SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: February 18, 2016

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

FRANKLIN S. GOLDEN AND KALI DE JESUS-GOLDEN,	**CASE NO. 15-00582-NPO**
DEBTORS.	**CHAPTER 12**

ORDER DISMISSING BANKRUPTCY CASE, OVERRULING OBJECTIONS TO CONFIRMATION, AND DENYING STAY MOTION

This matter initially came before the Court for hearing on November 6, 2015 (the "November Hearing") on (1) the First Amended Chapter 12 Plan of Reorganization (the "First Amended Plan") (Dkt. 51) filed by the debtors, Franklin S. Golden ("Franklin Golden") and Kali De Jesus-Golden ("Kali Golden") (collectively, the "Debtors"); (2) Wells Fargo's Objection to Debtor's [*sic*] First Amended Chapter 12 Plan of Reorganization [Dkt. #51] (the "Wells Fargo Objection") (Dkt. 68) filed by Wells Fargo Financial Leasing, Inc. ("Wells Fargo"); (3) the Trustee's Objection to the First Amended Chapter 12 Plan of Reorganization (the "Trustee Objection") (Dkt. 71) filed by Harold J. Barkley, Jr., the chapter 12 trustee (the "Trustee"); (4) Wells Fargo's Motion to Terminate the Automatic Stay and to Compel Abandonment of Property of the Estate or, in the Alternative, to Compel Adequate Protection (the "Stay Motion")

(Dkt. 73) filed by Wells Fargo; and (5) the Answer and Response to Wells Fargo's Motion to Terminate the Automatic Stay and to Compel Abandonment of Property of the Estate or, in the Alternative, to Compel Adequate Protection (Dkt. 90) filed by the Debtors in the above-styled chapter 12 bankruptcy case (the "Bankruptcy Case"). This matter came before the Court for a supplemental hearing on January 28, 2016, which was then reset to February 2, 2016 (the "Supplemental Hearing"), on the Order Setting Supplemental Hearing and Requiring Parties to Submit Memorandum Briefs (the "Supplemental Hearing Order") (Dkt. 113). At all hearings on the matter, Craig M. Geno ("Geno") represented the Debtors, Alan Smith ("Smith") represented Wells Fargo, and Todd Johns ("Johns") appeared on behalf of the Trustee. After fully considering the matter, the Court finds as follows:

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of the Bankruptcy Case pursuant to 28 U.S.C. § 1334. These are core proceedings pursuant to 28 U.S.C. § 157(b)(2)(A), (G), and (L). Notice of the Wells Fargo Objection, the Trustee Objection, and the Stay Motion were proper under the circumstances.

Facts

Note and Farming Operations

In April 2006, Wells Fargo loaned $747,837.53 to Franklin Golden's brother, Marcus L. Golden ("Marcus Golden"). Wells Fargo issued a Mississippi Commercial Note (with Fixed Interest Rate) (the "Note") (Stay Mot. at 4, Ex. A) to Marcus Golden, who secured the Note by granting Wells Fargo deeds of trust in real property, including 102 acres of real property in Newton County, Mississippi (*Id*. at Ex. B) and three (3) vacant lots located in Lauderdale County, Mississippi (*Id.* at Exs. B and C). In addition, Marcus Golden granted Wells Fargo a

security interest in certain personal property, including five (5) poultry houses and all equipment located in six (6) poultry houses (*Id*. at 4 and Ex. B), as evidenced by an April 2006 security agreement (*Id*. at Ex. D), an April 2006 UCC-1 Financing Statement filed with the Mississippi Secretary of State reflecting Wells Fargo's interest in the personal property (*Id*. at Ex. E), and a May 2006 UCC-1 Financing Statement filed with the Chancery Clerk of Newton County, Mississippi reflecting Wells Fargo's interest in the fixtures (*Id.* at Ex. F). The Note is also secured by three (3) personal guaranties, including: (a) an April 2006 Continuing Guaranty, executed by Laura Golden, Marcus Golden's ex-wife (*Id*. at Ex. G); (b) a March 2011 Personal Guaranty of lease, loan, or other credit agreement, executed by the Debtors (*Id*. at Ex. H); and (c) a March 2011 Guaranty of lease or loan executed by Golden Farms, LLC ("Golden Farms") (*Id*. at Ex. I).[1] The Debtors owned and operated Golden Farms until October 2013. (Wells Fargo Obj. at 7).

Default and Pre-Petition Transfers of Collateral

At the § 341[2] meeting of creditors and at the November Hearing, Kali Golden stated that the Debtors used the money from the loan to conduct farming operations. (*Id*. at 8). At the November Hearing, Kali Golden testified that either the Debtors or Golden Farms paid Wells Fargo each month and that Wells Fargo accepted payment from them rather than Marcus Golden. Neither Marcus Golden nor the Debtors have made any payments on the Note since Golden Farms ceased operating in October 2013. (Wells Fargo Obj. at 7). Wells Fargo notified Marcus Golden and the Debtors, as guarantors of the Note, that the loan was in default and demanded

[1] Hereinafter, the Court will refer to all individual pieces of collateral collectively as the "Collateral" unless stated otherwise.

[2] All code sections refer to the Bankruptcy Code in title 11 of the U.S. Code unless stated otherwise.

payment. (Stay Mot. at 8). No action was taken to remedy the default, and Wells Fargo initiated foreclosure proceedings on the Collateral. (*Id.*). The foreclosure was scheduled for February 20, 2015. (*Id*. at Ex. K). Days before the scheduled foreclosure, Marcus Golden "transfer[red], convey[ed] and assign[ed] all of his right, title, and interest in and to the Collateral to the Debtors." (*Id*. at 8, Ex. L).

Bankruptcy Case

The Debtors filed a voluntary petition for relief pursuant to chapter 12 of the Bankruptcy Code on February 18, 2015. (Dkt. 1). They filed their original Chapter 12 Plan of Reorganization on May 19, 2015 (the "Plan") (Dkt. 37). On May 21, 2015, the Debtors filed the Motion for Scheduling Order and Related Relief (the "Motion for Scheduling Order") (Dkt. 38). The Trustee filed the Trustee's Objection to the Chapter 12 Plan of Reorganization (the "Objection") (Dkt. 39) on May 22, 2015, arguing that the Plan could not be confirmed absent Wells Fargo's consent. (Obj. at 1). The Trustee also argued that the Plan was not feasible. (*Id.*). On June 19, 2015, Wells Fargo filed the Response of Wells Fargo Financial Leasing, Inc. to Debtor's [*sic*] Motion for Scheduling Order and Related Relief [Dkt #38] (the "Wells Fargo Response to Scheduling Motion") (Dkt. 46).

On June 23, 2015, the Court held a hearing (the "June Hearing") on the Motion for Scheduling Order and the Wells Fargo Response to Scheduling Motion. Johns contended that the Plan impermissibly provided that the Debtors would turnover some of the Collateral to Wells Fargo and keep some of the Collateral in their possession. He argued that under the law of the Fifth Circuit Court of Appeals, a chapter 12 debtor cannot divide collateral without the creditor's consent. Smith agreed with Johns' interpretation of Fifth Circuit law, stating that Wells Fargo

also objected to the division of the Collateral. Geno stated that he would amend the Plan if Johns and Smith were correct that the Debtors could not divide the Collateral.

First Amended Plan and Objections

The Debtors filed the First Amended Plan on July 30, 2015, which contained an explanation of the Debtors' proposed farming operations. (First Amended Plan, Ex. A at 4-11). The First Amended Plan provided that the Debtors would participate in the "Farm to Table" movement and that they plan to convert Golden Farms into a farm that provides "naturally grown beef, goat and turkey meat to the health [conscious] individual." (*Id.*). The First Amended Plan did not indicate how the Debtors would pay for the animals or equipment, or how they plan to convert Golden Farms into a free range animal farm.

BankPlus filed the Objection of BankPlus to Confirmation of First Amended Chapter 12 Plan (the "BankPlus Objection") (Dkt. 67) on August 21, 2015, arguing that the Debtors owed it $8,163.86, not $1,400.00 as listed in the First Amended Plan. BankPlus and the Debtors entered into an agreed order withdrawing the BankPlus Objection on January 26, 2016. (Dkt. 123).

Wells Fargo filed the Wells Fargo Objection on August 21, 2015. Wells Fargo first argued that the First Amended Plan is not feasible because the Debtors did not provide any evidence tending to prove that it is possible to convert a poultry farm into a free range farm. (Wells Fargo Obj. at 2-3). It argued that the First Amended Plan offered "vague and speculative" assertions regarding the plan to convert Golden Farms into a free range farm. (*Id.* at 2). As to the possibility of using the Collateral to operate a free range farm, Wells Fargo took issue with the absence of any grower's agreement, which in general is an agreement where a poultry company provides the birds, feed, and medicine and the farmer provides the land, equipment, utilities, and labor. (*Id.* at 1). According to Wells Fargo, the Debtors testified at the

§ 341 meeting that no poultry company in their geographic area is willing to enter into a growers agreement with them. (*Id.*). Wells Fargo also argued that the First Amended Plan impermissibly divides its Collateral under Fifth Circuit law. (*Id.* at 3-4). Finally, Wells Fargo argued that because it is a secured creditor, the First Amended Plan cannot be confirmed without its consent pursuant to § 1225(a)(5)(A).[3] (*Id.* at 4).

The Trustee filed the Trustee Objection on August 26, 2015. The Trustee objected to confirmation, arguing that the First Amended Plan cannot be confirmed without Wells Fargo's approval. (Trustee Obj. at 1). The Trustee also argued that the First Amended Plan is not feasible. (*Id.*).

Stay Motion

Wells Fargo filed the Stay Motion on September 18, 2015. Wells Fargo argued that the stay should be terminated for cause pursuant to § 362(d)(1) or § 362(d)(2) because the Debtors do not have equity in the Collateral and it is not necessary for an effective reorganization. (Stay Mot. at 18). According to Wells Fargo, the state of the Collateral is rapidly deteriorating. (*Id.* at 12). The Debtors admitted to selling portions of Wells Fargo's collateral pre-petition, and they have not paid taxes on the Collateral, have not paid for insurance on the Collateral, and have not provided adequate protection. (*Id.* at 9-17). Wells Fargo also reiterated its arguments from the Wells Fargo Objection that the First Amended Plan is not feasible and impermissibly divides the

[3] A plan may also be confirmed if the elements for cram down under § 1225(a)(5)(B)(i)-(ii) are satisfied, or if the debtor surrenders the collateral under § 1225(a)(5)(C). The Debtors did not propose to surrender the Collateral, so § 1225(a)(5)(C) is not satisfied. As an alternative to acceptance, the Debtors could have met the cram down option if the plan provided that Wells Fargo would retain a lien securing its claim and receive property having a value, as of the effective date of the plan, not less than the allowed amount of the secured claim. 8 COLLIER ON BANKRUPTCY ¶ 1225.03[1] (16th ed. 2015); *see* 11 U.S.C. § 1225(a)(5)(B)(i)-(ii). The Court does not reach the merits of whether the Debtors have satisfied any part of § 1225(a).

Collateral. (*Id.* at 20-24). Wells Fargo argued in the alternative for the Court to compel adequate protection. (*Id.* at 25).

October Hearing

1. Hearing Reset

The November Hearing was originally scheduled for October 15, 2015 (the "October Hearing"). The morning of the October Hearing, Geno called the Courtroom Deputy and informed her that he was ill and could not attend. Smith informed the Courtroom Deputy that he had an out-of-state witness, Victor Dutchuk, Jr. ("Dutchuk"), and preferred to proceed with his testimony as scheduled, but did not oppose a continuance. The Court ordered that the October Hearing be continued, but to accommodate both parties, it allowed Dutchuk to testify. Geno's law partner, Jarret P. Nichols, attended the October Hearing on behalf of Geno to preserve any objections to Dutchuk's testimony. After the October Hearing, Dutchuk was to make himself available for cross-examination by telephone.[4]

2. Dutchuk's Testimony

a. Dutchuk is an authorized Wells Fargo agent who works with customers who are having trouble making payments. He also helps with litigation, bankruptcy, and foreclosure proceedings. In 2011, Wells Fargo allowed the Debtors to become guarantors on the Note because Marcus Golden was not involved in the farming operation. Dutchuk began working on the Debtors' file eighteen (18) months ago and tried to reach a forbearance agreement with the Debtors to sell the Collateral because there was no poultry operation, grower's agreement, or income, and because the Note was in default.

[4] Dutchuk was not cross-examined after the October Hearing, and his testimony was closed.

b. Marcus Golden transferred title of the Collateral to the Debtors a few days prior to the foreclosure date of February 20, 2015. Neither Marcus Golden nor the Debtors sought Wells Fargo's permission to transfer the Collateral, and did not otherwise notify Wells Fargo of the transfer.

c. Wells Fargo wants the Debtors to pay for the following: (a) the force-placed insurance obtained by Wells Fargo on all of the Collateral; (b) the unpaid real estate taxes for 2013 and 2014; and (c) the portion of Wells Fargo's Collateral that they sold pre-petition. Wells Fargo believes the highest value and best use of the Collateral is to use it to operate a poultry farm and that Golden Farms should not be converted into a free range farm. According to Dutchuk, in his opinion as a lay person with seven (7) years of experience helping debtors restructure loans and foreclosures, the longer the poultry houses sit on the property without being used, the faster they deteriorate. Thus, Wells Fargo desires to obtain control of the Collateral.

November Hearing

At the November Hearing, Geno stated that the Debtors and BankPlus had reached an agreement on the BankPlus Objection, so the only objections to confirmation before the Court at the November Hearing were the Wells Fargo Objection and the Trustee Objection (collectively, the "Objections"). At the end of the November Hearing, the parties stipulated that the Debtors would pay $219,500.00[5] to Wells Fargo. The parties further agreed to the 5.00% *Till* rate for calculating interest and agreed that the stipulated amount of $219,500.00 would be repaid over twenty (20) years. At the conclusion of the November Hearing, several issues raised in the Objections remained for the Court's consideration.

[5] Although the parties agreed that the Debtors would pay Wells Fargo $219,500.00 over twenty (20) years at 5.00%, they did not specify whether this amount was the stipulated value of the Collateral or the stipulated balance of the debt. The Court presumes that $219,500.00 is the stipulated value of the Collateral.

1. Kali Golden's Testimony

a. Kali Golden owns 51.00% of Golden Farms and conducts approximately 95.00% of the farming operations. Franklin Golden and Marcus Golden each own 24.5% of Golden Farms. The Debtors did all of the "leg work" in obtaining the Note but when their application was denied, Marcus Golden obtained the Note. Because the Debtors ran the farm, they had a vested interest in Golden Farms, and wanted to take responsibility for the Note. Thus, the Debtors asked to become guarantors in 2011. The Note became delinquent when Tyson Foods, Inc. ("Tyson") terminated its grower's agreement with Golden Farms. Until that point, the Note was paid to Wells Fargo via direct deposit when Tyson paid Golden Farms pursuant to the grower's agreement.

b. When Kali Golden became aware of the scheduled foreclosure of the Collateral, she called Wells Fargo and attempted to resolve the matter. Wells Fargo and the Debtors could not reach an agreement, and Marcus Golden deeded all of the Collateral to the Debtors in February 2015. Kali Golden knew about the scheduled foreclosure and asked Marcus Golden to transfer the Collateral because the Debtors intended to file for bankruptcy and Marcus Golden had nothing to do with Golden Farms.

c. In deciding to convert Golden Farms into a free range farm, Kali Golden conducted online research, visited local farms and farmers markets, and considered the demand for grass fed and free range products in Mississippi. According to Kali Golden, 70.00% of the world's population eats goat meat and there is a shortage of goat meat in Mississippi. Therefore, the Debtors want to meet the demand for goat meat by participating in the "Farm to Table" movement, which means that Golden Farms would raise the product and sell it directly to the consumer. Additionally, the farmers market in Jackson only has a few free range and grass

fed providers. The Debtors would have a competitive advantage because Golden Farms is located near Highway 20, which is seventy (70) miles away from Jackson and is close to Meridian, Mississippi.

d. Kali Golden also conducted research on the Mississippi State University Department of Agriculture website and determined that she could graze ten (10) cattle per acre of land. Based on this formula, Golden Farms has enough land to conduct the free range operation proposed in the First Amended Plan.

e. Kali Golden prepared a "Projected Farm Operation" chart (the "Operation Chart") and a "Personal Projections" chart (Nov. Hr'g Debtors Ex. 3) in addition to the proposed business plan (First Amended Plan, Ex. A). She prepared the Operation Chart to evidence Golden Farms' projected cash flow. She estimated the costs and expenses of converting Golden Farms into a free range turkey, beef, goat, and laying hen farm, and calculated income by estimating the projected proceeds from selling meat and eggs. The Operation Chart accounted for holidays with a greater demand for certain types of meat. It also took the cost of purchasing animals into consideration. Additionally, the projections accounted for the fact that she would purchase hay to feed the animals during the winter months or droughts when there is no grass for the animals. Negative cash flow would be supplemented through Franklin Golden's income.[6]

f. Five (5) of the six (6) poultry houses are in such bad condition that no benefit would be derived from insuring them. Kali Golden obtained insurance on the poultry house the Debtors were using, the Debtors' mobile home, and one other building the week of the

[6] According to Kali Golden, Franklin Golden became a licensed nurse practitioner two weeks prior to the November Hearing, and his yearly salary is $140,000.00. Although there was some initial confusion about whether $140,000.00 was exclusive of bonuses, Kali Golden testified that the $140,000.00 projected salary includes bonuses. Franklin Golden's base salary is $33.00 an hour, or about $70,000.00 a year, with the potential for another $70,000.00 in bonuses.

November Hearing. Kali Golden also admitted to selling portions of the Collateral pre-petition. She sold electric fans from one of the poultry houses in early 2015 to pay bills. Kali Golden claimed that she did not know the fans were part of Wells Fargo's Collateral and immediately stopped selling the equipment after consulting with Geno. In regard to the force-placed insurance, past-due taxes, and the pre-petition sale of some of the Collateral, the Debtors agreed to: (a) refund Wells Fargo for the amount of the insurance Wells Fargo placed on the poultry house the Debtors are utilizing within forty-five (45) days; (b) pay the past-due taxes;[7] and (c) repay Wells Fargo $3,500.00 for the pre-petition sale of collateral within forty-five (45) days.

2. Attorneys' Arguments

In regard to the division of Wells Fargo's Collateral, Geno stated that § 1203 allows a debtor in possession to perform all of the duties of a chapter 11 trustee.[8] Geno further stated that under § 1206, a trustee can sell assets "free and clear of any interest in such property." Geno further argued that § 1222, which governs plan contents, provides for the sale of all or any part of the property of the estate under § 1222(b)(8), which is contrary to the *In re Williams* case.[9] Geno stated that the First Amended Plan is feasible because Kali Golden's testimony is the only evidence as to feasibility and her testimony indicated that the Debtors would be able to successfully reorganize into a free range farming operation.

[7] The Debtors agreed to pay the 2014 taxes by June of 2016, the 2015 taxes by September of 2016, and all future taxes on time.

[8] There are exceptions to this general principal. Section 1203 provides that a chapter 12 debtor in possession has all the rights, "other than the right to compensation under section 330" and powers, and "shall perform all the functions and duties, except the duties specified in paragraphs (3) and (4) of section 1106(a)" of a chapter 11 trustee, "[s]ubject to such limitations as the court may prescribe . . . ."

[9] Wells Fargo argued in the Stay Motion and at the November Hearing that *Williams v. Tower Loan of Mississippi (In re Williams)*, 168 F.3d 845 (5th Cir. 1999), prohibits debtors from dividing an undersecured creditor's collateral.

Smith argued that Kali Golden's testimony and the limited evidence the Debtors presented demonstrated their "wishful thinking." He stated that Kali Golden came up with the numbers and has provided no evidence of how she will actually make it happen. According to Smith, the First Amended Plan is highly speculative and that in the ten (10) months since the Debtors filed for bankruptcy, they have had no income at all. Johns agreed that the First Amended Plan does not appear to be feasible, stating that the Debtors presented insufficient evidence of feasibility.

Secured Creditors Did Not File Proofs of Claims

While writing the Opinion after the November Hearing, the Court discovered that none of the Debtors' secured creditors filed a proof of claim in the Bankruptcy Case. This fact was not brought to the Court's attention by any of the parties. The Court entered the Supplemental Hearing Order on December 29, 2015. (Dkt. 113). The Court noted that pursuant to FED. R. BANKR. P. 3002(c) ("Rule 3002(c)"), the bar date for filing non-governmental proofs of claims was July 6, 2015, a deadline that was noticed to all scheduled creditors.[10] (Supp. Hr'g Order at 2). The Court stated that the "issues not addressed in the pleadings or at the November Hearing are whether [the secured creditors] are entitled to participate in distributions under the First Amended Plan since they did not file a timely proof of claim; and whether BankPlus and Wells Fargo may object to confirmation." (*Id*). The Court cited *In re Boucek,* 280 B.R. 533 (Bankr. D. Kan. 2002), 11 U.S.C. § 501-502, and FED. R. BANKR. P. 3002(a) in the Supplemental Hearing Order. The Court set the Supplemental Hearing and required the parties to submit

[10] The deadline for a governmental unit to file a proof of claim under FED. R. BANKR. P. 3002(c)(1) is "not later than 180 days after the date of the order for relief." The Court may also enlarge the time for a governmental unit to file a proof of claim for cause, but only upon a motion made before the deadline. FED. R. BANKR. P. 3002(c)(1).

supplemental briefs on the limited issue of how a secured creditor's failure to file a timely proof of claim in a chapter 12 case affects the Bankruptcy Case. (Supp. Hr'g Order at 2-3).

1. Memorandum Briefs

Prior to the Supplemental Hearing, the Trustee filed the Trustee's Memorandum of Authorities on the Filing of Proofs of Claim in a Chapter 12 Bankruptcy (the "Trustee Memorandum Brief") (Dkt. 115). The Trustee distinguished the Bankruptcy Case from *In re Boucek,* arguing that no party in the Bankruptcy Case "has asserted that Wells Fargo should not be allowed to participate in the confirmation process due to the failure to timely file a proof of claim." (Trustee Memo. Br. at 2). The Trustee argued that secured creditors cannot participate in a chapter 12 plan unless they file a proof of claim, but that untimely filing a proof of claim is not an absolute bar and the proof of claim can be allowed if there are no objections. (*Id.* at 3).

The Debtors filed the Debtors' Memorandum of Points and Authorities with Respect to the Failure to File Proofs of Claim in a Chapter 12 Bankruptcy Case (the "Debtor's Memorandum Brief") (Dkt. 116) before the Supplemental Hearing. Contrary to the position of the Trustee, the Debtors contended that there is no exception under Rule 3002 that authorizes the Court to allow a late filed proof of claim. (Debtors' Memo. Br. at 2). Accordingly, the Debtors argued that "whatever claim Wells Fargo may have is now an *in rem* claim since it did not file a proof of claim. . . ." (*Id.* at 3). The Debtors further argued that "failure of a secured creditor to file its proof of claim means it retains its lien, but loses its right to a distribution under the plan." (*Id.* at 5). The Debtors concluded that although Wells Fargo cannot participate in distribution under the First Amended Plan since it did not file a timely proof of claim, the Debtors must retain the Collateral to reorganize successfully. (*Id.*). Accordingly, the "Debtors are willing to

pay the secured claims of Wells Fargo under the alternative the Court picks as set out in the Debtor's [*sic*] Plan." (*Id.* at 6).

Wells Fargo filed the Supplemental Brief of Wells Fargo Regarding Plan Confirmation and Stay Relief Issues (the "Wells Fargo Memorandum Brief") (Dkt. 117). In the Wells Fargo Memorandum Brief, Smith argued for the first time that Wells Fargo is an unsecured creditor. Smith stated that "the only claim of Wells Fargo to be adjusted in the instant bankruptcy case is the *unsecured* guaranty claim." (Wells Fargo Memo. Br. at 4). For over ten (10) months, all parties, including Wells Fargo, maintained that Wells Fargo was a secured creditor. Until the filing of the Wells Fargo Memorandum Brief, Smith contended in *at least* three (3) pleadings and during *at least* one (1) hearing that Wells Fargo was a secured creditor.[11] Smith did not explain his change in position, or even acknowledge that he was making a change in his position. Instead, Smith seemed to argue that Wells Fargo always contended that it was an unsecured creditor.

2. Supplemental Hearing

At the Supplemental Hearing, Geno argued that Wells Fargo's lien will pass through the Bankruptcy Case unaffected, despite the fact that it did not file a proof of claim. According to Geno, the Debtors need the Collateral in order to reorganize successfully. Therefore, the Debtors are willing to waive the proof of claim requirement and reobligate themselves to Wells Fargo.

The Court noted at the Supplemental Hearing that Smith had neglected to address the fact that he changed his entire legal position in the Wells Fargo Memorandum Brief. It was apparently Smith's position that the Court should have reviewed the documents filed by Wells

[11] At the Supplemental Hearing, the Court noted that, at a minimum, Wells Fargo characterized itself as a secured creditor in: a) the Wells Fargo Response to Scheduling Motion; b) the Wells Fargo Objection at 4, 5, and 6; c) the Stay Motion at 1, 10, 14, and 23; and d) the November Hearing at 10:14:30 a.m. and 1:03:20 p.m.

Fargo, and it would have been able to discern that Wells Fargo actually was unsecured. Essentially, Smith seemed to argue that the Court should have disregarded his, Geno's, and Johns' characterization of Wells Fargo as a secured creditor for a ten (10) month period. Although Smith argued at the Supplemental Hearing that Marcus Golden improperly transferred the Collateral to the Debtors, he conceded that Wells Fargo never sought any relief. Although the Collateral was titled in the name of the Debtors, was property of the Debtors' estate, and was secured by a lien of Wells Fargo, Wells Fargo was somehow an unsecured creditor according to Smith.[12]

Smith's position at the Supplemental Hearing continued to contradict his previous representations to the Court. Smith argued that the Court should deny the Wells Fargo Objection that *he filed* based on lack of standing. He also argued that because Wells Fargo was unsecured, it had no ability to receive payments through the First Amended Plan without a proof of claim. Since Wells Fargo would not be paid through the First Amended Plan as a result of its failure to

[12] Pursuant to § 506(a)(1), an "allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property. . . ." Thus, a creditor is secured when the claim is "secured by a 'lien' on some specific item of property in which the estate has an interest . . . ." 4 COLLIER ON BANKRUPTCY ¶ 506.03[1]. Section 101 defines a lien as a "charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(37). Therefore, "a claim may be a secured claim regardless of whether the relevant lien was created by agreement, statute, common law, equity, or judicial process." 4 COLLIER ON BANKRUPTCY ¶ 506.03[1]. When Marcus Golden transferred ownership of the Collateral to the Debtors subject to Wells Fargo's lien, Wells Fargo from that point forward had an interest in the Collateral owned by the Debtors. *See* MISS. CODE ANN. § 75-9-315 (a security interest in collateral survives a transfer, sale, lease, or other disposition of collateral, unless the secured party authorized the disposition free of the security interest); *see also* U.C.C. § 9-315 cmt. 7 (providing that the secured party may repossess collateral from the transferee or maintain an action for conversion). By its own admission, Wells Fargo did not seek relief from this allegedly improper transfer. The Debtors have an interest in the Collateral because they own, occupy, and/or use it. Therefore, even if Wells Fargo did not initially hold a secured claim against the Debtors, its claim became secured when Marcus Golden transferred the Collateral to the Debtors.

file a proof of claim, Smith argued that the Court should grant Wells Fargo's Stay Motion. All of these new arguments came to Smith when he purportedly became more "focused" on the position of Wells Fargo after receiving the Supplemental Hearing Order and realizing that no proof of claim was filed.

Johns argued at the Supplemental Hearing that the Trustee allows claims to be paid in chapter 11 without a proof of claim, but that is not the case in chapter 12. According to Johns, it is of major consequence in the Bankruptcy Case whether Wells Fargo is secured or unsecured because the Trustee objects to untimely filed unsecured proofs of claims, but not secured proofs of claims.[13] He further stated that Wells Fargo is holding the confirmation process and the Collateral hostage.

The Court gave the parties over a week to attempt to resolve the issues raised in the Supplemental Hearing Order and at the Supplemental Hearing. The parties were unable to reach any agreement.

Discussion

Despite its best efforts, the Court is unable to confirm the First Amended Plan and allow the parties to proceed with the Bankruptcy Case. Wells Fargo neglected to file a timely proof of claim under Rule 3002(c), and the Debtors and the Trustee failed to file a proof of claim on behalf of Wells Fargo under Federal Rule of Bankruptcy Procedure 3004 ("Rule 3004") after the bar date fixed pursuant to Rule 3002(c). The Debtors and the Trustee could have filed such a

[13] The Court does not reach the merits of this practice, but the bankruptcy court in an analogous chapter 13 case, *In re Hogan*, held that "filing a proof of claim is a prerequisite to [a secured] claim's allowance." 346 B.R. 715, 719 (Bankr. N.D. Tex. 2006). Thus, "if a creditor elects not to file a claim, then it also elects not to be paid under the plan." *Id.* at 720. Further, "the court has *no* discretion to enlarge the time under [Rule 3002(c)] for a creditor's filing a proof of claim other than in the case of a claim by a governmental unit, an infant, or an incompetent person." *Id.* at 721 (quotation omitted).

claim "within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c). . . ." FED. R. BANKR. P. 3004. Rule 3004 was enacted to give "a debtor or trustee the right to file a proof of claim for a creditor who, for whatever reason, does not file a timely proof of claim . . . ." *In re Hogan*, 346 B.R. at 723. Because Wells Fargo did not timely file a proof of claim and neither the Debtors nor the Trustee filed a proof of claim on its behalf, Wells Fargo may not participate in the First Amended Plan. Without the right to pay for the Collateral through the First Amended Plan, the Debtors will not be able to reorganize.

In *In re Boucek,* the bankruptcy court was faced with a similar issue when an unsecured creditor challenged a secured creditor's ability to participate in a chapter 12 plan after it failed to file a timely proof of claim. The bankruptcy court first held that even if the "informal proof of claim" doctrine applies to chapter 12 cases, the secured creditor failed to satisfy it. *In re Boucek,* 280 B.R. at 535. It further concluded that excusable neglect does not apply to a secured creditor's failure to file a proof of claim in a chapter 12 case. *Id.* at 536. Importantly, the bankruptcy court held that secured creditors in a chapter 12 case are required to file a timely proof of claim. *Id.* at 538. The bankruptcy court also raised a troubling conundrum that arose because the secured creditor did not have an allowed claim: if the secured creditor's motion for stay relief is granted, the debtor will not be able to successfully reorganize, which would result in unsecured creditors receiving far less than they would have received under a successful reorganization. *Id.* at 539.

Pursuant to its discretionary power under § 105(a), the Court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Further, "[n]o provision of this title…shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to

enforce or implement court orders or rules, or to prevent an abuse of process." *Id*. The Court finds that it is unnecessary to solve the conundrum raised in *In re Boucek* because the proper remedy is to dismiss the Bankruptcy Case without prejudice so that the Debtors may refile if they so choose. If Wells Fargo again neglects to file a proof of claim, the Debtors and the Trustee have a remedy provided by Rule 3004. At the current juncture, after a tremendous waste of time, money, and judicial resources, the Court has no choice but to dismiss the Bankruptcy Case without prejudice. As a result, the Objections should be overruled as moot, and the Stay Motion should be denied as moot.

IT IS, THEREFORE, ORDERED that the Bankruptcy Case is hereby dismissed without prejudice.

IT IS FURTHER ORDERED that the Objections are hereby overruled as moot.

IT IS FURTHER ORDERED that the Stay Motion is hereby denied as moot.

##END OF ORDER##