

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

In re: MICHELE GERALDINE AMENT

Debtor.

Case No.: 19-12187-j11

**MEMORANDUM OPINION AND ORDER GRANTING, IN PART, AND DENYING, IN PART CITY BANK'S MOTION FOR RELIEF FROM STAY AND CITY BANK'S SUPPLEMENT TO MOTION FOR RELIEF FROM STAY**

THIS MATTER comes before the Court on City Bank's Motion for Relief from Stay (the "Stay Relief Motion") (Docket No. 12) and Supplement to Motion for Relief from Stay (Docket No. 38). The Court held a final hearing on the Stay Relief Motion on November 7, 2019. The Court also held a final hearing on Debtor's Amended Disclosure Statement on January 9, 2020. The parties and counsel who appeared at the final hearings are reflected in the record.

After consideration of the evidence presented at the final hearing on the Stay Relief Motion and the related proceedings as noted below, and being otherwise sufficiently informed, the Court will grant City Bank's Stay Relief Motion as to the property at 1064 Mechem Drive, Ruidoso, New Mexico, and certain personal property. City Bank's Stay Relief Motion is denied as to the property at 1074 Mechem Drive, Ruidoso, New Mexico, and two specific vehicles, on the condition that Debtor provide adequate protection to City Bank as set forth below.

**FINDINGS of FACT**

**I. JURISDICTION AND VENUE**

1. This Court has jurisdiction over the parties to and subject matter of the Stay Relief Motion. *See* 28 U.S.C. §§ 1334 and 157, and the standing order of reference of the United States District Court for the District of New Mexico, entered March 19, 1992. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (G).

2. Venue is proper in this District and before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

## II. INDEBTEDNESS OWED TO CITY BANK

3. Debtor and her non-filing<sup>1</sup> spouse Eric Ament (“E. Ament”) asked City Bank to finance the acquisition of a business commonly known as Apple Tree Home Improvement (“Apple Tree”).
4. City Bank began to work with the Small Business Administration (the “SBA”) to provide a small business loan to Debtor, E. Ament, and Apple Tree (owned by the Debtor and E. Ament) for the acquisition of the business.
5. Because approval for the SBA Loan had not occurred by December 2012, in order to close the sale of the business prior to the end of 2012 and by agreement of the parties, Apple Tree executed a bridge loan in favor of City Bank in the principal amount of \$1,700,000.00 on December 28, 2012 (the “Bridge Loan”). Docket No. 12-1. The proceeds from the Bridge Loan went to pay Appletree Home Improvement, LLC (seller of the home improvement business) the purchase price for the assets of the business, which included real and personal property. *See* Case No. 17-10314, Docket No. 15.
6. To secure the Bridge Loan, Debtor and E. Ament executed a Mortgage of even date granting City Bank a lien against real property legally described as follows:

Lot 7A-1, Block 1, THIRD ADDITION TO CREE MEADOWS HEIGHTS SUBDIVISION, Ruidoso, Lincoln County, New Mexico, as shown by the Dern Replat of Lot 5, Lot 6 & Lot 7A, Block 1, Third Addition to Cree Meadows Heights thereof filed in the Office of the County Clerk and Ex-officio Recorder of Lincoln County, New Mexico, February 3, 1999, in Cabinet G, Slide No. 303; and Lots 9 and 10, Block 1, THIRD ADDITION TO CREE MEADOWS HEIGHTS SUBDIVISION, Ruidoso, Lincoln County, New Mexico, as shown by the plat

---

<sup>1</sup> E. Ament filed a separate chapter 7 bankruptcy case on October 7, 2019. Case No. 19-12307-j7, Docket No. 1. The Court takes judicial notice of E. Ament’s bankruptcy case and the papers filed of record therein. Judge Robert H. Jacobvitz also presides over E. Ament’s bankruptcy case.

thereof filed in the office of the County Clerk and Ex-officio Recorder of Lincoln County, New Mexico, July 9, 1956, in Tube No. 158 and as further shown by the Boundary Survey Plat thereof filed January 22, 2008, in Cabinet J, Slide No. 53; and

Lot 13A, Block 1, THIRD ADDITION TO CREE MEADOWS HEIGHTS SUBDIVISION, Ruidoso, Lincoln County, New Mexico, as shown by the Replat of Lots 13, 14, 15, 16, Block 1 Third Addition to Cree Meadows Heights Subdivision, thereof filed in the office of the County Clerk and Ex-officio Recorder of Lincoln County, New Mexico, March 2, 2005, in Cabinet I, Slide No. 256; and

Lots 17, 18, 19, 20, and 21, Block 1, THIRD ADDITION TO CREE MEADOWS HEIGHTS SUBDIVISION, Ruidoso, Lincoln County, New Mexico, as shown by the plat thereof filed in the office of the County Clerk and Ex-officio Recorder of Lincoln County, New Mexico, July 9, 1956, in Tube No. 158 and as further shown by the Boundary Survey Plat thereof filed January 22, 2008, in Cabinet J, Slide No. 53; LESS AND EXCEPTING that portion conveyed to New Mexico State Highway and Transportation Department by Warranty Deed, recorded October 8, 1997, in Book 1997-16, pages 32 and 33, records of Lincoln County, New Mexico, containing 0.3421 acres of land more or less. The Mortgage was recorded with the Lincoln County Clerk on December 31, 2012 at 2:26:52 p.m.

Docket No. 12-2.

7. In or around June of 2013, the SBA approved the SBA Loan to Apple Tree, Debtor, and E. Ament. On June 27, 2013, the Debtor, E. Ament, and Apple Tree executed a U.S. Small Business Administration Note in favor of City Bank in the original principal amount of \$1,762,300 (the "SBA Loan"). City Bank Exh. 1. The Court assumes for purposes of this Opinion that the SBA Loan paid off the Bridge Loan.
8. To secure the SBA Loan, Debtor and E. Ament executed a Mortgage and Security Agreement (the "Mortgage and Security Agreement") dated June 27, 2013 granting City Bank a lien against real property, including the real property described in paragraph 6, but also including the following legally described property:

Lots 11 and 12, Block 1, THIRD ADDITION TO CREE MEADOWS HEIGHTS SUBDIVISION, Ruidoso, Lincoln County, New Mexico, as shown by the plat thereof filed in the office of the County Clerk and Ex-officio Recorder of Lincoln

County, New Mexico, July 9, 1956, in Tube No. 158. The Mortgage and Security Agreement was recorded with the Lincoln County Clerk on June 28, 2013 at 1:26:06 p.m.

City Bank's Exh. 2.

9. In addition to the Mortgage to secure the SBA Loan, Debtor, E. Ament, and Apple Tree Home executed a Security Agreement dated June 27, 2013, granting City Bank a security interest in Debtor's, E. Ament's, and Apple Tree's equipment, vehicles, inventory, accounts, instruments, chattel paper, and general intangibles. City Bank's Exh. 3.

### **III. STATE COURT FORECLOSURE SUIT AND 2017 BANKRUPTCY FILINGS**

#### **A. State Court Foreclosure Lawsuit and 2017 Bankruptcy Filings**

10. On December 19, 2016, City Bank commenced a suit against Debtor, E. Ament, several of their business entities, and other parties claiming an interest in the real property described above in paragraphs 6 and 8 to collect on the indebtedness owed by the Debtor, E. Ament, and their business entities and to foreclose on the Mortgage and Security Agreement in the Twelfth Judicial District Court under Cause No. D-1226-CV-2016-00249 ("Foreclosure Suit"). City Bank Exh. 15.
11. After City Bank served Debtor and the other parties to the Foreclosure Suit, Debtor and Apple Tree Home commenced bankruptcy cases in the United States Bankruptcy Court for the District of New Mexico.

#### **B. Apple Tree Bankruptcy**

12. On February 12, 2017, Apple Tree filed a voluntary petition for relief under chapter 7 of title 11 of the United States Code ("Bankruptcy Code") in the United States

Bankruptcy Court for the District of New Mexico under case number 17-10313-j7 (the “Apple Tree Bankruptcy Case”).

13. On March 30, 2017, the Apple Tree Bankruptcy Case was closed. Case No. 17-10313, Docket No. 15.
14. City Bank asserts that, after the Apple Tree Bankruptcy Case was closed, City Bank sold the equipment, inventory, and other personal property collateral of Apple Tree.

C. First Michele Geraldine Ament Bankruptcy

15. On February 12, 2017, Debtor filed a voluntary petition under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of New Mexico under case number 17-10314-j11 (the “First Michele Ament Bankruptcy Case”).<sup>2</sup>
16. During the First Michele Ament Bankruptcy Case, City Bank filed a motion for relief from stay. As grounds for the motion for relief from stay, City Bank asserted Debtor, E. Ament, and Apple Tree had failed to make certain payments on the SBA Loan. Before the Court heard the motion for relief from stay, City Bank and Debtor reached a resolution wherein Debtor would work towards restructuring the indebtedness owed to City Bank. Case No. 17-10314, Docket No. 67.
17. Debtor and City Bank sought court approval of the resolution; however, another creditor objected to the compromise. Case No. 17-10314, Docket No. 69.
18. After receiving the objection, with Court approval and pursuant to an order approved by City Bank, Debtor instead sold Lots 13A and Lots 17, 18, 19, 20, and 21 (the “Sold Real Property”) described above in paragraph 6. Proceeds from the sale of the Sold

---

<sup>2</sup> At the final hearing on City Bank’s Stay Relief Motion, the parties did not object to the Court’s taking judicial notice of the docket and documents filed in the First Michele Ament Bankruptcy Case.

Real Property were applied against the indebtedness owed to City Bank by the Debtor and others. Case No. 17-10314, Docket No. 119. The Order approving the sale was entered July 5, 2018. *Id.*

19. City Bank pursued its request for stay relief as to the remaining real property (the “Remaining Real Property”) which has the following legal description:

Lot 7A-1, Block 1, THIRD ADDITION TO CREE MEADOWS HEIGHTS SUBDIVISION, Ruidoso, Lincoln County, New Mexico, as shown by the Dern Replat of Lot 5, Lot 6 & Lot 7A, Block 1, Third Addition to Cree Meadows Heights thereof filed in the Office of the County Clerk and Ex-officio Recorder of Lincoln County, New Mexico, February 3, 1999, in Cabinet G, Slide No. 303; and

Lots 9 and 10, Block 1, THIRD ADDITION TO CREE MEADOWS HEIGHTS SUBDIVISION, Ruidoso, Lincoln County, New Mexico, as shown by the plat thereof filed in the office of the County Clerk and Exofficio Recorder of Lincoln County, New Mexico, July 9, 1956, in Tube No. 158 and as further shown by the Boundary Survey Plat thereof filed January 22, 2008, in Cabinet J, Slide No. 53; and

Lots 11 and 12, Block 1, THIRD ADDITION TO CREE MEADOWS HEIGHTS SUBDIVISION, Ruidoso, Lincoln County, New Mexico, as shown by the plat thereof filed in the office of the County Clerk and Exofficio Recorder of Lincoln County, New Mexico, July 9, 1956, in Tube No. 158.

Case No, 17-10314, Docket No. 109.

20. The street addresses for the Remaining Real Property are 1074 Mechem Drive and 1064 Mechem Drive, Ruidoso, New Mexico, 88345. Docket No. 22.
21. A popular restaurant called the Log Cabin operates on a portion of the Remaining Real Property located at 1074 Mechem Drive. The restaurant is owned by Log Cabin, Inc., in which Debtor holds a 50% interest. Docket No. 22. A third party operates a tool rental business in a separate building on a separate portion of the Remaining Real Property located at 1064 Mechem Drive. Debtor does not collect rent from the third party. M. Ament testimony.

22. On May 31, 2018, in the First Michele Ament Bankruptcy Case, this Court held a status conference on City Bank's motion for relief from the automatic stay and on Debtor's motion to sell the Sold Real Property. At the status conference, the Court set a hearing on City Bank's motion for relief from stay and set deadlines for Debtor to file a disclosure statement and chapter 11 plan of reorganization. The Court provided that if Debtor failed to meet the deadlines to file a disclosure statement and plan of reorganization by a date certain, the stay would terminate on the Remaining Real Property without further notice or hearing. Case No. 17-10314, Docket Nos. 107 and 109.

23. Instead of filing a disclosure statement and chapter 11 plan of reorganization, Debtor filed a motion to convert the First Michele Ament Bankruptcy Case to a chapter 7 bankruptcy. Case No. 17-10314, Docket No. 126. Eventually, the Court granted City Bank relief from the automatic stay after the appointed chapter 7 trustee had time to evaluate the case and City Bank's claims. Case No. 17-10314, Docket No. 134.

24. The Court granted Debtor a discharge in the First Michele Ament Bankruptcy Case. The discharge relieved Debtor from any personal liability to City Bank on the SBA Loan and other obligations to the extent set forth in 11 U.S.C. § 727(b). Case No. 17-10314, Docket Nos. 143, 144.

D. State Court Foreclosure Lawsuit

25. After the Court granted City Bank relief from the automatic stay in the First Michele Ament Bankruptcy Case, City Bank prosecuted its Foreclosure Suit to judicially foreclose on the Remaining Real Property. City Bank Exh. 15.

26. On August 6, 2019, the Twelfth Judicial District Court in the Foreclosure Suit entered its Default Judgment as to Certain Defendants, Decree of Foreclosure, and Appointment of Special Master (“Foreclosure Judgment”). City Bank Exh. 15.
27. On September 3, 2019, the Special Master and City Bank filed with the Twelfth Judicial District Court its Notice of Foreclosure Sale (the “Foreclosure Notice”), giving notice that the sale would occur on October 8, 2019, at 10:00 a.m. (the “Foreclosure Sale”). City Bank Exh. 16.

#### **IV. BALANCES OWED ON INDEBTEDNESS**

28. Since July 8, 2016, the only payments made against the SBA Loan and other indebtedness owed by Debtor have been from the sale of City Bank’s collateral. M. Ament testimony; M. Wilcox testimony; City Bank Exh. 17.
29. As set forth in the Foreclosure Judgment, the indebtedness owed on the SBA Loan (Note \*\*\*4654) as of July 11, 2019, is \$1,300,040.58, which includes principal; accrued, unpaid interest at the per diem rate of \$208.88; and late charges. Additionally, due to the costs of the Foreclosure Suit, the Apple Tree Bankruptcy, and the First Michele Ament Bankruptcy Case, the Foreclosure Judgment awards City Bank attorneys’ fees in the amount of \$132,467.69. The total indebtedness is \$1,432,508.27. This amount is secured by the Remaining Real Property. City Bank Exh. 15.
30. Additionally, while Debtor is no longer personally liable on this indebtedness, Debtor executed Note \*\*\*5032 in the original principal amount of \$364,876.93. As set forth in the Foreclosure Judgment, the indebtedness owed on Note \*\*\*5032 as of July 11, 2019, is \$347,576.80, which includes principal; accrued, unpaid interest at the per diem



- rate of \$57.20; and late charges. As more fully described below, there is collateral that secures the indebtedness owed on Note \*\*\*5032. City Bank Exh. 15.
31. Likewise, Debtor executed Note \*\*\*5423 in the original principal amount of \$30,150.00. As set forth in the Foreclosure Judgment, the indebtedness owed on Note \*\*\*5423 as of July 11, 2019, is \$22,749.14, which includes principal and accrued, unpaid interest at the per diem rate of \$3.34. As more fully described below, there is collateral that secures the indebtedness owed on Note \*\*\*5423. City Bank Exh. 15.
32. The Foreclosure Judgment provided that post-judgment interest accrues at the rate of eighteen percent (18%) per annum. City Bank Exh. 15.

## V. COLLATERAL

33. The SBA Loan is secured by the Remaining Real Property. City Bank Exh. 15.
34. The value of the portion of the Remaining Real Property located at 1064 Mechem Drive is \$325,000. The value of the portion of the Remaining Real Property located at 1074 Mechem Drive is \$575,000. City Bank Exh. 21; Debtor's Exh. A-1 (Debtor's Schedule A/B).<sup>3</sup>
35. Additionally, the SBA Loan, Note \*\*\*5032, and Note \*\*\*5423 (collectively, the "Indebtedness") are secured by the following personal property of Debtor and E. Ament: 2009 Porsche Cayenne (VIN WP1AC29P19LA81219), 2003 Dodge Ram (VIN

---

<sup>3</sup> At the hearing, the Court admitted without objection Debtor's Exhibit A, which is Debtor's schedules, and Exhibit A-1, which is Debtor's amended schedules A/B and D. *See* Docket Nos. 22, 29. "Under Evidence Rule 801(d)(2), an admission by a party opponent is admissible as a non-hearsay statement. Evidence Rule 801 defines a statement as an 'oral or written assertion.'" *In re Cluff*, 313 B.R. 323, 340 (Bankr. D. Utah 2004), *aff'd sub nom. Cluff v. eCast Settlement*, No. 2:04-CV-978 TS, 2006 WL 2820005 (D. Utah Sept. 29, 2006); *In re Earl*, 140 B.R. 728, 731 (Bankr. N.D. Ind. 1992) ([T]he verified [s]chedules and [s]tatements filed by a debtor[] are not just pleadings, motions or exhibits thereto. They are evidentiary admissions."). *See* Fed. R. Bankr. 9017 (stating that the Federal Rules of Evidence apply to cases under the Bankruptcy Code).

3D7LU38C13G766228). The value of the 2009 Porsche is \$21,000 and the value of the 2003 Dodge Ram is \$6,000. Debtor's Exh. A-1 (Debtor's Schedule A/B).

36. In addition, the Indebtedness is secured by the following personal property of the Debtor and E. Ament: 2001 Ultra BRM Motorcycle (VIN 19ZWS31A81C005679), 2005 SeaDoo 175COO (Hull # YDV30418C505), 1977 GJ7 Jeep (VIN J7F93EH049054), 2004 Cantankerous Bunch Official (#1224919), and 1981 Jet Boat (Hull # JBX019046578). City Bank Exh. 3, 8-14. The value of the 2001 Ultra BRM Motorcycle is \$12,000, the value of the 1977 GJ7 Jeep is \$3,500, and the value of the 2004 Cantankerous Bunch Official is \$100,000. Debtor's Exh. A-1 (Debtor's Schedule A/B). No evidence was presented as to the value of the 2005 SeaDoo 175COO and 1981 Jet Boat.

## **VI. SECOND MICHELE GERALDINE AMENT BANKRUPTCY and RELATED PROCEEDINGS**

37. On September 23, 2019 (the "Petition Date"), Debtor filed a voluntary petition under chapter 11 of the Bankruptcy Code commencing the present bankruptcy case ("Second Michele Ament Bankruptcy Case").<sup>4</sup>

38. On October 21, 2019, Debtor filed her Schedules and Statement of Financial Affairs. Docket No. 22.

39. Debtor included in her schedules a 50% interest in the stock of Log Cabin, Inc. She also stated the properties located at 1064 Mechem Drive and 1074 Mechem Drive, as well as the collateral described in paragraphs 35 and 36, are community property. Docket No. 22.

---

<sup>4</sup> At the final hearing on City Bank's Stay Relief Motion, the parties did not object to the Court taking judicial notice of the docket and documents filed in the Second Michele Ament Bankruptcy.

40. In his chapter 7 case (Case No. 19-12307), E. Ament included in his schedules a 50% interest in the stock of Log Cabin, Inc. He also stated that the properties located at 1064 Mechem Drive and 1074 Mechem Drive, as well as the collateral described in paragraphs 35 and 36, are community property. Case No. 19-12307, Docket No. 1.
41. Debtor and E. Ament are currently separated and in the process of a divorce in the Twelfth Judicial District Court, Lincoln County, New Mexico (the “Divorce Proceeding”). M. Ament Testimony; Docket No. 44. On November 20, 2019, Debtor moved the domestic relations court to bifurcate dissolution of the marriage from division of community property. M. Ament Testimony; Docket No. 44.
42. On November 19, 2019, Debtor filed a Chapter 11 Plan of Reorganization (the “Plan”) and Amended Disclosure Statement. Docket Nos. 40, 41.
43. In the Plan, Debtor proposes to retain the property located at 1074 Mechem Drive, the 2009 Porsche, and the 2003 Dodge Ram, and to surrender 1064 Mechem Drive and the remaining collateral to City Bank. Docket No. 40.
44. In the Plan, Debtor proposes to divest E. Ament of his interest in the properties located at 1064 Mechem Drive and 1074 Mechem Drive and his interest in the 2003 Dodge Ram and 2009 Porsche, as well as the remaining collateral. Plan of Reorganization, Docket No. 40.
45. The Plan does not include a proposal for the disposition of Debtor’s and E. Ament’s ownership interest in the stock of Log Cabin, Inc. Docket No. 40.
46. In the Plan, Debtor proposes to use net profits from the restaurant operated by Log Cabin, Inc. to pay City Bank.

47. The cash flow projections included in Debtor's Amended Disclosure Statement appear to show sufficient profits to fund the Plan if Debtor is entitled to so use them after division of the community property.

48. City Bank and the New Mexico Tax and Revenue Department objected to Debtor's Amended Disclosure Statement. Docket Nos. 49, 50.

49. On January 9, 2020, the Court held a final hearing on Debtor's Amended Disclosure Statement. The Court's rulings resulting from that hearing are set forth in a separate order.

#### **VII. CITY BANK'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY**

50. On September 27, 2019, City Bank filed the present Motion for Relief from the Automatic Stay.<sup>5</sup> Docket No. 12. On November 7, 2019, the Court held a final hearing on City Bank's Motion for Relief from the Automatic Stay.

51. On November 12, 2019, City Bank filed a Supplement to Motion for Relief from Automatic Stay requesting that the Court admit in evidence an article that appeared in the Ruidoso News regarding allegations that the third party operating a tool rental business on the Remaining Real Property, who is also in a personal relationship with Debtor, was arrested on criminal charges. Docket No. 37. Debtor objected to admission of this evidence. Docket No. 38.

#### **VIII. ADDITIONAL FINDINGS**

52. Debtor has no equity in the Remaining Real Property or the collateral described in paragraphs 35 and 36.

---

<sup>5</sup> City Bank also filed a Motion for Relief from Stay in E. Ament's bankruptcy case. Case No. 19-12307, Docket No. 12 (filed October 16, 2019). E. Ament did not oppose the motion. Although the objection period has expired and no objection was filed, City Bank has not yet submitted a proposed order to the Court.

53. The property located at 1064 Mechem Drive is not necessary to Debtor's reorganization.
54. The personal property described in paragraph 36 is not necessary to Debtor's reorganization.
55. Without the property located at 1074 Mechem Drive, Debtor cannot propose a feasible plan of reorganization.
56. Without the personal property described in paragraph 35, Debtor cannot propose a feasible plan of reorganization.
57. Debtor has a reasonable possibility of confirming a plan for a successful reorganization within a reasonable time under which she retains the property located at 1074 Mechem Drive, the 2009 Porsche Cayenne, and the 2003 Dodge Ram.

## DISCUSSION

### **I. City Bank's Exhibits 23 and 24 (Docket No. 37) are Inadmissible.**

As a preliminary matter, the Court finds that the newspaper articles City Bank proffered in evidence are inadmissible because they are hearsay. *See Good v. Bd. of Cnty. Comm'rs of Cnty. of Shawnee, Kan.*, 331 F. Supp. 2d 1315, 1327 (D. Kan. 2004) (denying admission of newspaper articles on the ground that they are hearsay), *aff'd sub nom. Good v. Hamilton*, 141 F. App'x 742 (10th Cir. 2005). Moreover, the articles do not mention Debtor or her business and do not pertain to the proceedings before this Court and are, therefore, irrelevant. *See Fed. R. Evid. 401* ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.").

## **II. Relief from the Automatic Stay**

Relief from the automatic stay is governed by 11 U.S.C. § 362(d), which permits the Court to “grant relief from the stay . . . , such as by terminating, annulling, modifying, or conditioning such stay” on two grounds. The first ground is “cause, including the lack of adequate protection of an interest in property of such party in interest.” § 362(d)(1). Under the second ground, the Court may terminate the stay to permit “an act against property” when “(A) the debtor does not have an equity in such property; and (B) such property is not necessary to an effective reorganization.” § 362(d)(2).

### **A. Modifying the Stay for Cause**

City Bank argues that the stay should be terminated for cause as to its collateral under § 362(d)(1) because Debtor has failed to make payments on the SBA Loan and because Debtor filed the Second Michele Ament Bankruptcy Case despite having no intention to file a plan or reorganize. Docket No. 12. It also argues that stay relief is appropriate on the same grounds as it was granted in the First Michele Ament Bankruptcy Case and because City Bank has obtained a Foreclosure Judgment. Docket No. 12. Because relief under § 362(d)(1) includes terminating, annulling, modifying or conditioning the stay, the bankruptcy court enjoys “wide latitude in crafting relief from the automatic stay.” *Delaney-Morin v. Day (In re Delaney-Morin)*, 304 B.R. 365, 369 (9th Cir. BAP 2003). “Conditional orders are expressly contemplated by § 362(d) and absolutely crucial to the administration of bankruptcy cases in a varying range of circumstances.” *Chapel v. Derringer (In re Derringer)*, 375 B.R. 903, 911-12 (10th Cir. BAP 2007). “Cause” for relief from the automatic stay under § 362(d) is “a separate discretionary basis on which the bankruptcy court may lift the stay.” *Carbaugh v. Carbaugh (In re Carbaugh)*, 278 B.R. 512, 525 (10th Cir. BAP 2002). Ultimately, because the Bankruptcy Code does not further

define “cause,” the Bankruptcy Court must make a discretionary determination of whether to grant relief from the automatic stay on a case-by-case basis.

The Court will not terminate the automatic stay for cause. First, City Bank’s argument that Debtor has no intent to reorganize or to file a plan of reorganization is belied by the fact that she filed a Plan on November 19, 2019. Docket No. 40. Second, the fact that stay relief was granted in a prior bankruptcy case or that City Bank obtained a foreclosure judgment is insufficient to constitute cause under the present circumstances.

Further, cause does not exist based on lack of adequate protection of City Bank’s interest in the Debtor’s property as a result of the adequate protection the Court will grant to City Bank. As adequate protection, the Court will order Debtor to make adequate protection payments to City Bank in the amount of \$4,000 per month, which is the amount of adequate protection payment Debtor proposed in her Response to City Bank’s Stay Relief Motion. Debtor shall pay City Bank \$4,000 per month as adequate protection of its security interest.<sup>6</sup> The first payment shall be paid no later than January 31, 2020 and payment will be due thereafter by the last calendar day of each month, pending further order of Court. The adequate protection payments are approximately equal to interest only on the value of City Bank’s collateral with respect to which the Court is not granting City Bank relief from the stay at an interest rate of prime plus two percentage points. As additional adequate protection, Debtor will be required to timely file monthly operating reports by the 21st day of each month following the reporting period, unless an extension is granted by the Court on a motion filed before the due date. *See* §§ 1106, 1107(a); *cf.* § 28 U.S.C. § 586(a)(3)(G) (directing the United States Trustee to supervise chapter 11 bankruptcy cases by, among other things, “monitoring the progress of cases under title 11”). By January 31, 2020, Debtor must also file a

---

<sup>6</sup> This amount is approximately the amount of interest only on a debt of \$575,000 at a rate of prime plus two percent.

report regarding value, operations, and profitability of entities in which the estate holds a substantial or controlling interest as required by Bankruptcy Rule 2015.3 using the appropriate Official Form. *See In re McTiernan*, 519 B.R. 860, 867 (Bankr. D. Wyo. 2014) (“A debtor in bankruptcy must comply with the reporting requirements so that creditors and the court may determine whether the bankruptcy case is being properly administered while a debtor enjoys the benefits of the bankruptcy process.”).

**B. Modifying the Stay when the Debtor has no Equity in the Property and the Property is not Necessary to an Effective Reorganization**

Relying on § 362(d)(2), City Bank next asserts that the stay should terminate because Debtor has no equity in the Remaining Real Property or other collateral and the Remaining Real Property or other collateral is not necessary to an effective reorganization. Docket No. 12. Under 11 U.S.C. § 362(d)(2)(A), “the party requesting stay relief has the burden of proof on the issue of the debtor’s equity in property.” 11 U.S.C. § 362(g). “Whether the Debtor[] ha[s] equity in the [property at issue] requires the Court to consider two elements: 1) the value that can be realized from the sale of the [property at issue] in this bankruptcy case; and 2) the aggregate amount of all secured claims against th[at property].” *In re Young*, No. 7-11-12554 JS, 2011 WL 3799245, at \*9 (Bankr. D.N.M. Aug. 29, 2011) (unpublished).

The value of the real property located at 1064 Mechem Drive is \$325,000, and the value of the real property located at 1074 Mechem Drive is \$575,000.<sup>7</sup> The value of the 2009 Porsche Cayenne and the 2003 Dodge Ram are \$21,000 and \$6,000, respectively, and the total value of the 1977 Jeep, the DRM Ultra Motorcycle, and the 2004 Cantankerous Bunch Official yacht is

---

<sup>7</sup> Although Debtor argued at the final hearing on the Stay Relief Motion that City Bank’s appraisal was flawed because it did not consider the value of the restaurant as a going concern, Debtor’s Plan proposes to pay City Bank the appraised value of \$575,000. Plan of Reorganization, Docket No. 40; *see* City Bank Exh. 21, pg. 3 (City Bank’s appraisal); Debtor’s Exh. A-1 (Debtor’s Amended Schedule A/B (valuing the property at \$575,000)).



\$115,500. The aggregate value of the collateral the Debtor pledged to City Bank, therefore, is approximately \$1,042,500.<sup>8</sup> Debtor's total indebtedness to City Bank is \$1,802,834.21. City Bank's Exh. 15; *see* Debtor's Exh. A-1 (stating that the debt owed to City Bank was \$1,802,834.21.); M. Wilcox testimony. Hence, Debtor does not have equity in the Remaining Real Property and the personal property securing the Indebtedness.

As to the second prong of the analysis, Debtor carries the burden to show that the property is "necessary to an effective reorganization." § 362(d)(2)(B), (g)(2). First, "Debtor must . . . show[] that the property is *necessary*." *In re Kadlubek Family Revocable Living Tr.*, 545 B.R. 660, 665 (Bankr. D.N.M. 2016). "Property is necessary if it furthers the interests of the estate through rehabilitation or liquidation." *Id.* (citation omitted). In addition, because "the necessity of the property is only important to the extent that it exists simultaneously with a reasonable possibility of reorganization[,] . . . the Debtor must [also] show there is a 'reasonable possibility of successful reorganization within a reasonable time.'" *Id.* (quoting *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 376 (1988)). Indeed, "it must be demonstrated that an effective reorganization is realistically possible; the mere fact that the property is indispensable to the debtor's survival is insufficient." *In re Albany Partners, Ltd.*, 749 F.2d 670, 673 n.7 (11th Cir. 1984). "The fact that a debtor lacks equity in the property in question is not fatal where the secured claimant is adequately protected, the debtor has made progress in formulating a plan and there is a reasonable possibility of confirmation within a reasonable time." *Kadlubek Family*, 545 B.R. at 667.

---

<sup>8</sup> Although no evidence was presented as to the value of the 2005 SeaDoo 175COO and 1981 Jet Boat, the combined value of these two items will not substantially alter the value of the collateral for purposes of the Court's analysis.

The Court concludes that the 1064 Mechem Drive property is not necessary to an effective reorganization, as evidenced by the fact that Debtor proposes in the Plan to surrender the property to City Bank. Plan of Reorganization, Docket No. 40. Similarly, Debtor has proposed to surrender “all personal property which City Bank claims is collateral to City Bank except for the 2009 Porsche Cayenne and the 2003 Dodge Ram Pickup.” Plan of Reorganization, Docket No. 40. Hence that property is also not necessary to Debtor’s reorganization. The Court therefore will grant City Bank’s Motion as to the 1064 Mechem Drive property and the personal property described in paragraph 36.

The Court reaches a different conclusion as to the 1074 Mechem Drive property and the personal property Debtor proposes to retain. Debtor’s Plan, and any other feasible plan of reorganization Debtor may propose, depends on continued income from the Log Cabin restaurant, which operates on the property at 1074 Mechem Drive, to pay creditors, including City Bank. Hence, Debtor must retain the property at 1074 Mechem Drive to reorganize. The two vehicles Debtor proposes to retain are, similarly, necessary to operation of the restaurant.

City Bank argues that Debtor would not be able to confirm a plan because City Bank is the “only real creditor” and would not agree to a plan of reorganization.<sup>9</sup> Docket No. 12. At the time the Stay Relief Motion was filed, Debtor had not filed a plan. Since then, however, Debtor filed the Plan, in which she lists two classes of impaired claims in addition to the class containing City Bank’s claim. Docket No. 40. There was no evidence that the holders of impaired claims in other classes entitled to vote would vote to reject the Plan. Hence, City Bank’s expected rejection of the Plan does not conclusively establish that the Debtor will be unable to satisfy the confirmation requirements of 11 U.S.C. § 1129(a)(10). The Court will, therefore, continue the stay as to the

---

<sup>9</sup> This argument is apparently a reference to 11 U.S.C. § 1129(a)(10) under which a plan cannot be confirmed unless at least one class of claims that is impaired accepts the plan.

property at 1074 Mechem Drive, the 2009 Porsche Cayenne, and the 2003 Dodge Ram to permit Debtor to file a new or amended plan. *See Kadlubek Family*, 545 B.R. at 667 (stating that even if “a debtor lacks equity in the property[,]” the stay may be continued where “the secured claimant is adequately protected, the debtor has made progress in formulating a plan and there is a reasonable possibility of confirmation within a reasonable time.”).

In assessing whether a debtor has proven that there is a reasonable possibility of confirmation of a plan within a reasonable time, the burden on the debtor increases as the case progresses on a sliding scale that begins with plausibility and moves to probability. *In re DB Capital Holdings, LLC*, 454 B.R. 804, 819 (Bankr. D. Colo. 2011). The sliding scale “ensure[s] that the debtor is given the ‘breathing room’ Congress intended the stay to provide . . . to benefit debtors who have a realistic chance of reorganization but who have not had sufficient time to formulate a confirmable plan.” *Matter of Apex Pharm., Inc.*, 203 B.R. 432, 442 (N.D. Ind. 1996). *See also In re Settlers’ Hous. Serv., Inc.*, 505 B.R. 483, 489 (Bankr. N.D. Ill. 2014) (“There is a sliding scale as to the extent to which a debtor must prove the possibility of an effective reorganization in a lift stay proceeding depending on the stage of the case. A debtor should have more leeway in the initial stages of a chapter 11 proceeding, less as the case progresses.”) (internal citation and quotation marks omitted).<sup>10</sup>

---

<sup>10</sup> *See also In re Save Our Springs (S.O.S.) All., Inc.*, 388 B.R. 202, 227 (Bankr. W.D. Tex. 2008), *aff’d sub nom, In re Save Our Springs All., Inc.*, No. A-08-CA-727 LY, 2009 WL 8637183 (W.D. Tex. Sept. 29, 2009), *aff’d sub nom, In re Save Our Springs (S.O.S.) All., Inc.*, 632 F.3d 168 (5th Cir. 2011) (“courts have required a lesser or greater showing by the debtor under § 362 depending on the stage of the case.”); *In re Sun Valley Newspapers, Inc.*, 171 B.R. 71, 75 (9th Cir. BAP 1994) (the burden of proof to show a reasonable possibility of confirmation within a reasonable time becomes more difficult as the bankruptcy case progresses); *In re Ashgrove Apartments of DeKalb Cnty., Ltd.*, 121 B.R. 752, 757 (Bankr. S.D. Ohio 1990) (“[I]n the early stages of a Chapter 11 proceeding the debtor should be allowed greater latitude in making the required showing.”); *Matter of Weiser, Inc.*, 74 B.R. 111, 117 (Bankr. S.D. Iowa 1986) (“When a reorganization is in its infancy, a lesser showing of likelihood for an effective reorganization may be sufficient.”).

The Court, having taken into account the fact that a) Michele Ament filed her chapter 11 case on September 23, 2019; b) the exclusivity period to file a plan expires on January 21, 2020; and c) the Debtor filed a Plan and disclosure statement on November 19, 2019; and having considered the proposed Plan and the evidence, finds that the Debtor has shown there is a reasonable possibility of confirmation of a plan within a reasonable time as required by § 362(d)(2) to prevent relief from the stay at this time. Debtor's cash flow projections show sufficient net income from Log Cabin, Inc. to render a plan feasible. The Log Cabin restaurant has been in operation since 1983. The Debtor has managed the restaurant since 1998. Although the pending divorce proceedings raise issues regarding whether Debtor will retain the community property at 1074 Mechem and be entitled to use profits from Log Cabin, Inc. as necessary to fund a plan, the Debtor should be given a reasonable opportunity to confirm a plan, particularly given the requirement the Court imposed that Debtor make adequate protection payments to City Bank in the amount of \$4,000 per month.

**WHEREFORE, for the foregoing reasons,**

**IT IS ORDERED:**

1. City Bank's Stay Relief Motion is granted in part and denied in part.
2. The automatic stay is terminated as to the property at 1064 Mechem Drive, Ruidoso, New Mexico and as to the personal property Debtor has proposed to surrender to City Bank under the proposed Plan. Debtor will cooperate with City Bank with respect to City Bank obtaining title to such real and personal property in a foreclosure action or by its exercise of self-help remedies.
3. The automatic stay will remain in place, pending further order of the Court, with respect to the property at 1074 Mechem Drive, Ruidoso, New Mexico, as well as the 2009 Porsche

and 2003 Dodge Ram, on the condition that Debtor provide adequate protection to City Bank as follows:

(a) Debtor will make adequate protection payments to City Bank in the amount of \$4,000 per month. The first payment of \$4,000 is due January 31, 2020. Thereafter, payments are due on the last business day of each month unless the Court orders otherwise. If Debtor fails to make a payment when due, or within a 5-business-day grace period after the due date, unless the Court extends the due date on a motion filed before the payment is due, the automatic stay will terminate as to the real property located at 1074 Mechem Drive in Ruidoso, New Mexico and the 2009 Porsche and 2003 Dodge Ram.

(b) For the period starting January 1, 2020, Debtor must timely file monthly operating reports by the 21st of each month for the reporting period, unless an extension is granted on a motion filed before the due date.

(c) No later than January 30, 2020, Debtor must file the report required by Fed. R. Bankr. P. 2015.3, using Official Form 26, regarding value, operations, and profitability of Log Cabin, Inc.



---

ROBERT H. JACOBVITZ  
United States Bankruptcy Judge

Date Entered on Docket: January 16, 2020

Copy To:

R Trey Arvizu, III  
Attorney for Debtor  
PO Box 1479  
Las Cruces, NM 88004-1479

James C. Jacobsen  
NM Tax and Revenue Department  
201 Third Street Suite 300  
Albuquerque, NM 87102

Brad W. Odell  
Attorney for City Bank  
Mullin Hoard & Brown, LLP  
PO Box 2585  
Lubbock, TX 79408

Alice Nystel Page  
Office of the U.S. Trustee  
PO Box 608  
Albuquerque, NM 87103-0608