UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MICHIGAN

In re:

MARK ALLEN KRIEGER and JAME SUE SECONDINO KRIEGER,

Debtors.

Case No. DK 19-02148
Chapter 11
Hon. Scott W. Dales

MEMORANDUM OF DECISION AND ORDER

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

I. INTRODUCTION

The court held an evidentiary hearing on November 25, 2019 in Kalamazoo, Michigan, to consider motions for relief from the automatic stay filed by creditors First Financial Bank, N.A. ("First Financial") and BMO Harris Bank ("BMO," and with First Financial, the "Banks"), and for related relief under 11 U.S.C. § 543(d).[1] Chapter 11 debtors Mark and Jame Sue Krieger (the "Debtors"), First Financial, and BMO all appeared through counsel. The court heard testimony from the Debtors, a lender representative, and two real estate professionals, and admitted fourteen exhibits, largely without controversy.

By agreement reached after the preliminary hearing last July,[2] the parties limited the issues for initial consideration to (1) whether the Debtors' prepetition forbearance agreements, which

[1] *See* Motion of First Financial Bank, N.A. for Relief from Stay (ECF No. 36 the "First Financial Motion"); BMO Harris Bank N.A.'s Verified Motion for Relief from the Automatic Stay or, in the Alternative, for Entry of an Order Under § 543(d)(1) Excusing State Court Receiver from Turnover of Receivership Property (ECF No. 22, the "BMO Motion," and with the First Financial Motion collectively referred to as the "Motions").

[2] The preliminary hearing resulted in two nearly identical scheduling orders (ECF Nos. 43 and 45) memorializing the parties' agreement to conduct the final hearing in two phases. They reached this accord primarily to reduce the expense and delay of a protracted evidentiary hearing at which the court would be required to value the real estate for purposes of determining adequate protection and whether the Debtors have equity in the Banks' collateral.

included provisions requiring the Debtors not to oppose stay relief, constitute "cause" to lift the automatic stay; and (2) whether the Indiana state court receiver, Halderman Farm Management & Real Estate Service (the "Receiver"), should be excused from compliance with its turnover obligations under § 543(a) and (b).[3]

This Memorandum of Decision and Order constitutes the court's findings of fact and conclusions of law in accordance with Rule 52, made applicable to this contested matter through Rules 7052 and 9014.[4] For the following reasons, the court will grant relief from the automatic stay, and excuse the Receiver from complying with the turnover obligations under § 543.

II. JURISDICTION AND AUTHORITY

The United States District Court for the Western District of Michigan has subject matter jurisdiction over the Debtors' chapter 11 case, and *in rem* jurisdiction over their property, including the property encompassed in the Indiana receivership estate, which is also part of the Debtors' bankruptcy estate. 28 U.S.C. § 1334(a) and (e); 11 U.S.C. § 541(a). The district court has referred its jurisdiction over the case, related proceedings, and the bankruptcy estate to the United States Bankruptcy Court pursuant to W.D. Mich. LGenR 3.1(a) and 28 U.S.C. § 157(a). The contested matters, commenced when the Banks filed their Motions, are "core proceedings" within the meaning of 28 U.S.C. § 157(b)(2)(E) and (G). The court finds that it has jurisdiction and ample authority to resolve the Motions with a final order, subject to appellate review under 28 U.S.C. § 158. The parties have not suggested otherwise.

[3] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

[4] The court will refer to any Federal Rule of Bankruptcy Procedure or Federal Rule of Civil Procedure simply as "Rule ___," relying on the numbering convention for each set of rules to identify the intended reference.

III. ANALYSIS

1. Factual Background

As set forth in the two forbearance agreements (FFB Exh. H and BMO Exh. E), the Debtors financed their former cattle operation by borrowing substantial sums of money from the Banks pursuant to several promissory notes, which they secured with several mortgages encumbering over 2,300 acres of agricultural or recreational land in Indiana's Vermillion and Vigo counties. Prior to filing their bankruptcy petition, the Debtors raised cattle on their acreage, but after defaulting on their obligations to the Banks in May 2017, they sold their livestock and farming equipment, in consultation with the Banks. By the time they reached bankruptcy court, the Debtors were no longer engaged in cattle ranching, and had relocated to their current residence in Southwest Michigan. As of their bankruptcy filing, the Debtors owed approximately $3,504,619.83 to BMO as represented by the judgment of the Vermillion County court. They also owed First Financial approximately $2,591,268.52 pursuant to a separate Indiana judgment. According to the Debtors' schedules, and their list of 20 largest creditors, the scheduled unsecured claims in this case will not likely exceed $167,629.00. In addition, according to the Debtors' schedules, they also have a substantial but fully secured residential mortgage. Although the court makes no findings regarding the universe of claims, it cannot be denied that the Banks, by far, hold the lion's share of the claims in this case.

BMO and First Financial both assert interests in the same acreage by virtue of prepetition mortgage and judgment liens, with BMO in first position on approximately 1,077 acres in which First Financial holds a junior position, and First Financial in first position on approximately 1,350-1,382 acres in which BMO holds the junior position. *See* BMO Exh. E (Debtors' acknowledgment of obligations to BMO); FFB Exh. H (Debtors' acknowledgment of obligations to First Financial).

The testimony of First Financial's Randy Snyder and Mark Krieger was generally consistent on these points.

The Banks' overlapping interests evidently fostered a great deal of cooperation between them prepetition, producing remarkably similar forbearance agreements -- including an identical paragraph 24 in each agreement through which the Debtors agreed not to oppose the Banks' request for relief from the automatic stay in a future bankruptcy case, as explained more fully below.

The Banks' respective interest in the parcels is different in this respect: BMO sought and, with the consent of the Debtors, obtained an order from the Vermillion County (Indiana) Circuit Court appointing the Receiver to take custody of the 1,077 acres in Vermillion County in which BMO enjoyed the senior position. *See* Agreed Order Appointing Receiver Over Real Estate (BMO Exh. D, the "Receivership Order"). First Financial did not obtain an order appointing a receiver. Instead, it successfully pursued judicial foreclosure in the courts of Vigo County, Indiana, eventually resulting in the Agreed Order of Partial Summary Judgment, Replevin, and Decree of Foreclosure on June 22, 2018 (FFB Exh. D).

By the time the Debtors reached the bankruptcy court, the two state courts had entered foreclosure decrees divesting the Debtors of their equity of redemption, remitting them to a statutory right of redemption that they must exercise before the "hammer falls" at the respective foreclosure sales, but leaving them with title to the property until then. *See In re Collins*, No. 03-10138-JKC-13, 2003 WL 25321292, at *1 (Bankr. S.D. Ind. July 17, 2003) ("a sheriff's sale is complete when the hammer falls"); *In re Masters*, 104 B.R. 83, 85 (Bankr. S.D. Ind. 1989) ("title to the mortgaged property does not pass until sale").

Both Debtors have been involved in agriculture their entire lives and are knowledgeable in several areas of farming including cattle, pesticides, livestock insurance and in some aspects of purchasing and selling farmland. Mr. Krieger is 57 years old, attended two years of college at Michigan State University, studying agriculture. He testified that he has no reading disability, and indeed read a portion of a forbearance agreement without apparent difficulty in open court. Mrs. Krieger, 59 years of age, has also been involved in farming her entire life. She earned a four-year degree from Purdue University, studying agricultural economics. She also holds licenses in many jurisdictions authorizing her to sell livestock insurance throughout the midwestern and eastern United States. She and her husband have been involved in approximately 30 real estate transactions throughout their lives. As the former proprietors of a large livestock operation over several decades, they are sophisticated business people.

The testimony from the witnesses paints a picture of former cattle farmers in Indiana who, throughout the course of several years, became indebted to the Banks for several million dollars. In an attempt to pay down the loans after their debts matured and the Banks pursued legal remedies, the Debtors sold all of their livestock and farming equipment, turned the proceeds over to the Banks, and moved to Berrien County, Michigan. The proceeds of the sales of personal property were not enough to satisfy the Banks' loans.

In 2017, after the Debtors' obligations to the Banks matured, the Banks informally agreed to forebear from collection while the Debtors attempted to refinance their debts or sell their acreage and other property to satisfy the Banks' claims. The testimony in no way suggested an acrimonious relationship, although the borrowers and their lenders did have their disagreements involving the latter's refusal to release liens, or the Receiver's delay in consummating several sales that the former procured. Instead, it appears that the parties generally cooperated with respect to the collection activity, both hopeful that a refinancing would end their debtor-creditor relationship, though both sides were frustrated with the slow pace in liquidating the acreage for a price acceptable to all.

In October 2018, in conjunction with a forbearance agreement (BMO Exh. E), BMO and the Debtors entered into the Receivership Order (BMO Exh. D) which provided for the appointment of the Receiver with authority to sell 1,077 of the roughly 2,055 acres of land the Debtors still owned. Together, the Receivership Order and the Forbearance Agreement dated October 9, 2018 stayed BMO's collection of its prior judgment in order to give the Debtors an additional chance to refinance their obligations to BMO by December 31, 2018. In nearly lockstep fashion, after a similarly extensive but informal period of forbearance, the Debtors and First Financial also penned a formal forbearance agreement that similarly allowed the Debtors until December 31, 2018 to refinance their obligations to First Financial (FFB Exh. H). In exchange for this forbearance, the Debtors acknowledged their debts, waived various claims against their lenders, and agreed to other typical provisions customarily included in forbearance agreements.

On or about January 3, 2019, the Indiana state court appointed the Receiver. From Mr. Litten's credible testimony and BMO Exh. LL, the court finds that the Receiver is a large farm management company providing real estate services in several states and Canada. It is highly qualified as a manager and marketer of agricultural land in Indiana and environs, with decades of relevant experience dating back to 1930, and thousands of acres under management for hundreds of clients.

As mentioned above, each forbearance agreement included an identical paragraph 24 through which the Debtors agreed that should they ever file bankruptcy, they would not oppose the Banks' motions to lift the stay to proceed with their state court remedies (the "Stay Provision").

The Stay Provision, at the heart of the Banks' Motions and the first phase of the final hearing, provides as follows:

> 24. Stay Relief. For value received, the receipt and sufficiency of which is hereby acknowledged, in the event that any of the Krieger Parties becomes the subject of a voluntary or involuntary case under the Bankruptcy Code, such of the Krieger Parties consents to, and shall not oppose, any motion for stay relief filed by the Bank in any such bankruptcy case.

FFB Exh. H at ¶ 24; BMO Exh. E at ¶ 24.

First Financial's representative, Randy Snyder, testified that the Stay Provision was material and that First Financial would not have agreed to forbear from pursuing foreclosure and other collection measures without it. He also stated that the forbearance agreement with the Debtors was the first instance in which he insisted on including a provision like the Stay Provision during his career as a workout officer.

Although both Debtors testified, more or less consistently and more or less implausibly, that they were unaware of the Stay Provisions included within each lender's forbearance agreement, they signed each agreement after consulting with a well-known, experienced bankruptcy attorney, David Krebs, who was assisting them in their dealings with the Banks. For her part, Mrs. Krieger testified that she did not recall whether anyone explained the Stay Provision to her, and that she probably did not understand it, but that she nevertheless signed the forbearance agreements because, in effect, she did not think it would be "like this," by which the court infers the Debtors believed they could avoid a bankruptcy filing through a refinancing or sale.

During the forbearance period, the Debtors hired a real estate sales broker, Jeff Michalic, who has owned his own agricultural real estate agency since 2017. He works primarily in the two counties in which the Debtors' land sits. According to the Debtors (and even the Receiver's representative), Mr. Michalic has a good reputation in the business community where the Debtors formerly conducted their livestock operations. Although he has been involved in substantial transactions (including a sale of approximately 3,000 acres for another receivership involving the Debtors' children and granddaughter), he has far less experience than Mr. Litten. It would appear, however, that what he lacks in experience he may make up in personal touch and local presence, according to inferences the court draws from Mr. Krieger's testimony.

Credible testimony from Mr. Michalic and Mr. Krieger establishes that the former maintains personal relationships with several farmers, hunters and other residents who might be interested in purchasing the Debtors' land. During the forbearance period, he procured several offers to buy various parcels of the Debtors' property, including from a local labor union, Mr. Stan Szczepaniak, and Mike and Margaret Gudenschwager (BMO Exh. CC, DD, EE). According to the testimony of both Mr. Michalic and the Receiver's agent, Todd Litten, Mr. Michalic sent these offers to the Receiver by late January 2019. The Receiver failed to act on the offers for roughly four months. Mr. Litten blamed the delay on the Receiver's counsel who inexplicably sat on the agreements before providing modest modifications reflected within Debtors' Exhs. 3 and 4. He really offered no substantial reason for the delay, and it was evidently a matter of some concern for the Debtors who were clearly frustrated that the Receiver was not promptly responding to Mr. Michalic's efforts on their behalf.

In the meantime, after the extended deadline for the forbearance agreement came and went, and while the Debtors continued their efforts to refinance or market the acreage (including through a failed auction in May 2018), First Financial eventually re-scheduled a sheriff's sale for May 16, 2019.

The rescheduled sheriff's sale evidently prompted the Debtors to file their joint chapter 11 bankruptcy petition on May 15, 2019, just before the sale. Approximately two months later, the

Banks filed their Motions (ECF Nos. 22 and 36), which the Debtors opposed, notwithstanding the Stay Provisions included within each forbearance agreement (ECF Nos. 32 and 42).

As the docket reveals, in more than six months since the petition date, the Debtors have not filed their plan, and have forfeited their exclusive right to do so under § 1121(b). Although they succeeded in obtaining orders from this court approving the three transactions they first brought to the Receiver's attention, Mr. Michalic testified that, as of the hearing, none of the sales had closed and, Mr. and Mrs. Gunderschwager appeared unwilling or unable to close. According to Mr. Michalic, however, the Gunderschwagers may have an alternate buyer willing to make the same offer. Testimony also showed that the acreage at issue in the three post-petition motions (approximately 170 acres) constitutes a small fraction of the acreage included within the Banks' collateral packages.

Under the circumstances, especially given the Debtors' prepetition agreement not to contest the Banks' stay relief motions, the Banks now argue that cause exists to lift the automatic stay under § 362(d)(1).

In addition to seeking stay relief, BMO also requests an order under § 543(d) excusing the Receiver from complying with the restrictions on a "custodian" prescribed in § 543(a). *See* 11 U.S.C. § 101(11)(A) (defining "custodian") and 543(a) (imposing restrictions on custodians). The two types of relief are closely related.

2. <u>Relief Under § 543(d)</u>

Section 543(a) works in tandem with the automatic stay of § 362(a) to presumptively create a collective proceeding designed to protect all bankruptcy stakeholders, not just a creditor like BMO who appears to have won the race of diligence. H.R.REP. NO. 595, 95th Cong., 1st Sess. 340–41 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6296–97 (describing role of the automatic stay). Section 543 works by imposing upon a custodian -- including a "receiver . . . of any of the property of the debtor, appointed in a case or proceeding not under this title" -- several duties:

> (a) A custodian with knowledge of the commencement of a case under this title concerning the debtor may not make any disbursement from, or take any action in the administration of, property of the debtor, proceeds, product, offspring, rents, or profits of such property, or property of the estate, in the possession, custody, or control of such custodian, except such action as is necessary to preserve such property.

11 U.S.C. § 543(a). A custodian must also turn over and otherwise account for estate property. *Id.* § 543(b). The duties are mandatory under the statute, requiring no court order to take effect.[5]

Just as § 362(d) gives the court authority to mitigate the effect of the automatic stay and permit the resumption of collection activity, § 543(d) gives the court discretion, in a proper case, to relieve a receiver from the onus of the restrictions and turnover obligations. The standards, however, are not identical.

"Cause" for relief from the automatic stay under § 362(d)(1) is "an intentionally broad and flexible concept which must, of necessity, be determined on a case by case analysis." *See Sumitomo Trust & Banking Co. v. Grand Rapids Hotel L.P. (In re Holly's Inc.),* 140 B.R. 643, 687 (Bankr. W.D. Mich. 1992). As this court recently observed, "[t]he Bankruptcy Code does not define 'cause,' and courts have interpreted the term flexibly to balance the legitimate interests of creditors and debtors." *In re McLain*, No. DL 17-02218, 2019 WL 2323776, at *2 (Bankr. W.D. Mich. May 29, 2019). Relief under § 543(d), however, is different in several respects, but especially because the statute directs the court to consider only the interests of creditors, without balancing the interests of an insolvent debtor:

[5] Given the pendency of the BMO Motion and with the agreement of the Debtors, however, the court temporarily excused the Receiver from his turnover obligations, pending the outcome of the hearing.

> (d) After notice and hearing, the bankruptcy court --
>
> (1) may excuse compliance with subsection (a), (b), or (c) of this section if the interests of creditors and, if the debtor is not insolvent, of equity security holders would be better served by permitting a custodian to continue in possession, custody, or control of such property . . .

11 U.S.C. § 543(d)(1). A party seeking such relief, here BMO, has the burden of establishing by a preponderance of the evidence that the best interests of the creditors are served by permitting a custodian to retain control of the estate.

As Judge Tucker recently observed, unless the debtor is solvent, "the paramount and sole concern is the interests of all creditors." *In re Skymark Properties II, LLC*, 597 B.R. 391, 397-98 (Bankr. E.D. Mich. 2019). This court has made substantially similar observations. *In re Ying Hua Tam*, No. DK 12–06379, 2012 WL 3555416, at *4 (Bankr. W.D. Mich. Aug. 9, 2012) (citing *In re Northgate Terrace Apartments, Ltd.*, 117 B.R. 328, 332 (Bankr. S.D. Ohio 1990)).

The *Skymark* court, citing an earlier decision from the Northern District of Illinois, identified several factors bearing on the decision to relieve a receiver from the onus of turnover under § 543:

> (1) The likelihood of a reorganization;
> (2) The probability that funds required for reorganization will be available;
> (3) Whether there are instances of mismanagement by the debtor;
> (4) Whether turnover would be injurious to creditors;
> (5) Whether the debtor will use the turned over property for the benefit of its creditors;
> (6) Whether or not there are avoidance issues raised with respect to property retained by a receiver, because a receiver does not possess avoiding powers for the benefit of the estate; and
> (7) The fact that the bankruptcy automatic stay has deactivated the state court receivership action.

Skymark Properties, 597 B.R. at 397 (quoting *In re Falconridge, LLC*, No. 07-bk-19200, 2007 WL 3332769, at *6 (Bankr. N.D. Ill. Nov. 8, 2007)). For its part, this court is on record as stating that the first factor -- the likelihood of a successful reorganization -- "weighs heavily in the balance." *Ying Hua Tam*, 2012 WL 3555416, at *4.

On this first point, the Banks argued during the hearing that six months have passed since the Debtors filed their petition, the exclusivity period under § 1121 expired on September 12, 2019, and yet the Debtors have not filed a chapter 11 plan. Even if they had filed a plan, the plan would not involve reorganization in any traditional sense, because the Debtors have ceased their livestock operations, selling their cattle and equipment months before filing their chapter 11 petition. The court regards the Debtors' failure to file a plan in the more than six months since the petition date as significant, especially juxtaposed against the substantial forbearance that the Banks extended, prepetition. The Debtors induced the Banks' forbearance in part by agreeing to the Stay Provisions which were obviously designed to expedite the Banks' access to their collateral. The first factor favors an order excusing the Receiver under § 543(d).

Because the Debtors have not filed a reorganization plan, it is of course impossible to evaluate the second factor, namely the availability of funds required for reorganization. In fact, the evidence of the Debtors' prepetition livestock and equipment sales suggests that this case is not headed toward any reorganization, but rather liquidation. If the Debtors' reorganization would ultimately depend on liquidation, it seems reasonable to conclude that sale proceeds from individual asset sales would likely fund the reorganization. Whether the Debtors' Indiana acreage is disposed of by the Debtors or by the Receiver would seem to be a matter of considerable importance. As between the Debtor and Mr. Michalic, on the one hand, and the Receiver on the other, the Receiver has substantially greater experience liquidating large tracts of farmland than either of the Debtors or Mr. Michalic. The second factor, therefore, favors returning the liquidation of the acreage to the Receiver's bailiwick.

As for the third factor, the record contains no evidence of Debtor mismanagement. This factor, therefore, counts in favor of turnover. Similarly, on the fourth point, evidence that turnover would be injurious to creditors, other than the Banks, is scant. The testimony of Mr. Litten and Mr. Michalic did not reveal any dramatic differences in the marketing techniques and liquidation of the Debtors' Indiana acreage, although their predicted marketing periods differed somewhat. The only creditors participating in the hearing clearly oppose turnover, so the court infers at least some injury to them, essentially the loss of bargained-for control over their collateral. As for non-participating creditors, there is no evidence they will suffer regardless of whether the court requires turnover or excuses the Receiver under § 543(d), only speculation that the Banks' hasty and self-centered disposition may depress the sale price and increase the Banks' deficiency claims. Moreover, testimony from Mrs. Krieger suggests the existence of substantial unencumbered property -- her 38% interest in a family limited partnership worth several million dollars -- that will remain for unsecured creditors even if the court grants the BMO Motion.

The last two factors do not appear to play a meaningful role in this case. No one has called to the court's attention any chapter 5 avoidance issues that may be lost or compromised by excusing the Receiver from its turnover obligations, and although the Indiana receivership proceeding has been stayed, no one suggested that it has been "deactivated."

As the court earlier noted, it must consider as "paramount" the interest of creditors. At the hearing, BMO and First Financial argued that they hold approximately 99% of the claims in this case. Although the percentage is probably closer to 85% (based on a cursory review of the Debtors' schedules and including their consumer debt), it cannot be gainsaid that BMO and First Financial hold the lion's share of the debt in this case. Accordingly, the majority of creditors, at least in terms of the value of claims, favor granting the BMO Motion. Other creditors expressed no view.

Under these circumstances, and with a statutory standard weighted so heavily in favor of creditor (rather than debtor) interests, the court cannot ignore the preferences that BMO and First Financial have expressed, both before and after the Debtors' bankruptcy filing, for collecting their claims outside of bankruptcy. Moreover, while the other creditors remained silent, the court infers that they are at least indifferent or, stated differently, the costs of opposing the BMO Motion did not warrant their involvement, even as a witness. The interest of all creditors who bothered to participate[6] does favor excusing the Receiver from complying with § 543's turnover and other requirements and returning control of the acreage to the Indiana state court.

As BMO's counsel noted, nothing in today's decision will preclude the Debtors from participating in the receivership proceedings and being heard on questions involving any proposed transactions that may affect the estate and this case. *See* 11 U.S.C. § 323 (trustee is representative of the estate); § 1107 (rights and powers of debtor-in-possession); Fed. R. Bankr. P. 6009 (debtor-in-possession may enter appearance and defend any pending action by or against the debtor in any tribunal); *In re Picacho Hills Util. Co.*, No. 11-13-10742 TL, 2013 WL 1788298, at *11 (Bankr. D.N.M. Apr. 26, 2013) (debtor may participate in post-bankruptcy receivership proceedings). This addresses to some extent the Debtors' concerns about a fire sale.

3. Relief Under § 362(d)

This aspect of the dispute is complicated, somewhat, by the parties' desire to limit the issues during the first phase of the final hearing to the effect of the Stay Provisions on the court's decision. The court acquiesced in the limitation to assist the parties in avoiding the expense

[6] The United States Trustee, who typically advocates for the interests of silent unsecured creditors in chapter 11 cases without an official committee, did not participate in the hearing.

associated with a valuation hearing involving thousands of acres and at least two, likely competing, experts, with the expert reports and depositions that would likely ensue at considerable expense to the parties. In the court's experience, valuation disputes drive most bankruptcy controversies (including relief from the automatic stay)[7] and yet, in this instance, the parties have strenuously avoided offering or even discussing evidence regarding value.

Instead, as the Motions pertain to stay relief, they framed the issue as follows:

> With respect to BMO Harris Bank's request under 11 U.S.C. $362(d)(1) that the Court grant relief from the automatic stay for "cause", on the basis that the Debtors signed a pre-petition forbearance agreement that included a provision whereby the Debtors agreed to consent to and not oppose BMO Harris Bank's motion for stay relief, the Court makes no ruling on such request at this time. Rather, the Court will conduct an evidentiary final hearing at which BMO Harris Bank and the Debtor shall have the opportunity to present evidence in support of or in opposition to such request. …

See Order dated Aug. 13, 2019 (ECF No. 43). The docket includes another stipulated order governing the First Financial Motion with similar limiting language. *See* Order dated Aug. 16, 2019 (ECF No. 45).

Certainly, had the parties simply sought a legal ruling from the court on the enforceability of the Stay Provisions as a matter of law, they could have requested an order in the nature of partial summary judgment under Rule 56, without resorting to an evidentiary hearing. *See* Fed. R. Bankr. P. 9014(c) (incorporating Rules 7056 and 56 into contested matters). They did not. Instead, they clearly intended to present evidence, suggesting to the court at least, that they contemplated a

[7] For example, the concept of "adequate protection" as that term is used in § 362(d)(1) and "equity" as used in § 362(d)(2) frequently require valuation, or at least a comparison of the value of liens and the value of the encumbered property. Similarly, the effectiveness of a reorganization, even one that involves liquidation or refinancing, is heavily dependent on the value of estate property.

ruling involving more than a simple "yea or nay" decision as a matter of law regarding prepetition waivers of the automatic stay.

At the beginning of the hearing, the Debtors pressed the court for a ruling that a prepetition agreement to consent to, and not oppose, relief from the automatic stay is unenforceable as contrary to federal policy, largely for the reasons set forth in *In re Pease*, 195 B.R. 431, 433 (Bankr. D. Neb. 1996) (pre-bankruptcy waiver of the automatic stay of 11 U.S.C. § 362 is unenforceable, *per se*). The Banks, in contrast, sought to enforce the Stay Provisions, noting a trend in cases giving effect to the prepetition waivers, although the Bank's position is more nuanced than the Debtors' view. According to the Banks, enforcing such waivers will foster prepetition settlements. For this and other reasons, they contend that "[a] pre-petition agreement involving a waiver is a primary element in determining if cause exists for relief from the stay." *In re Darrell Creek Associates LP*, 187 B.R. 908, 912 (Bankr. D.S.C. 1995).

The court agrees with much of the *Pease* rationale for treating as unenforceable prepetition waivers, like those embodied in the Stay Provisions, especially the notion that the automatic stay benefits not just debtors, but the creditor body generally. Principally for this reason, enforcing a prepetition waiver against the estate's representative is improvident in the court's view.[8]

Nevertheless, as courts (including this one) frequently observe, because "cause" is not defined in the Bankruptcy Code, they should determine on a case-by-case basis whether relief from the automatic stay is appropriate. *Laguna Assocs. Ltd. P'ship v. Aetna Cas. & Sur. Co. (In re Laguna Assocs. Ltd. P'ship)*, 30 F.3d 734, 737 (6th Cir. 1994) (citation omitted); *see also In re Patriot Solar Grp., LLC*, 569 B.R. 451, 456 (Bankr. W.D. Mich. 2017) (case-by-case basis);

[8] Perhaps enforcing a prepetition waiver against a debtor who is not a fiduciary would be less inconsistent with bankruptcy policy, but the court is not facing that situation in this case. The Debtors remain in possession, and function as fiduciaries.

Chrysler LLC v. Plastech Engineered Prods., Inc. (In re Plastech Engineered Prods., Inc.), 382 B.R. 90, 109 (Bankr. E.D. Mich. 2008) (describing "cause" as an "elastic concept" varying with the circumstances of each case). This *ad hoc*, fact-specific approach to "cause" under § 362(d)(1) is inconsistent with giving prepetition waivers (or consent) talismanic effect, but also inconsistent with ignoring them. The cause determination requires careful balancing and sifting of facts and circumstances. The existence of the Stay Provisions, and the circumstances surrounding the Debtors' execution of the forbearance agreements, are facts to be weighed, though not dispositive *per se*.

The Stay Provisions are part of the compromise the parties reached prepetition to give the Debtors a limited opportunity to refinance or retire their obligations, balanced against the Banks' obvious interest in not prolonging the collection process unduly. The court will not ignore the unfairness that would result from giving the Debtors the benefit of that bargain, while burdening the Banks with the delay that would result from treating the Stay Provisions as a nullity. The sense of urgency and diligence that the Stay Provisions reveal are also factors weighing in favor of finding cause to grant relief from the automatic stay. The Debtors have benefitted from the Bank's forbearance, informal and formal, since their obligations matured in 2017, and their prosecution of the chapter 11 phase of the relationship only promises further delay.

On the other hand, enforcing the Stay Provisions against the Debtors *qua* debtors-in-possession, or using their prepetition contractual undertakings to pressure them into taking action that could be inconsistent with their fiduciary obligations or the interests of other stakeholders points against finding cause. The Debtors, however, offered no persuasive evidence showing that the granting stay relief will adversely affect the interests of creditors. 11 U.S.C. § 362(g)(2) (burden of proof). Indeed, in considering the interests of creditors in connection with the motion under § 543(d), the court regards the Receiver as a more experienced liquidator than the Debtors or their chosen real estate professional, Mr. Michalic, and nothing in the record points to an outcome other than liquidation of the acreage. Moreover, as noted during the hearing, the Debtors may represent the estate in the Indiana receivership proceedings. On balance, the Stay Provisions weigh in favor of finding cause to grant stay relief.

In an early and influential opinion applying § 362(d)(2), the Honorable James D. Gregg noted that the longer a chapter 11 case continues, the heavier the burden on the debtor to justify the injunctive mandate of § 362(a). *See In re Holly's Inc.*, 140 B.R. at 700 (burden on debtor under § 362(d)(2) is less stringent early in chapter 11 case). In words equally applicable to a motion under § 362(d)(1) as (d)(2), Judge Gregg opined that "[a]fter the expiration of the exclusivity period, the balance between the reasonableness of the delay borne by a secured creditor and the debtor's ability to formulate a plan favors the creditor." *Id.*, 140 B.R. at 702. Although Judge Gregg made this observation with respect to motions under § 362(d)(2), and although the parties at this point, have only asked the court to consider "cause" under § 362(d)(1), the expiration of the exclusivity period without any request to extend it signals a sluggish pace of the case, highlighting existing, and forecasting further, delay of the sort the Stay Provisions were designed to mitigate.

The record of the state court proceedings adduced at the first phase of the final hearing in this case shows that the prepetition litigation -- the judicial foreclosure proceedings commenced by each lender -- were reaching their conclusion by the time the Debtors filed this case. Each of the circuit courts, with the agreement of the Debtors, had foreclosed the Debtors' equity of redemption in the Banks' respective real estate collateral and the Debtors commenced their case on the eve of judicial sale resulting from the bargains they struck prepetition and the rulings of two state courts in Indiana.

Certainly, with respect to BMO's collateral, the court's decision under § 543(d) presages stay relief under § 362(d)(1). A decision under either section typically operates as a relaxation of the bankruptcy court's exclusive *in rem* jurisdiction under 28 U.S.C. § 1334(e), or stated differently, abstention in favor of a state court's concurrent, though temporarily-suspended, jurisdiction. The court notes, too, that much of First Financial's collateral is also included within the receivership estate.

Granting relief under § 543(d), obviously influenced by the Debtors' failure to take meaningful steps towards confirmation (for example, by filing a plan and disclosure statement), combined with the unfairness of permitting these sophisticated former ranchers to enjoy forced forbearance under § 362(a) after they convinced the Banks to voluntarily forbear in part on the promise of a quick extrication from eventual bankruptcy proceedings, persuades the court that there is cause at this time to grant relief from the automatic stay under § 362(d)(1).

The Banks did not rush to liquidate their collateral after the Debtors' default in 2017 gave them the right to do so. Instead, they worked with the Debtors to afford them opportunities and to sell or refinance over nearly two years before First Financial's scheduling of the judicial sale triggered the Debtors' bankruptcy filing. That filing prompted another period of forbearance, this time mandated by the automatic stay, after which the Banks again proceeded deliberately, but not hurriedly, and mindful of the costs that the estate would bear if put to the expense of a valuation hearing right out of the gate. The Banks showed respect for the reorganization process that, regrettably, never took shape, and have endured an additional seven months without taking meaningful collection activity.

The evidentiary hearing left the court with the distinct impression, which ripened into a finding, that the Debtors' case is a liquidation proceeding, at least insofar as the Banks' collateral is concerned. In addition, the hearing established that the Banks have found in the Receiver a capable and expert liquidator of farmland, whose experience outmatches the Debtors' or their agent's liquidation experience.

IV. CONCLUSION AND ORDER

The court understands that the Debtors hope to avoid the fire sale prices they predict will attend the Receiver's and First Financial's judicial sales, and the court is mindful of the concern. Nevertheless, at some point forbearance, forced or unforced, must come to an end, and the Debtors offered no meaningful reason to postpone the inevitable liquidation after nearly seven months of bankruptcy court protection. The Debtors have enjoyed a breathing spell from the Banks' collection activity without meaningfully advancing their reorganization. The court finds cause to grant relief from the automatic stay under § 362(d)(1) and relief to the Receiver under § 543(d).

NOW, THEREFORE, IT IS HEREBY ORDERED that the Motions (ECF Nos. 22 and 36) are GRANTED, the Receiver is excused from its obligations under § 543(a) and (b), and the automatic stay is modified to permit the Banks to resume their collection activity in accordance with applicable non-bankruptcy law and their prepetition loan documents.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon the Debtors, Daniel R. Kubiak, Esq., Joseph M. Ammar, Esq., Perry G. Pastula, Esq., and the United States Trustee.

END OF ORDER

IT IS SO ORDERED.

Dated December 18, 2019

Scott W. Dales
United States Bankruptcy Judge