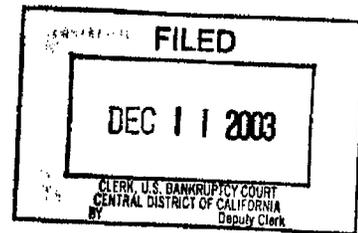
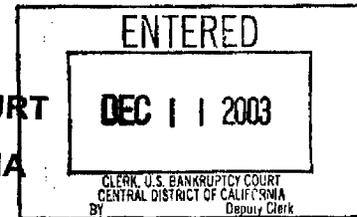


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2 **FOR PUBLICATION**
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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA



In re

Case No. SV 02-17038-GM

Chapter No. 11

OAK PARK CALABASAS CONDOMINIUM
ASSOCIATION,

MEMORANDUM OF OPINION DENYING
MOTION FOR RECONSIDERATION OF
ORDER DENYING CONFIRMATION

Debtor.

Oak Park Calabasas Condominium Association seeks reconsideration of its Second Modified Plan of Reorganization, apparently on the grounds that the Court made a manifest error of law in the application of 11 U.S.C. §§ 1129(a)(7) and 726(a)(5).¹ The debtor further argues that I failed to look at the underlying policies of the Bankruptcy Code, which weigh in its favor. This motion does not meet the requirements for reconsideration of the prior order and

¹ Unless stated otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. § 101 et seq.; all "Rule" references are to the Federal Rules of Bankruptcy Procedure; all "F.R.C.P." references are to the Federal Rules of Civil Procedure; and all "L.B.R." references are to the Local Bankruptcy Rules.

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1 therefore is denied.

2 On October 23, 2003, I entered a Memorandum of Decision on
3 Confirmation of the Debtor's Plan followed by an Order Denying
4 Confirmation, which was entered on November 6, 2003. The motion for
5 reconsideration was timely filed on November 17, 2003, with the hearing
6 set on February 4, 2004. There is no explanation for the setting of
7 this motion some 10 weeks after filing (since only 24 days' notice is
8 required),² as my self-calendaring procedures would allow it to be heard
9 any Wednesday after the necessary noticing period has expired. Other
10 than December 31 and January 28, there are no Wednesdays unavailable for
11 the hearing on this motion.

12 However, since the motion is based solely on law, no actual
13 hearing is necessary. Therefore, the order denying this motion vacates
14 the hearing date of February 4, 2004.³

15 Although the motion to reconsider does not state a specific
16 procedural basis, it appears to fall under Rule 9023, which incorporates
17 F.R.C.P. Rule 59. A motion brought under F.R.C.P. 59 involves
18 reconsideration on the merits and should not be granted unless it is
19 based on one or all of the following grounds: (1) to correct manifest
20 errors of law or fact upon which the judgment is based; (2) to allow the
21 moving party the opportunity to present newly discovered or previously
22 unavailable evidence; (3) to prevent manifest injustice; or (4) to
23 reflect an intervening change in controlling law.⁴ Since there is no
24 newly discovered or previously unavailable evidence presented and no
25

26 ² L.B.R. 9013-1(a)(6)(B).

27 ³ L.B.R. 9013-1(a)(14).

28 ⁴ McDowell v. Calderon, 197 F.3d 1253, 1255 (9th Cir. 1999), cert. denied, 529 U.S. 1082, 120 S.Ct. 1708 (2000)(cit.
omitted).

1 intervening change in controlling law, the motion must be based either
2 on a manifest injustice or manifest errors of law or fact. A "manifest
3 injustice" is defined as "an error in the trial court that is direct,
4 obvious, and observable, such as a defendant's guilty plea that is
5 involuntary or that is based on a plea agreement that the prosecution
6 rescinds;" while the term "manifest error" is "an error that is plain
7 and indisputable, and that amounts to a complete disregard of the
8 controlling law or the credible evidence in the record."⁵

9 The motion puts forth two bases: (1) if the debtor is
10 determined to be solvent, the best interest of creditors test is
11 satisfied when the debtor pays post-petition interest at the federal
12 judgment interest rate; and (2) the Court has misread § 1129(a)(7)
13 because that provision does not guarantee recovery equal to what a
14 creditor would receive if there were no bankruptcy.

15 The movant is incorrect on both grounds and neither rises to
16 the level of "manifest injustice" or "manifest error."

17 Debtor claims that I must treat the debtor as "solvent" or
18 "insolvent" when applying §§ 1129(a)(7) and 726(a). There is no legal
19 foundation for this argument. However, even following debtor's line of
20 reasoning, its theory does not lead to the result it seeks. The debtor
21 errs by merging the payment from liquidated assets of the estate (thus
22 calculating the amount ECC would **receive** under Section 726(a)) and the
23 rights that ECC would **retain** to collect from property of the debtor
24 which is not property of the estate. The Trustee may only collect and
25 distribute assets of the debtor which are property of the estate.⁶
26

27
28 ⁵ Black's Law Dictionary 563 (7th ed. 1999).

⁶ Section 704(1).

1 Theoretically, homeowner fees for post-petition assessments might be
2 classified as property of the estate, but in actuality they have little
3 or no value and would be abandoned by the trustee.⁷

4 The most similar situation is In re General Teamsters,
5 Warehousemen and Helpers Union, Local 890,⁸ which involved a local
6 chapter of a union. While the opinion does not directly confront the
7 issue of whether a union local could merely cease to exist, the Ninth
8 Circuit found that in a hypothetical Chapter 7, the local's collective
9 bargaining agreement and right to collect future dues could not be
10 liquidated to pay off creditors because the law requires that the
11 members choose their own representatives and that the dues are to be
12 used solely for the members' and union's benefit.⁹ The homeowner
13 association situation in this case is very similar since, by state law,
14 the only thing that dues can be used for is the expenses of the
15 association, though some portion is subject to execution for payment of
16 judgments.¹⁰ This limited use leaves no unencumbered asset for the
17 trustee to sell and it is inconceivable that anyone would buy it for an
18 amount that would pay off even the principal still owing ECC. Since
19 only the trustee, the elected board of the HOA, or a court-ordered
20 person could manage and collect the dues, realizing on this stream of
21 payments would also be terribly burdensome to the trustee and of little
22 or no value to the estate. Abandonment would be the result. Thus,
23 future dues would not be collected by the trustee in a Chapter 7 and
24

25 ⁷ Section 554(a).

26 ⁸ 265 F.3d 869 (9th Cir. 2001).

27 ⁹ Id. at 877.

28 ¹⁰ See the discussion in the Memorandum of Opinion entered on October 23, 2003, pp. 6-12.

1 there would be no distribution of the dues to unsecured creditors under
2 § 726.

3 Section 1129(a)(7)(A) requires that if a claim or interest
4 does not accept the plan, that claim will "receive or **retain** under the
5 plan on account of such claim or interest property of a value, as
6 of the effective date of the plan, that is not less than the amount that
7 such holder would so receive or **retain** if the debtor were liquidated
8 under Chapter 7 of this Title on such date" (emphasis added). As
9 explained in the Memorandum of Opinion Denying Confirmation, this debtor
10 is unique because it will and must continue to exist even if it were
11 "liquidated" in Chapter 7. The best analogy to this debtor is a human
12 being who obtains a discharge from some of its obligations, but faces
13 the future with certain non-dischargeable debts. This is an anomaly in
14 the corporate world, but there are a variety of cases dealing with it
15 in the area of tax debt or non-dischargeable student loans.

16 The premier case is Bruning v. United States,¹¹ which held that
17 in a Chapter 7 case a non-dischargeable tax debt continues to accrue
18 interest against the individual debtor post bankruptcy. As would be
19 noted in later cases determining that the federal judgment rate is the
20 appropriate one for distribution from a solvent Chapter 7 estate,
21 Bruning holds that:

22 The basic reasons for the rule denying post-
23 petition interest as a claim against the bankruptcy
24 estate, are the avoidance of unfairness as between
25 competing creditors and the avoidance of
26 administrative inconvenience. These reasons are
27 inapplicable to an action brought against the
28 debtor personally. In the instant case, collection
of post-petition interest cannot inconvenience
administration of the bankruptcy estate, cannot
delay payment from the estate unduly, and cannot
diminish the estate in favor of high-interest

¹¹ 376 U.S. 358, 84 S.Ct 906 (1964).

1 creditors at the expense of other creditors. . . .
2 [W]e hold that post-petition interest on an unpaid
3 tax debt not dischargeable by § 17 remains, after
4 bankruptcy, a personal liability of the debtor.¹²

5 Though Bruning was decided under the Bankruptcy Act, it has
6 been made applicable under the Bankruptcy Code by the Ninth Circuit in
7 In re Artisan Woodworkers.¹³

8 The movant relies on In re Dow Corning Corporation,¹⁴ which is
9 a very different kind of debtor from a California homeowner association
10 as there is no requirement that Dow Corning Corporation survive a
11 Chapter 7 liquidation. Dow Corning's holding that the most that an
12 unsecured creditor is entitled to receive in a Chapter 7 proceeding is
13 the amount of its claim plus interest at the legal rate from the date
14 of filing does not differentiate between claims against the estate and
15 those against the debtor and does not deal with the situation when the
16 discharge of only certain debts is allowed. A better statement is found
17 in In re Vogt,¹⁵ which states that § 726(a)(5)

18 provides a pre-emptive interest overlay, upon all
19 claims paid through the final distribution, before
20 funds are to be returned to the debtor. This
21 interest overlay does not satisfy the state law
22 claim, and if there is a discharge, it is the
23 discharge that precludes further collection efforts
24 against the debtor, personally (it does not
25 preclude collection efforts from other sources -
26 see § 524(e)).

27 If there is no discharge (a corporate case, for
28 example), the effect of § 726(a)(1)-(5), in
combination with § 726(a)(6), is to limit the
distributions that creditors are entitled to from

25 ¹² Id., 376 U.S. at 363, 84 S.Ct. at 909.

26 ¹³ 204 F.3d 888, 892, 9th Cir. 2000. For a list of other circuit courts which have applied Bruning to the Bankruptcy Code,
27 see In re Pardee, 218 B.R. 916, 921 (9th Cir. BAP 1998).

28 ¹⁴ 270 B.R. 393 (Bankr. E.D. Mich. 2001).

¹⁵ 250 B.R. 250 (Bankr. M.D. La. 2000).

1 the trustee of the estate, as trustee of the
2 estate. The interplay of § 726(a)(1)-(5) and
3 (a)(6) do not generate the satisfaction of all
rights to payment if there be no discharge.¹⁶

4 This differentiation between the federal judgment interest
5 rate, which is chargeable to the estate, and the ability to collect the
6 remaining judgment at the state interest rate from the debtor who
7 survives bankruptcy is seen in a variety of cases. In the Matter of
8 Cajun Electric Power Cooperative, Incorporated¹⁷ holds that "a debtor's
9 obligation with respect to post-petition interest terminates only 'if
10 and when' the debtor obtains a discharge from the bankruptcy court."
11 Citing Kellogg v. United States (In re West Tex. Marketing Corp.),¹⁸
12 Cajun states that "[o]nly upon discharge . . . is the state law
13 obligation to pay extinguished."¹⁹

14 The issue of interest has arisen in a series of Chapter 13
15 student loan cases, such as In re Kielisch,²⁰ in which the Court of
16 Appeals allowed the creditor to apply plan payments to post-petition and
17 post-confirmation interest on the non-dischargeable student loan debt.
18 Kielisch involved two cases of Chapter 13 debtors whose confirmed plans
19 paid their student loan creditors the full amount of principal and pre-
20 petition interest, but no post-petition interest. Under the terms of
21 the notes, one loan accrued interest at 8% and the other at 9%.²¹ After
22

23 ¹⁶ Id. at 265.

24 ¹⁷ 185 F.3d 446, 455 (5th Cir. 1999).

25 ¹⁸ 54 F.3d 1194, 1203 (5th Cir. 1995).

26 ¹⁹ 185 F.3d at 455.

27 ²⁰ 258 F.3d 315 (4th Cir. 2001).

28 ²¹ Educational Credit Mgmt. Corp. v. Kielisch, 258 F.3d 315, 326 (4th Cir. 2001), referencing Brief of Appellant Educational Credit Management Corporation, filed on January 19, 2001, 2001 WL 34108330 at 4,6.

1 discharge, ECMC sought accrued post-petition interest on its claims and
2 calculated the amount due by applying the Chapter 13 payments it
3 received first to post-petition and post-confirmation interest. The
4 Fourth Circuit allowed this on the grounds that application of payments
5 has no effect on other creditors since the debtors remain personally
6 responsible for non-dischargeable debts that ride through the bankruptcy
7 unaffected to become a post-petition liability of the former debtor.
8 No comment was made by the Fourth Circuit that a reduced rate of
9 interest should be used. Similarly, post-petition interest on support
10 obligations rides through the bankruptcy and is collectible individually
11 against the debtor.²²

12 In the § 523(a) context, if a state court judgment had been
13 obtained prior to bankruptcy, the most that the bankruptcy court should
14 do is to find that some or all of that judgment is non-dischargeable.
15 The state court judgment would not be replaced with a federal judgment
16 at the federal interest rate.²³ After termination of the automatic stay,
17 the judgment creditor could continue collection efforts against property
18 which is NOT property of the estate to satisfy its judgment. Any sums
19 received from the trustee would be applied to reduce the amount still
20 owed on the judgment, but would not transmute it to the lower (or
21 potentially higher) federal judgment interest rate.

22 This result is logical because the public policy for limiting
23 post-petition interest to the federal judgment interest rate for
24 distributions under § 726(a)(5) is to safeguard a fair distribution of
25

26 ²² See In re Foross, 242 B.R. 692 (9th Cir. BAP 1999).

27 ²³ See In re Comer, 723 F.2d 737 (9th Cir. 1984); In re Heckert, 272 F.3d 253 (4th Cir. 2001).

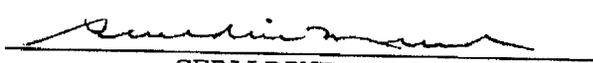
1 the assets of the estate and to create administrative simplicity. The
2 only reason that the debtor who is liquidated under Chapter 7 is not
3 personally liable to pay the creditor the difference between the amount
4 received from the solvent estate and the higher interest rate still owed
5 on the contract or state court judgment, is because the debtor has
6 received a Chapter 7 discharge. If the debtor is not qualified for
7 discharge or the debt involved is not discharged, the creditor can
8 proceed against the debtor personally to collect the balance that is
9 owed to it.

10 Because Oak Park cannot obtain a discharge and cannot simply
11 disappear, but remains a collectible entity as though it were a human
12 being, the Court must look at what ECC retains after the application of
13 Chapter 7. In this case ECC retains a non-dischargeable judgment, since
14 the debtor cannot get a discharge and since ECC has not agreed to the
15 discharge set forth in the Chapter 11 plan. The future stream of
16 payments against which ECC can collect, the requirement by the state
17 that Oak Park remain in business, and the determination by the
18 Bankruptcy Code that a debtor who is not an individual is barred from
19 receiving a Chapter 7 discharge create a public policy that requires ECC
20 to be paid in full at the state judgment interest rate of 10% through
21 the plan or the plan must fail.

22 For the above reasons, the motion to reconsider is hereby
23 denied.

24 Dated: December 11, 2003.

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GERALDINE MUND
United States Bankruptcy Judge

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CERTIFICATE OF MAILING

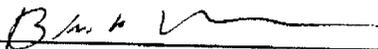
I, Bruce M. Bann, a regularly appointed and qualified clerk of the United States Bankruptcy Court for the Central District of California, do hereby certify that in the performance of my duties as such clerk, I personally mailed to each of the parties listed below, at the addresses set opposite their respective names, a copy of the **MEMORANDUM OF OPINION DENYING MOTION FOR RECONSIDERATION OF ORDER DENYING CONFIRMATION** in the within matter. That said envelope containing said copy was deposited by me in a regular United States mailbox in the City of Los Angeles, in said District, on

DEC 11 2003

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20 (Clerk)
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