

**TO THE HONORABLE ROBERT KWAN, UNITED STATES BANKRUPTCY
JUDGE, THE OFFICE OF THE UNITED STATES TRUSTEE, THE OFFICIAL
COMMITTEE OF UNSECURED CREDITORS, AND OTHER PARTIES-IN-INTEREST:**

James C. Gianulias ("Mr. Gianulias"), one of the debtors and debtors-in-possession in these substantively consolidated cases (the "Debtors"),¹ hereby opposes the motion for relief from the automatic stay (the "Motion") filed by Fasching Haus East Condominium Association, Inc. ("Fasching Haus") with respect to real property located at 747 S. Galena Street, Suite 340, Aspen, Colorado 81611 (the "Property").

INTRODUCTION

By the Motion, Fasching Haus seeks relief from the automatic stay pursuant to section 362(d)(2) to allow it to foreclose on the Property. Fasching Haus contends that Mr. Gianulias has no equity in the Property and that the Property is not necessary for an effective reorganization. The timing of the Motion is unfortunate because the Debtors just recently achieved a major milestone in their cases – a settlement with the Committee that forms the basis of a revised plan of reorganization likely to be confirmed. The amended plan filed by the Debtors provides that the allowed claims of Fasching Haus will be paid in full. The Debtors believe that, under the circumstances of this case, the Motion should be denied.

Among other reasons, the Motion should be denied because Fasching Haus is an oversecured creditor with a substantial equity cushion (approximately 85%). Fasching Haus contends that it is owed \$142,908.84, secured by a lien for special assessments in connection with improvements made to the Property, and asserts that it is entitled to a "superpriority" lien under applicable Colorado law. Fasching Haus does not allege that it is undersecured and, in fact, acknowledges that the fair market value of the Property is approximately \$945,000. As an oversecured creditor with an equity cushion of more than \$800,000, Fasching Haus should not be entitled to relief from the stay, which could trigger a foreclosure sale for an amount significantly

¹ Cameo Homes, a California corporation ("Cameo"), is the other debtor herein.

1 below the market value of the Property, to the detriment of the junior lienholders, as well as the
2 Debtors' unsecured creditors.

3 Furthermore, the Property is necessary for the Debtors' reorganization, which alone
4 provides a basis for denial of the Motion. On November 9, 2009, the Debtors filed a plan of
5 reorganization (the "Plan") which is predicated on the continued ownership and operation of the
6 Debtors' real estate businesses, and making payments to creditors from income generated from the
7 rental of the estates' properties. As the real estate market improves, the Debtors may elect to sell
8 certain properties in a manner intended to minimize any deficiency claims that may be asserted
9 against the Debtors and thereby maximize the return to both secured and unsecured creditors.
10 Hence, continued ownership of the Debtors' portfolio of properties is vital to the success of the
11 Plan. The Debtors have proposed a confirmable plan in good faith, and fairness dictates that they
12 be allowed an opportunity to submit their Plan to creditors for a vote.

13 In sum, there are insufficient grounds to justify granting relief from stay under the
14 circumstances -- particularly when the Debtors have just filed a confirmable Plan which provides
15 that the allowed claim of Fasching Haus will be paid in full. As a result, the Motion should be
16 denied.

17 **OBJECTION**

18 **A. Relief from Stay Under Section 362(d)(2) Should be Denied Because Fasching Haus is** 19 **Oversecured and Granting the Motion may Result in Harm to Other Creditors**

20 In order to obtain relief from the automatic stay under section 362(d)(2), a movant must
21 first demonstrate that it is an undersecured creditor. "Once the movant under § 362(d)(2)
22 establishes that he is an undersecured creditor, it is the burden of the debtor to establish that the
23 collateral at issue is 'necessary to an effective reorganization.'" United Savings Association of
24 Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 375-376 (1988); see also In re
25 Bonner Mall Partnership, 2 F.3d 899, 902 (9th Cir. 1993) (citing same).²

26 ² In determining whether a debtor has equity in a property, bankruptcy courts have used
27 two different approaches. Under the first approach, courts calculate the debtor's equity to be "the
28 amount or value of a property above the total liens or charges". Stewart v. Gurley, 745 F.2d 1194,
1196 (9th Cir. 1984). Under the second approach, courts subtract from the value of the collateral
only those amounts owed to the lienholder seeking relief and any senior lienholders. See, e.g.,

Courts have held that “the existence of an equity cushion . . . is the classic form of protection for a secured debt . . . [and] the existence of an equity cushion, standing alone, can provide adequate protection.” Pistole v. Mellor (In re Mellor), 734 F.2d 1396, 1400 (9th Cir. 1984) (citations omitted). Accord First Eastern Bank v. Llewellyn (In re Llewellyn), 27 B.R. 481, 482 (Bankr. M.D. Pa. 1983); City Nat’l Bank v. San Clemente Estates (In re San Clemente Estates), 5 B.R. 605, 610 (Bankr. S.D. Cal. 1980); In re Stratbucker, 4 B.R. 251, 253 (Bankr. D. Neb. 1980). In the Motion, Fasching Haus contends that “Fasching Haus holds a ‘superpriority’ lien against Unit 340 for all unpaid condominium assessments and costs related thereto” in the amount of \$142,908.84. Memorandum of Points and Authorities, ¶ 9, lines 8-10; see Declaration of Frederick F. Peirce, ¶ 6 and Exhibit “A”. For purposes of this Opposition, Mr. Gianulias accepts the foregoing as true. Furthermore, Fasching Haus has not alleged, nor has it provided any evidence, that the value of the Property is declining such that Fasching Haus is likely to become an undersecured creditor. In fact, Fasching Haus acknowledges that the Property has a value of approximately \$945,000, more than sufficient to satisfy Fasching Haus’s secured lien and to leave an equity cushion of approximately \$800,000. Based on the information contained in Fasching Haus’s own Motion, Fasching Haus is an oversecured creditor with a substantial equity cushion, and as such is adequately protected.

“This [C]ourt has the duty to preserve whatever equities the Debtor may have not only for rehabilitation purposes, but to protect the rights of all creditors in the potential fund.” In re El Patio, Ltd., 6 B.R. 518, 521-22 (Bankr. C.D. Cal. 1980). Lifting the stay and permitting Fasching Haus to foreclosure at this time would benefit Fasching Haus at the expense of the junior lienholders and the Debtors’ unsecured creditors. The Debtors believe that under favorable market conditions that the Property can be sold for an amount sufficient to pay all secured creditors in full or substantially in full, thereby reducing any potential deficiency claims that would otherwise be asserted against the Debtors’ estates. By contrast, the sale price at a foreclosure sale is likely to be far lower than if the Property is marketed for a reasonable period of time consistent with current

Asquino v. Palmer River Realty, Inc. (In re Palmer River Realty, Inc.), 26 B.R. 138, 140 (Bankr. D.R.I. 1983).

1 market conditions. As a result, Gus Gianulias, the junior lienholder, will have a significant
2 unsecured, deficiency claim against the Debtors potentially up to the amount he is owed, which is
3 approximately \$700,000. This, in turn, will increase the total unsecured claims against the
4 Debtors, thereby diluting the distributions to all unsecured creditors.

5 Fasching Haus, an oversecured creditor with a substantial equity cushion, should not be
6 permitted to dictate the treatment of the Property to the detriment of the junior lienholders and the
7 Debtors' unsecured creditors, particularly when the Plan provides for full payment of its allowed
8 claim. Based on the foregoing, the Motion should be denied.

9 **B. Fasching Haus is Not Entitled to Relief from Stay Pursuant to Section 362(d)(2)**

10 **Because the Property is Necessary for the Debtors' Reorganization**

11 Section 362(d)(2) provides a two-pronged test for granting relief from stay: the debtor
12 must not have any equity in the property and the property must not be necessary for an effective
13 reorganization. See 11 U.S.C. § 362(d)(2). In order to prevail under section 362(d)(2) the debtor
14 does not have to prove that its plan for reorganization is confirmable, but only that there is a
15 reasonable possibility that a reorganization is possible. See Am. State Bank v. Grand Sports, Inc.
16 (In re Grand Sports, Inc.), 86 B.R. 971, 974 (Bankr. N.D. Ind. 1988).

17 The U.S. Supreme Court has interpreted the phrase "not necessary to an effective
18 reorganization" to mean that there must be "a reasonable possibility of a successful reorganization
19 within a reasonable time." United Savings Association of Texas v. Timbers of Inwood Forest
20 Associates, Ltd., 484 U.S. at 376. This feasibility standard is lower than the feasibility standard
21 that applies to confirmation. See In re Terrace Gardens Park P'ship, 96 B.R. 707, 712 (Bankr.
22 W.D. Tex. 1989) (holding that a reasonable possibility of reorganization of an effective
23 reorganization within a reasonable period of time "requires a lower quantum of evidence than does
24 actual confirmation under Section 1129(a)," and that if "that reasonable possibility has been
25 established, the stay should remain in place"); see also In re Ritz-Carlton of D.C., Inc., 98 B.R.
26 170, 172 (S.D.N.Y. 1989) (holding that Timbers' "feasibility test" does not require that debtor
27 show that its reorganization plan is confirmable in order for debtor to defeat a motion for relief
28 from stay); In re Missouri Flats Assocs., 86 B.R. 634, 638 (Bankr. E.D. Cal. 1988) (denying

1 motion for relief from stay; “although at this point it is *not* clear that the debtor can effectively
2 organize or that it could propose a confirmable plan, the debtor has presented to this court a
3 workable theory of rehabilitation and should be allowed a reasonable amount of time to propose a
4 plan of reorganization”) (emphasis in original).

5 The Debtors filed their Plan and related disclosure statement (the “Disclosure Statement”)
6 on November 9, 2009, within the exclusive period to do so, and a hearing on the Disclosure
7 Statement is set for December 16, 2009. The Plan is premised on utilizing revenue generated from
8 the leasing of real property owned by the Debtors and their related subsidiaries to make payments
9 to creditors under the Plan. Upon improvement of the market, the Debtors may elect to sell
10 various properties in a manner designed to maximize the value of the properties, so as to pay all
11 secured creditors in full, thereby reducing any deficiency claim that would otherwise be asserted
12 against the Debtors’ estates. Hence, continued ownership of the Debtors’ portfolio of properties is
13 vital to the success of the Plan.

14 The proposed plan structure is the result of extensive negotiations between the Debtors and
15 the Committee, and the Debtors believe that the Plan is reasonable and that they have a reasonable
16 possibility of successfully reorganizing. Under the Plan, any allowed claim of Fasching Haus will
17 be paid in full or otherwise remain unaltered. Nowhere in the Motion does Fasching Haus allege
18 that the Plan cannot be confirmed or that the treatment of Fasching Haus’s claims under the Plan is
19 inconsistent with the requirements of the Bankruptcy Code. Lifting the stay and permitting
20 Fasching Haus to foreclose at this time would benefit Fasching Haus at the expense of the junior
21 lienholders and the Debtors’ unsecured creditors. A foreclosure sale is unlikely to result in a sale
22 price that will satisfy all of the secured claims against the Property, which will increase the total
23 unsecured claims against the Debtors, thereby diluting the distributions to all unsecured creditors.

24 The Debtors have proposed a confirmable Plan which proposes to pay Fasching Haus in
25 full, and fairness dictates that they be allowed an opportunity to submit their Plan to creditors for a
26 vote. Fasching Haus should not be entitled to relief from the stay at the expense of the junior
27 lienholders and the Debtors’ unsecured creditors. Given that the proposed plan structure is
28

1 reasonable, the Court should find that the Property is necessary for an effective reorganization and
2 therefore deny the Motion.

3 **CONCLUSION**

4 **WHEREFORE**, the Debtors respectfully request that the Court enter an order denying the
5 Motion in its entirety.

6 DATED: November 17, 2009

IRELL & MANELLA LLP

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8 By: Kerri A. Lyman
Alan J. Friedman
9 Kerri A. Lyman
IRELL & MANELLA LLP

10
11 Attorneys for Debtors and
Debtors-in-Possessions

12 -and-

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15 THE LOBEL FIRM, LLP

16 Attorneys for Debtors and
17 Debtors-in-Possession
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DECLARATION OF JOHN MCFADDEN

I, John McFadden, do hereby declare and state as follows:

1. I am the Corporate Controller of G Companies Management, LLC ("G Companies") and provide services to various entities in which James C. Gianulias ("Gianulias") has an interest, including Cameo Homes, a California corporation ("Cameo" and, collectively with Gianulias, the "Debtors"). In my position as Corporate Controller, I provide oversight of all accounting services and tax related matters for Gianulias, Cameo, G Companies and various related entities.

2. I have personal knowledge of the facts stated herein, except as to those facts stated upon information and belief, and as to those facts, I believe them to be true. If called as a witness to testify herein, I could and would testify competently to the following.

3. I have general knowledge of the Debtors' books and records, and I am familiar with the Debtors' financial and operational affairs. As to the following facts, I know them to be true of my own knowledge, or I have gained such knowledge from the business records of the Debtors or one of their businesses which were made at or near the time of the acts, conditions or events to which they relate. Any such document or record was prepared in the ordinary course of business by a person who had personal knowledge of the event being recorded and had a business duty to accurately record such event.

4. I submit this declaration in support of the *Opposition To Fasching Haus East Condominium Association, Inc.'s Motion For Relief From Automatic Stay* (the "Opposition"). I am authorized by the Debtors to submit this Declaration.

5. The Debtors filed their Plan and related disclosure statement (the "Disclosure Statement") on November 9, 2009, and a hearing on the Disclosure Statement is set for December 16, 2009. I have read and am familiar with the Plan.

6. The Plan is premised on utilizing revenue generated from the leasing of real property owned by the Debtors and their related subsidiaries to make payments to creditors under the Plan. I am informed and believe that the continued ownership of the Debtors' portfolio of properties is vital to the success of the Plan. Upon improvement of the market, the Debtors may

1 elect to sell various properties in a manner designed to maximize the value of the properties, so as
2 to pay all secured creditors in full, thereby reducing any deficiency claim that would otherwise be
3 asserted against the Debtors' estates. The Debtors and I believe that under favorable market
4 conditions that the Property can be sold for an amount sufficient to pay creditors with secured
5 claims against the Property in full or substantially in full.

6 7. If Fasching Haus has an allowed secured claim, the claim will be paid in full or
7 otherwise remain unaltered under the Plan. The Plan provides for the following treatment of Other
8 Secured Claims (those not specifically classified by name):

9 Except to the extent that the holder of an Allowed Secured Claim in Class 1H agrees to a
10 different treatment, the holder of the Allowed Secured Claim in Class 1H shall, at the sole
11 election of the Debtors (made prior to the Effective Date), receive one of the following
12 treatments: (i) the Allowed Secured Claim shall be cured and reinstated pursuant to section
13 1124(2) of the Bankruptcy Code, and the Debtors shall fund all amounts and take all
14 actions otherwise necessary to reinstate such Allowed Secured Claim, on or prior to the
15 tenth (10th) Business Day following the Effective Date; or (ii) the legal, equitable and
16 contractual rights to which the holder of such Allowed Secured Claim is entitled shall
17 remain unaltered. Notwithstanding the foregoing, alternatively, the Debtors may elect to
18 satisfy an Allowed Secured Claim in Class 1H by one of the following treatments: (x) the
19 surrender to the holder of the Allowed Secured Claim of such property of the applicable
20 Estate as may be security and collateral for its Claim, or (y) the payment in Cash of the
21 amount of such Allowed Secured Claim, as set forth in the Confirmation Order or other
22 Final Order.

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1 8. The proposed plan structure is the result of extensive negotiations between the
2 Debtors and the Committee. I participated in these negotiations and I believe that the Plan is
3 reasonable and that the Debtors have a reasonable possibility of successfully reorganizing.

4 I declare under penalty of perjury that the foregoing is true and correct.

5 Executed this 17 day of November 2009 at Newport Beach, California.

John McFadden

In re:
James C. Gianulias and Cameo Homes

Debtor(s).

CHAPTER 11

CASE NUMBER 8:08-bk-13150-RK

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:
840 Newport Center Drive, Suite 400, Newport Beach, CA 92660-6324

The foregoing document described as **OPPOSITION TO FASCHING HAUS EAST CONDOMINIUM ASSOCIATION, INC.'S MOTION FOR RELIEF FROM AUTOMATIC STAY** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner indicated below:

I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On November 17, 2009, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

☒ Service information continued on attached page

II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL (indicate method for each person or entity served):

On November 17, 2009 I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows. *Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.*

☒ Service information continued on attached page

III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (indicate method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on November 17, 2009 I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. *Listing the judge here constitutes a declaration that personal delivery on the judge will be completed no later than 24 hours after the document is filed.*

Chambers of Honorable Robert W. Kwan
United States Bankruptcy Court
411 W. Fourth Street
Santa Ana, CA 92701

☒ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

11/17/09
Date

Lori Gauthier
Type Name

/s/ Lori Gauthier
Signature

In re:
James C. Gianulias and Cameo Homes

Debtor(s).

CHAPTER 11

CASE NUMBER 8:08-bk-13150-RK

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In re: James C. Gianulias and Cameo Homes	Debtor(s).	CHAPTER 11 CASE NUMBER 8:08-bk-13150-RK
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