

NOT FOR PUBLICATION

MAY 29 2013

SUSAN M SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No. CC-12-1636-DKiTa
	)	
LSSR, LLC,	)	Bk. No. 12-24557-VZ
	)	
Debtor.	)	
_____	)	
BANK OF AMERICA, N.A.,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>M E M O R A N D U M<sup>1</sup></b>
	)	
LSSR, LLC,	)	
	)	
Appellee.	)	
_____	)	

Argued and Submitted on May 15, 2013  
at Pasadena, California

Filed - May 29, 2013

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Vincent P. Zurzolo, Bankruptcy Judge, Presiding

Appearances: \_\_\_\_\_  
Teresa H. Pearson of Miller Nash LLP argued for  
Appellant, Bank of America, N.A.; David B.  
Golubchik of Levene, Neale, Bender, Yoo & Brill  
LLP argued for Appellee, LSSR, LLC.

Before: DUNN, KIRSCHER and TAYLOR, Bankruptcy Judges.

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<sup>1</sup> This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may  
have (see Fed. R. App. P. 32.1), it has no precedential value.  
See 9th Cir. BAP Rule 8013-1.

1 Bank of America sought relief from the automatic stay as to  
2 certain real property owned by the debtor, LSSR, LLC.<sup>2</sup> The  
3 bankruptcy court denied without prejudice Bank of America's  
4 request for relief from stay on the ground that Bank of America  
5 failed to serve its motion for relief from the stay ("Motion")  
6 properly on the 20 largest unsecured creditors, among other  
7 reasons.<sup>3</sup>

8 We AFFIRM.

9  
10 **FACTS**

11 The debtor owns several acres of undeveloped real property  
12 located in Lincoln City, Oregon ("Lincoln City property").<sup>4</sup> The  
13

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14 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
15 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
16 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

17 <sup>3</sup> The bankruptcy court actually denied Bank of America's  
18 Motion on at least two grounds; it also denied relief from stay  
19 because the debtor timely made payment to Bank of America through  
20 one of the debtor's affiliates. Because we determine that the  
21 bankruptcy court did not abuse its discretion in granting relief  
22 from stay on the first ground and because we may affirm on any  
23 ground supported by the record, see Shanks v. Dressel, 540 F.3d  
24 1082, 1086 (9th Cir. 2008), we need not reach the merits of any  
25 other grounds.

26 <sup>4</sup> The debtor is an Oregon limited liability company with its  
27 principal office located in Portland, Oregon. Mark Hemstreet  
28 ("Hemstreet") is the debtor's principal and sole member. Shilo  
Management Corporation ("SMC"), the debtor's management company,  
has its principal office in Portland, Oregon.

According to Bank of America, the debtor filed its  
chapter 11 petition in the Central District of California because  
one of its affiliates, Shilo Inn, Seaside Oceanfront, LLC ("Shilo  
Inn"), filed its own chapter 11 petition there (11-34669) on

(continued...)

1 Lincoln City property consists of two adjacent lots, with one lot  
2 encumbered by a trust deed held by Bank of America. Bank of  
3 America's trust deed also encumbers other real properties owned  
4 by the debtor's affiliates, JDCK, LLC ("JDCK") and Troy Lodge,  
5 LLC ("Troy Lodge")(collectively, "affiliates").<sup>5</sup>

6 Hemstreet owns 100% of the debtor. SMC manages the debtor,  
7 JDCK and Troy Lodge.

8 A few years prepetition, Bank of America initiated a state  
9 court action against Hemstreet, SMC, the debtor and its  
10 affiliates for failing to make payments on the trust deed  
11 obligation. Bank of America, Hemstreet, SMC, the debtor and its

12 \_\_\_\_\_  
13 <sup>4</sup>(...continued)

14 June 7, 2011. See Bank of America, N.A.'s Motion to Dismiss  
15 Debtor or Alternatively, to Transfer Venue, docket no. 30. Shilo  
16 Inn operates a hotel in Seaside, Oregon.

17 Shilo Inn apparently filed its chapter 11 bankruptcy  
18 petition in the Central District of California because it had  
19 several affiliates that filed their own chapter 11 bankruptcy  
20 petitions in the same district. Bank of America sought to  
21 transfer venue of the debtor's bankruptcy case to Portland,  
22 Oregon, but the bankruptcy court denied its request. See Order  
23 Denying Motion to Dismiss Bankruptcy Case or, Alternatively,  
24 Transfer Venue, docket no. 73.

25 <sup>5</sup> According to the debtor's Schedule D, Bank of America's  
26 trust deed is "secured by numerous [real] properties of Debtor's  
27 affiliates." (Emphasis added.) The debtor listed Shilo Inn as  
28 its only affiliate on its petition.

Our search on the bankruptcy court's electronic docket  
revealed, however, two associated cases filed by JDCK (12-36468)  
and Troy Lodge (12-26469). JDCK and Troy Lodge both list the  
debtor and Shilo Inn as affiliates. Hemstreet owns 100% of JDCK  
and Troy Lodge. SMC manages both JDCK and Troy Lodge.

On June 4, 2012, the bankruptcy court entered an order for  
joint administration of the bankruptcy cases of the debtor, Troy  
Lodge and JDCK, with the debtor's bankruptcy case as the lead  
case.

1 affiliates eventually resolved the state court action under a  
2 "Covenant Not to Execute" ("covenant").

3 Under the covenant, Bank of America agreed to dismiss  
4 without prejudice the state court action in exchange for  
5 scheduled payments from Hemstreet, SMC, the debtor and its  
6 affiliates. In turn, they agreed to enter into a confession of  
7 judgment ("Confession Judgment") as to the amounts due Bank of  
8 America. Bank of America recorded the Confession Judgment on  
9 September 21, 2011.

10 Under the Confession Judgment, Hemstreet, SMC, the debtor  
11 and its affiliates were jointly and severally liable to Bank of  
12 America in the principal amount of \$5,049,778.93. The  
13 prejudgment interest rate was

14 at a variable interest rate computed by taking the sum  
15 of 4% per annum and the interest rate from time to time  
16 published in the 'Money Rates' section of the Wall  
17 Street Journal as the 'Dealer Commercial Paper' rate  
18 for 30-day high grade unsecured notes sold through  
19 dealers by major corporations, which interest rate  
20 changes as of the date of publication in the Wall  
21 Street Journal of a 30-day dealer commercial paper rate  
22 that is different from that published on the preceding  
23 business day (the "Contract Interest Rate").

24 The postjudgment interest rate was "simple interest at at  
25 [sic] the Contract Interest Rate or the rate of [9%] per annum,  
26 whichever [was] greater."

27 If Hemstreet, SMC, the debtor and its affiliates failed to  
28 make any scheduled payment and to cure any default, Bank of  
29 America could file the Confession Judgment in state court. Bank  
30 of America also could take any action to enforce the Confession  
31 Judgment.

32 The debtor filed its chapter 11 bankruptcy petition on

1 April 25, 2012. Notably, a sheriff's sale of the Lincoln City  
2 property had been scheduled for April 26, 2012. The bankruptcy  
3 court entered an order determining that the debtor was a single  
4 asset real estate debtor ("single asset debtor order") on  
5 September 17, 2012.

6 In addition to Bank of America, the debtor scheduled the  
7 Lincoln County Tax Assessor as the only other secured creditor.  
8 It scheduled the Internal Revenue Service ("IRS") for notice  
9 purposes. The debtor scheduled two general unsecured creditors  
10 only: Clark Signs and Green & Markley, PC ("Green & Markley"), a  
11 law firm based in Portland, Oregon. It named these general  
12 unsecured creditors on its "List of Creditors Holding 20 Largest  
13 Unsecured Claims" ("20 Largest Unsecured Creditors List"). No  
14 unsecured creditors committee was appointed.

15 SMC sent Bank of America a check, dated September 27, 2012,  
16 in the amount of \$7,784. The check named another one of the  
17 debtor's affiliates, Shilo Franchise International, LLC ("SFI"),  
18 as the account payable obligor.

19 SMC enclosed with the check a letter, also dated  
20 September 27, 2012. In the letter, SMC referenced the debtor and  
21 its bankruptcy case number, as well as SMC's customer number.  
22 SMC also stated in the letter that the check amount  
23 "constitut[ed] the monthly interest payment for the above-  
24 referenced customer number" and asked that Bank of America "apply  
25 the interest payment accordingly." Bank of America accepted the  
26 check, applying the payment to debt owed by SMC.

27 On October 19, 2012, Bank of America filed its Motion under  
28

1 § 362(d)(3)(B) as to the Lincoln City property.<sup>6</sup>

2 In the Motion, Bank of America contended that the debtor had  
3 made no payments to it since the petition date. It provided a  
4 copy of the check, pointing out that the check was not from the  
5 debtor's bank account but from that of its affiliate, SFI.  
6 Because the check came from SFI and not from the debtor directly,  
7 Bank of America argued that the debtor failed to pay Bank of  
8 America pursuant to § 362(d)(3)(B).

9 Bank of America further contended that the amount of the  
10 check was not "equal to the then-applicable non-default contract  
11 rate of interest on the value of [its] interest in the [Lincoln  
12 City property]." It claimed that the appropriate interest  
13 payment amount due was \$14,625.<sup>7</sup>

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15 <sup>6</sup> At the time Bank of America filed the Motion, the debtor  
16 had not filed its disclosure statement or its chapter 11 plan.  
17 The debtor filed its initial disclosure statement and chapter 11  
18 plan on December 6, 2012. It filed amended disclosure statements  
19 and chapter 11 plans on January 16, 2013, March 7, 2013, and  
20 April 11, 2013. See docket nos. 210, 238 and 255. A hearing has  
21 been set for June 6, 2013, for approval of the second amended  
22 disclosure statement (docket no. 255).

23 Under § 362(d)(3), a debtor must either file a confirmable  
24 chapter 11 plan or commence monthly payments not later than  
25 90 days after entry of the order for relief (the bankruptcy  
26 filing date) or within 30 days after the court determines that  
27 the debtor is a single asset real estate debtor, whichever occurs  
28 later. Here, the debtor either had to file its chapter 11 plan  
or start monthly payments by October 17, 2012. The debtor filed  
its chapter 11 plan more than a month past the October 17, 2012  
deadline.

26 <sup>7</sup> To determine the monthly interest payment amount, Bank of  
27 America took the value of the Lincoln City property, which its  
28 appraiser estimated to be \$1.95 million, and multiplied it by 9%  
(continued...)

1 Bank of America included a proof of service with its Motion.  
2 The proof of service indicated that Bank of America served a copy  
3 of the Motion by U.S. Mail, first class, postage prepaid, on the  
4 debtor, its attorney, the Lincoln County Tax Assessor, Hemstreet,  
5 Clark Signs and Green & Markley.<sup>8</sup> With respect to Clark Signs

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7 <sup>7</sup>(...continued)  
8 per annum divided by 12 months.

9 <sup>8</sup> The proof of service also listed the United States Trustee  
10 ("UST") and the IRS among the parties served with the Motion.

11 LBR 2002-2(a)(1) of the Local Bankruptcy Rules ("LBR") of  
12 the United States Bankruptcy Court for the Central District of  
13 California requires that "a copy of any document filed by a  
14 person or entity in a bankruptcy case or adversary proceeding  
15 under chapters 7, 9, or 11 must be served upon the [UST]."

16 LBR 2002-2(b) provides, in relevant part, that "the United  
17 States attorney for [the Central District of California] has  
18 waived notice under FRBP 2002(j)."

19 LBR 2002-2(c)(1) provides that "[e]xcept with respect to  
20 contested matters or adversary proceedings (where service must  
21 comply with the requirements of FRBP 7004 and LBR 2002-2(c)(2)),  
22 or as otherwise ordered by the court, the United States [IRS]  
23 must be served at the address . . . contained in the Court Manual  
24 . . . ." LBR 2002-2(c)(2) requires that "[i]n all contested  
25 matters and adversary proceedings involving the United States  
26 [IRS], the United States, the Attorney General in Washington,  
27 D.C., and the United States attorney in Los Angeles must be  
28 served at addresses listed in the Register of Federal and State  
Governmental Unit Addresses contained in the Court Manual  
available from the clerk and on the court's website."

Appendix D of the Court Manual lists the addresses of  
various state and federal government agencies and offices,  
including the United States Attorney General, the United States  
Civil Process Clerk, the IRS and the local offices of the UST.

Bank of America properly served the IRS and the UST at its  
local office in Los Angeles, California, as listed in Appendix D  
of the Court Manual. Although the IRS was listed in the proof of  
service, Bank of America did not serve the United States, the  
United States attorney or the Attorney General, presumably in

(continued...)

1 and Green & Markley, Bank of America provided their addresses,  
2 but did not name any individual, such as an officer or a  
3 registered agent.<sup>9</sup>

4 The debtor opposed the Motion, arguing that it timely paid  
5 the correct amount to Bank of America. It stressed that Bank of  
6 America did not explain why the payment amount was incorrect or  
7 provide the correct payment amount. The debtor also contended  
8 that, although the check was from SFI's bank account, it was made  
9 as a payment on the debtor's behalf.

10 The bankruptcy court held a hearing on the Motion on  
11 November 13, 2012. It issued its ruling orally, denying the  
12 Motion without prejudice on two grounds.

13 First, the bankruptcy court determined that Bank of America  
14 failed to serve the Motion properly because it did not serve the  
15 20 largest unsecured creditors as required under the Rules.  
16 However, it did not cite the specific Rule on which it relied in  
17 making its determination. The bankruptcy court looked to the  
18 proof of service, noting that it "[did] not state the capacity or  
19 establish that that obligation of service with regards to the  
20

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21 <sup>8</sup>(...continued)  
22 accordance with LBR 2002-2(b) and (c)(2) as the IRS was not  
23 involved in the Motion.

24 <sup>9</sup> Both the 20 Largest Unsecured Creditors List and the proof  
of service state these names and addresses as follows:

25 Green & Markley, P.C.  
26 1515 SW Fifth Avenue, Ste. 600, Portland, OR 97201

27 Clark Signs  
28 31321 Signs Drive, Deer Island, OR 97054



1 holders of the 20 largest unsecured claims [had] been met.”

2 Tr. of November 13, 2012 hr’g, 4:4-6.

3 Second, the bankruptcy court determined that the debtor made  
4 a payment to Bank of America as required under § 362 for single  
5 asset real estate cases, even though SMC tendered the payment on  
6 the debtor’s behalf.

7 The bankruptcy court acknowledged that the debtor and Bank  
8 of America disagreed as to the correct payment amount. But it  
9 believed that such a dispute was “the subject of an adversary  
10 proceeding for declaratory relief [that] would need to be  
11 adjudicated first before [the bankruptcy court] could make a  
12 determination as to whether or not the amount tendered was  
13 adequate.” Tr. of November 13, 2012 hr’g, 4:19-22.

14 On December 3, 2012, the bankruptcy court entered an order  
15 consistent with its ruling. Bank of America timely appealed.

#### 17 JURISDICTION

18 The bankruptcy court had jurisdiction under 28 U.S.C.  
19 §§ 1334 and 157(b)(2)(G). We have jurisdiction under 28 U.S.C.  
20 § 158.

#### 22 ISSUE

23 Did the bankruptcy court abuse its discretion in denying  
24 Bank of America’s Motion?

#### 26 STANDARDS OF REVIEW

27 We review de novo a bankruptcy court’s interpretation of the  
28 Bankruptcy Code, as it presents a question of law. Meruelo

1 Maddux Properties-760 S. Hill Street LLC v. Bank of America, N.A.  
2 (In re Meruelo Maddux Props., Inc.), 667 F.3d 1072, 1076 (9th  
3 Cir. 2012). We review the bankruptcy court's factual findings  
4 for clear error. Id.

5 We review the bankruptcy court's decision to deny relief  
6 from stay for an abuse of discretion. Gruntz v. County of Los  
7 Angeles (In re Gruntz), 202 F.3d 1074, 1084 n.9 (9th Cir. 2000).

8 We apply a two-part test to determine objectively whether the  
9 bankruptcy court abused its discretion. United States v.

10 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009)(en banc). First,  
11 we "determine de novo whether the bankruptcy court identified the  
12 correct legal rule to apply to the relief requested." Id.

13 Second, we examine the bankruptcy court's factual findings under  
14 the clearly erroneous standard. Id. at 1262 & n.20. A  
15 bankruptcy court abuses its discretion if it applied the wrong  
16 legal standard or its factual findings were illogical,  
17 implausible or without support in the record. TrafficSchool.com  
18 v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

19 We may affirm on any ground supported by the record. Shanks  
20 v. Dressel, 540 F.3d 1082, 1086 (9th Cir. 2008).

## 21 22 **DISCUSSION**

23 On appeal, Bank of America contends that the bankruptcy  
24 court abused its discretion in denying relief from stay by  
25 finding that Bank of America did not properly serve the Motion on  
26 the 20 largest unsecured creditors. Bank of America insists that  
27 it properly served the Motion by serving the Motion on each and  
28 every one of the creditors scheduled by the debtor.

1 It is true that Bank of America mailed the Motion to each  
2 and every creditor scheduled by the debtor. The problem lies in  
3 the fact that Bank of America did not serve these creditors  
4 pursuant to the Rules and the LBRs.

5 In a chapter 11 case, Rule 4001(a)(1) requires a motion for  
6 relief from stay to be served on the debtor and its attorney and  
7 any committee of unsecured creditors ("unsecured creditors  
8 committee") appointed by the UST pursuant to § 1102 or its  
9 authorized agent.<sup>10</sup> If no unsecured creditors committee has been  
10 appointed, the motion for relief from stay must be served on the  
11 creditors holding the 20 largest unsecured claims as listed  
12 pursuant to Rule 1007(d).<sup>11</sup> LBR 4001-1(c)(1)(B)(v) also requires  
13 that the motion for relief from stay be served on any party  
14 entitled to notice under Rule 4001.

15 Additionally, because a motion for relief from stay is a  
16 contested matter under Rule 9014, it must be served pursuant to  
17 Rule 7004(b). See Rules 4001(a)(1) and 9014(b).<sup>12</sup>  
18 Rule 7004(b)(3) requires service on a domestic corporation or a  
19

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20 <sup>10</sup> Section 1102(a)(1) provides, in relevant part, that "the  
21 [UST] shall appoint a committee of creditors holding unsecured  
22 claims and may appoint additional committees of creditors or of  
equity security holders as the [UST] deems appropriate."

23 <sup>11</sup> Rule 1007(d) provides, in relevant part, that, "a debtor  
24 in a voluntary chapter 11 reorganization case shall file with the  
25 petition a list containing the name, address and claim of the  
26 creditors that hold the 20 largest unsecured claims, excluding  
insiders, as prescribed by the appropriate Official Form."

27 <sup>12</sup> Rule 9014(b) provides, in relevant part, that in  
28 contested matters, "[t]he motion must be served in the manner  
provided for service of a summons and complaint by Rule 7004."

1 partnership to be made by mailing a copy of the motion for relief  
2 from stay "to the attention of an officer, a managing or general  
3 agent, or to any other agent authorized by appointment or by law  
4 to receive service of process . . . ." LBR 9013-3(c) moreover  
5 requires that the proof of service "explicitly indicate[] how  
6 each person who is listed on the proof of service is related to  
7 the case . . . ."

8 "Unless all of the specified entities are served properly  
9 under the rules, the court should decline to grant the relief  
10 requested." 9 Collier on Bankruptcy ¶ 4001.02[4](Alan N. Resnick  
11 & Henry J. Sommer, eds., 16th ed. 2013)(citing In re Safon  
12 Ochart, 74 B.R. 131, 133 (Bankr. D.P.R. 1986)). Here, Bank of  
13 America did not indicate on the proof of service that it mailed  
14 the Motion to the attention of an officer, a managing or general  
15 agent or any other authorized agent of Clark Signs and Green &  
16 Markley as required under Rule 7004(b)(3), LBR 4001-1(c)(1)(B)(v)  
17 and 9013-3(c). Bank of America failed to comply with the service  
18 requirements set forth under both the Rules and the LBRs. The  
19 bankruptcy court therefore did not abuse its discretion in  
20 denying without prejudice Bank of America's Motion.

21  
22 **CONCLUSION**

23 For the foregoing reason, we determine that the bankruptcy  
24 court did not abuse its discretion in denying Bank of America  
25 relief from the automatic stay without prejudice. We AFFIRM.  
26  
27  
28