing of the current bankruptcy case before the court, then no automatic stay goes into effect in the then current case before the bankruptcy court. 11 U.S.C. § 362(c)(4)(A). However, Congress authorizes the court to impose the automatic stay in the then current bankruptcy case as provided in 11 U.S.C. § 362(c)(4)(B), (C).

The Motion to Stay Foreclosure Proceedings, Void Potential Sale, and Challenge Creditor's Standing having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is **XXXXXXX** and **XXXXXXX**

FINAL RULINGS

7. [24-21092](#)-E-12 RHETT BURGESS CONTINUED MOTION TO CONFIRM
[DCJ](#)-4 David Johnston CHAPTER 12 PLAN
7-25-24 [[43](#)]

Final Ruling: No appearance at the October 3, 2024 Hearing is required.

The Motion to Confirm Chapter 12 Plan has been continued to October 24, 2024, by prior Order of the court. Docket 58.

No appearance of the parties is required for the October 3, 2024 hearing.