UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MICHIGAN

In re:

B&G CROP FARMS, LLC, *et al.*,[1]

Debtor.
_____/

Case No. DK 20-02747
Hon. Scott W. Dales
Chapter 12

MEMORANDUM OF DECISION AND ORDER

PRESENT: HONORABLE SCOTT W. DALES
Chief United States Bankruptcy Judge

Honor Credit Union ("HCU") seeks relief from the automatic stay under 11 U.S.C. § 362(d)[2] to pursue *in rem* remedies under a mortgage encumbering real estate in Climax, Michigan (the "Property") where chapter 11 debtors Robert and Martha Gibson (the "Debtors") reside. The balloon note for which the mortgage serves as security matured in November 2020, shortly after the petition date. Nevertheless, the Debtors' chapter 11 plan proposes to modify the lender's rights by extending the maturity date for approximately five years, with monthly payments of $2,600.00 (which includes interest at 5.5%).

The court confirmed the Debtors' plan recently, but preserved HCU's right to pursue stay relief after the parties agreed to adjourn the stay relief hearing that was scheduled to take place before the confirmation hearing. The confirmed plan provides that the court's decision regarding the stay relief motion will govern HCU's treatment in this case, notwithstanding § 1141. The court

[1] The related debtors are B&G Crop Farms, LLC (Case No.: 20-02747), Scotts Hook & Cleaver, Inc. (Case No.: 20-02748), Robert M. and Martha M. Gibson (Case No.: 20-02765) and Stumpbreakers, LLC (Case No.: 20-02781).
[2] The Bankruptcy Code is codified in 11 U.S.C. §§ 101 *et seq*. The court will refer to specific chapters of the Bankruptcy Code as "chapter __" and to specific sections as "§ ___."

has jurisdiction and unchallenged authority to resolve the current dispute regarding the plan and automatic stay.[3]

HCU argues that cause exists under § 362(d)(1) to modify the stay (and permit pursuit of foreclosure remedies) because the Debtors' plan impermissibly modifies its claim, and without the modification there is no point in continuing to tie HCU's hands with the automatic stay. The lender's counsel cites *In re Sampson*, 2018 WL 4786404 (Bankr. M.D. Fla. Sept. 6, 2018), a non-binding, unpublished, but nevertheless persuasive opinion, in support of a finding of "cause" under § 362(d). HCU opposes the proposed extension of its now-matured claim, arguing that § 1123(b)(5) prohibits any modification.

The court held a hearing, by Zoom, on May 19, 2021, to consider whether to grant HCU relief from the automatic stay, or accept the treatment of HCU's claim as proposed in their plan. The parties agreed that the record on this motion would consist of the Stipulated Facts With Respect to Honor Credit Union's Motion for Relief from Automatic Stay (ECF No. 347 in Case No. 20-02747, the "Stipulation"), the six exhibits attached to the Stipulation, and HCU's proof of claim in the claims register for B&G Crop Farms, LLC (Claim No. 28-1), including the membership agreement attached to it (which the court will refer to as "Exh. 7").

The statutory provision at the heart of this controversy reads, in relevant part, as follows:

> …[A] plan may … modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence. . .

[3] The federal district courts have "original and exclusive jurisdiction" of all cases under the Bankruptcy Code. 28 U.S.C. § 1334(a). They also have "original but not exclusive jurisdiction" of all civil proceedings arising under the Bankruptcy Code or arising in or related to cases under the Bankruptcy Code. 28 U.S.C. § 1334(b). District courts may, however, refer these cases to the bankruptcy judges for their districts. 28 U.S.C. § 157(a). In accordance with 28 U.S.C. § 157(a), the United States District Court for the Western District of Michigan has referred all of its bankruptcy cases and proceedings to the Western District's bankruptcy court. L. Gen. R. 3.1 (W.D. Mich.). Proceedings regarding a chapter 11 plan and the automatic stay are core proceedings. 28 U.S.C. § 157(b)(2)(A), (G), and (L).

11 U.S.C. § 1123(b)(5). The issue is whether HCU's claim is secured only by a security interest in real estate that is the Debtors' principal residence, or whether the nature or extent of HCU's collateral securing the claim forfeits the statutory protection against modification.

The following undisputed facts come straight from the parties' Stipulation:

> 1. The Creditor is a holder of a Mortgage dated October 19, 2015 on property owned by the Debtors located at 9628 S. 46th, Climax, Michigan 49034 (the "Property"). A copy of the Mortgage, and related Balloon Note and appraisal are attached as Exhibit 1, Exhibit 2, and Exhibit 3, respectively.
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> 2. Debtors filed their voluntary petition under Chapter 11 of the United States Bankruptcy Code on August 26, 2020.
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> 3. The Creditor has a secured claim, as acknowledged by the Debtors in their filed Plan of Reorganization, and the Creditor's claim is secured by the Property.
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> 4. The Property is the Debtors' principal residence.
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> 5. The Property is approximately 20 acres in size.
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> 6. The Debtors have farmed a hay field on the Property that is approximately 7.5 acres in size and have farmed that field from 2010 to 2015 as renters and from 2015 to the present as owners.
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> 7. The location and boundaries of the Property are depicted on the aerial photographs attached hereto as Exhibit 4 and Exhibit 5, with the Property being identified with the number "9628" in both photographs.
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> 8. The Property was appraised on April 25, 2019 for an estimated value of $520,000. See attached Exhibit 6.
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> 9. The Mortgage and Balloon Note matured on November 1, 2020 and Debtors have not satisfied the debt owed thereunder.

> 10. The Debtors' Plan of Reorganization proposes to extend the payments on the Creditor's claim another five (5) years even though the claim matured in November 2020.

*See* Stipulation at ¶¶ 1-10. In addition to the facts set forth in the Stipulation, HCU's counsel conceded during the hearing that the Debtors' interest in approximately $445.00 on deposit in an HCU share account (the "Share Account") on the petition date also secures HCU's claim.

Although the parties agree on the underlying facts, they have different views of the controlling law, specifically the meaning of § 1123(b)(5). Because the case law under § 1123(b)(5) is limited, the parties agreed that the court may look to the cases construing § 1322(b)(2) for guidance given the identical language in the two provisions. *In re Graham*, 506 B.R. 745, 748 (Bankr. W.D. Mich. 2014) (looking to cases under § 1322(b)(2) while interpreting § 1123(b)(5)).

HCU urges the court to strictly construe § 1123(b)(5), citing *In re Wages*, 479 B.R. 575 (Bankr. D. Idaho 2012), and similar decisions. Based on the "plain language" of the statute, HCU argues that § 1123(b)(5) shields its claim from modification so long as the Property secures its claim and includes the Debtors' principal residence. The mixed residential and agricultural use of the real estate does not, according to HCU, forfeit the protection. Taking aim at the Debtors' argument, HCU contends that their interpretation depends on engrafting additional language onto the statute, for example by adding the phrase "and only the residence" after "principal residence" where it appears in the statute.

As the court noted during the hearing, the original parties papered the transaction using the Freddie Mac/Fannie Mae uniform note and mortgage documents, suggesting, certainly, the residential character of the transaction if not the Property. Departing somewhat from its "plain language" argument, HCU argues that the underlying transaction is the very sort of transaction

that Congress sought to encourage as a policy matter, to promote homeownership through the mortgage finance industry generally.

The Debtors read the statute differently. They argue that because the Property includes agricultural, income producing acreage, HCU's claim falls outside the protection of § 1123(b)(5), even though the Property is also their residence. They ask the court to consider the totality of the circumstances as they existed when the Debtors borrowed the funds from Post Credit Union (HCU's predecessor in interest). They note that the appraiser who produced the appraisal, submitted as Exh. 6, considered mainly the 11 acres closest to the residential structure, and did not concern himself with the adjacent agricultural fields, where the Debtors have been growing hay as tenants even before they purchased the Property and continuously thereafter. In the Debtors' view, HCU "took" the additional acreage to secure the home loan, and thereby forfeited the protection of § 1123(b)(5). Of course, HCU "took" as collateral only that which the Debtors "gave," but their point is that HCU's claim is secured by more than the residence. In making their argument, the Debtors purport to be construing the statute strictly, as importing the notion that HCU's claim must be secured only by residential, not agricultural, property. In making this argument, they cite several cases from outside our district, but they also have the benefit of *In re Bulson*, 327 B.R. 830 (Bankr. W.D. Mich. 2005), in which Judge Hughes observed:

> Put simply, the Bulsons were permitted under their plan to modify Countrywide's rights as a lender and mortgagee under Section 1322(b)(2), because there was a second dwelling unit on the Holton property. As such, Countrywide's claim against Mr. Bulson was not secured "only by a security interest in real property that is the debtor's principal residence."

*Bulson*, 327 B.R. at 845. Here, substitute the "7.5 acre hayfield" for "a second dwelling unit" and *Bulson*, though not binding, certainly stands as local authority supporting the Debtors' argument.

In addition, the Debtors contend, and HCU conceded during the hearing, that under the membership agreement (Exh. 7), their interest in the funds on deposit in the Share Account also secures HCU's claim, thereby permitting modification under § 1123(b)(5). Ironically, by using its leverage as a depository to fortify its claims, the credit union arguably exposed its rights under the balloon note (and similar claims against other bankrupt members) to modification.

During the argument, HCU's counsel urged the court to disregard HCU's security interest in the Share Account because it arose in an unrelated transaction, is not referenced in the residential loan documents (note or mortgage), and because credit unions generally employ cross-collateralization provisions in their membership agreements.

The court has considered the parties' arguments and concludes that the Debtors have the stronger case. There is no dispute that the Share Account is personal property (not "real estate") and is unlike other types of non-real property collateral which some courts have found do not result in forfeiting a lender's protection under the anti-modification provision of § 1322(b)(2), collateral more closely related to the real estate itself.

Instead, the Share Account is entirely independent personal property that serves as additional collateral. The court cannot grant HCU's motion while applying the plain language of § 1123(b)(5), as it did in *Graham* and is urged to do here, without ignoring the fact that HCU's claim is admittedly secured by a security interest in personal property, even the modest amount of funds in the Share Account. *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (if the language at issue has a plain and unambiguous meaning and the disposition is not absurd the court's task is at an end). Moreover, the value of the additional collateral, here quite modest, is immaterial to the court's conclusion. *See In re Bainer*, No. 15-28344-SVK, 2016 WL 147899, at *2 (Bankr. E.D. Wis. Jan. 11, 2016) (because deposit accounts served as additional collateral for

mortgage loan, lender's claim could be modified under § 1322(b)(2) despite the fact that collateral included residential real estate); *In re Stevens*, 581 B.R. 534, 545 (Bankr. N.D. Ohio 2015) ("Because SunTrust has taken an additional security interest in the monies paid by the Debtors as escrow funds, the Mortgage is not protected from modification by § 1322(b)(2)").

Although the term "real estate that is the principal residence of the debtor" within § 1123(b)(5) may excite different interpretations (including whether mixed use of real property collateral forfeits the protection of the anti-modification provision), there can be no ambiguity regarding whether the Share Account qualifies as real estate -- it most certainly does not.[4] The analogous provision in § 1322(b)(2) "plainly contains two requirements: that the property be real property and that it be the debtor's principal residence." *In re Reinhardt*, 563 F.3d 558, 562 (6th Cir. 2009) (debtor's plan may modify claim secured by mobile home because the mobile home is not real property). The court perceives no reason to construe § 1123(b)(5) differently, nor to explore the legislative history of either provision. *Id.*

Nor is the court persuaded by HCU's argument that the pledge of the Share Account is reflected in a document (Exh. 7) separate from the residential loan documents. The statutory language simply requires the court to identify the claim and the collateral that secures it and as HCU's counsel necessarily conceded during argument the Share Account secures his client's claim. The statutory text provides no basis for distinguishing among prepetition transactions, and the result of strict construction in this case, though perhaps unanticipated, is not absurd. The court is unwilling to engraft onto the statute additional language to preserve the anti-modification protection against forfeiture, particularly given the simplicity of the statutory language (at least in

[4] HCU's admission that its claim is secured by the Share Account makes it unnecessary, and unwise, to choose between the various interpretations of § 1123(b)(5), or to decide whether *Bulson* has withstood the test of time. *See In re Lister*, 593 B.R. 587 (Bankr. S.D. Ohio 2018) (cataloguing several interpretations of the anti-modification provision).

this respect) and the ability of sophisticated commercial actors, such as HCU, to draft around the potential for modification in bankruptcy. Indeed, in drafting the cross-collateral provision of Exh. 7, for example, HCU carefully drafted a clause to avoid taking a security interest in a member's residence to secure, say, the member's credit card or overdraft debts, yet left in place the pledge of the member's shares for all debts. The court, in other words, reads the cross-collateral provision as the Debtors' counsel does. By subscribing to the membership agreement (Exh. 7) the Debtors granted HCU a security interest in specific personal property to secure HCU's claim related to the Property.

Finally, in view of the monthly payments the Debtors must remit to HCU under their confirmed plan, and the apparently uncontested equity cushion, HCU's claim is adequately protected. Under the circumstances, the court finds no cause to grant relief from the automatic stay, and no reason to stray from the treatment of HCU's claim as prescribed in the Debtors' plan.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Motion (ECF No. 298 in B&G Case No. 20-02747) is DENIED.

IT IS FURTHER ORDERED that the Clerk shall enter a copy of this Memorandum of Decision and Order in the Debtors' specific base case (Case No. 20-02765).

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Memorandum of Decision and Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon Andrew Barnes, Esq., Michael P. Hanrahan, Esq., the United States Trustee, and all entities requesting notice of this proceeding.

**IT IS SO ORDERED.**

**Dated May 27, 2021**

Scott W. Dales
United States Bankruptcy Judge