

The Honorable Brian D. Lynch
Chapter: 11 Tacoma
Hearing as to Rule 9024 Relief: July 27, 2011
Hearing Time: 9:00 a.m.
Response Date: July 20, 2011

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

In Re:

HAWKS PRAIRIE INVESTMENT LLC,
Debtor.

Case No. 10-46635-BDL

MOTION FOR RECONSIDERATION
AND AMENDMENT OF ORDER
UNDER BANKRUPTCY RULE 9023
AND FOR RELIEF FROM ORDER
UNDER BANKRUPTCY RULE 9024.

Pursuant to Fed. R. Bankr. R. 9023 and 9024; Fed. R. Civ. P. 59 and 60; LBR 9013-1 (h) and (i), and Local Dist. R. 7(h), HomeStreet Bank moves for reconsideration and amendment of this Court's Order Confirming Debtor's Amended Plan entered on June 8, 2011 and simultaneously moves for relief from the same order as more fully set forth herein. This Motion is supported by the Declaration of Dillon E. Jackson and the exhibits attached thereto.

I. FACTS.

1.1 Relief From Stay.

On December 13, 2010, HomeStreet Bank and Talbitzer and Glavin ("T/G") were granted relief from Stay. [Docket # 91]. Debtor had filed its Plan pursuant to the single asset real estate case, but with agreement by HomeStreet to the March 15, 2011 extension of a stay the

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1 Debtor did not contest relief. T/G also filed relief from stay and adopted the legal position and
2 evidence prepared by HomeStreet as part of its motion. [Docket #50]

3 **1.2 Settlement Agreement.**

4 On December 17, 2010 the Court approved a Settlement Agreement between the debtor
5 and HomeStreet Bank that provided that HomeStreet Bank and (“T/G”) would be stayed from
6 holding a foreclosure sale prior to March 15, 2011. [Docket #110]. Specifically the Settlement
7 Agreement stated in paragraph 4:

8 **Forbearance:** If the elements of this stipulation are approved by the Court
9 and implemented by the Debtor in Possession, HSB and T/G will hold their Deed
10 of Trust foreclosure sales no earlier than permitted under state law and no earlier
11 than March 15, 2011. If the terms of the stipulation are not complied with, HSB
12 and T/G will be permitted to hold their sales as permitted under state law.
13 [Docket # 94].

14 T/G were bound by the terms of the Settlement and the reimposition of the stay to March
15 15, 2011.¹

16 **1.3 Plan Confirmed.**

17 On March 4, 2011 this Court held a hearing on the confirmation of the Debtor’s Second
18 Amended Plan of Reorganization dated February 23, 2011 (“Plan”) [docket #197] and confirmed
19 that plan by decision from the bench [Minute Entry 3/4/2011]. One of the provisions of the Plan
20 was continuation of a stay against action by secured creditors, HomeStreet and Talbitzer and
21 Glavin to March 15, 2011. The “Drop Dead Date” was defined in the Plan as March 15, 2011.
22 Plan, page 3.

23 As to HomeStreet the Plan stated at page 6:

24 “If there is not a Stipulation Transaction or an Ultimate Disposition
25 and the HomeStreet Claims have not been paid by the Drop Dead Date,
26

¹ However, since T/G had not then commenced their foreclosure process, the prohibition
against holding a foreclosure sale prior to March 15, 2011 in the approved settlement was
arguably not material.

1 HomeStreet may enforce all of its state law remedies including
2 foreclosure.”

3
4 As to T/G the Plan stated at page 6:

5 “If there is not a Stipulation Transaction or Ultimate Disposition by the
6 Drop Dead Date, T/G may exercise all of their state law remedies including
7 foreclosure.”

8 In Section VI of the Plan is the following language:

9 “4. The automatic stay imposed by Section 362 of the Bankruptcy Code except as
10 terminated by the Bankruptcy Court by prior order shall remain in place with respect to the
11 Assets including the Property until the Drop Dead Date. “

12 The Plan contained no reference to Drop Dead Date extension or procedure for approval
13 of such an extension.

14 **1.4 Debtor’s Proposed Order Confirming Plan.**

15 On May 9, 2011, Debtor’s counsel filed its proposed Order Confirming Plan and set
16 presentation for May 25, 2011. [Docket # 221]. The debtor’s proposed Order contained a
17 provision extending the “Drop Dead Date” which redefined the stay against HomeStreet and T/G
18 “from March 15, 2011 to 30 days after resolution of the pending adversary proceeding filed
19 against Anthony Glavin and Howard Talbitzer, et al, under Adversary Proceeding No. 10-04422-
20 BDL, or March 15, 2012 whichever occurs first.” No Motion to Amend the Plan accompanied
21 the Debtor’s proposed order.

22 **1.5 Objection to Proposed Order.**

23 On May 16, 2011 Talbitzer filed an objection to the Debtor’s proposed Order. [Docket
24 224]. While the Plan attached to the Proposed Order provided for the original Drop Dead Date
25 of March 15, 2011, the Debtor’s Proposed Order extended the Drop Dead Date as indicated
26 above. The objection correctly reflected the record of the March 4, 2011 hearing. At the hearing

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1 on May 25, 2011, the Court ruled that the extended Drop Dead Date proposed in the Order was
2 not in the Plan approved by the Court's decision on March 4, 2011. The Court also approved
3 other clarifications to the Plan.

4 **1.6 Talbitzer's Counsel Submits The Plan and Order With Hand Written
5 Changes.**

6 On June 7, 2011 Talbitzer's counsel unilaterally submitted to this Court for entry a
7 version of the Plan and the Order Confirming Plan which were not consistent with this Court's
8 rulings, not consistent with the terms of the Debtor's Plan and not noticed for presentation as
9 required under the Rules of this Court. The proposed order and accompanying plan insertions
10 contained a provision which purported to bind HomeStreet to a stay other than the March 15,
11 2011 date. This provision was not supported by the record.

12 **II. PRESENTATION OF THE ORDER BY TALBITZER COUNSEL VIOLATES
13 LOCAL RULES.**

14 **2.1 Rule for Presentation.**

15 Local rule 9013-1(i) is clear and specific as to the means of presenting an Order.

16 **9013-1 (i) Presentation of Orders.** A party presenting a proposed order at a time
17 after the hearing on a motion shall serve copies on parties that were present at the
18 hearing and, unless agreement is reached as to the form of the order, shall give at
19 least 7 days' notice of the time, date and place of presentation of the proposed
20 order.

21 Talbitzer's abrupt and unilateral alteration of the local rule by email is a breach of this
22 Court's rules of procedure. Upon learning that counsel for Talbitzer had violated the rules of
23 procedure, and submitted the Order as if agreed, HomeStreet counsel promptly objected to the
24 action and upon learning that the Court had entered the Order, proposed a correction of the Order
25 dealing with the improper, unilateral imposition of stay against HomeStreet. HomeStreet's
26 request to agree to a correction eliminating a stay against HomeStreet beyond March 15, 2011
was refused. HomeStreet is thus obliged to seek relief by this Motion. *See, Travelers Indemnity
Co. v. Bailey*, 129 S. Ct. 2195; *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir.

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1 1987) (“Questions of the propriety or legality of the bankruptcy court confirmation order are
2 indeed property addressable on direct appeal.”); *Miller v. US*, 363 F.3d 999 (9th Cir. 2004)

3 **2.2 Opposing Counsel Cannot Circumvent the Protections Provided by**
4 **Presentation on Proper Notice by Unilateral Actions and Abrupt Deadlines.**

5 On Monday June 6, 2011 after 4:21 P.M. Talbitzer’s counsel stated that they would not
6 wait for the debtor to submit an order and attached a proposed Order and Plan modifications
7 demanding a response on the proposed submission (by noon the following day).

8 **2.3 The Proposed Order and Unilateral Modifications Did Not Reflect the**
9 **Court’s Rulings.**

10 Talbitzer and Glavin were originally granted relief from stay in part because HomeStreet
11 was granted relief from stay and for the same reasons HomeStreet obtained relief. The Order on
12 Relief from Stay for these secured creditors was granted on December 13, 2010. Following
13 relief from stay, the Court approved a settlement in which the stay was extended to March 15,
14 2010. The Plan confirmed on March 4, 2011 made the March 15, 2011 “Drop Dead Date”
15 applicable to both T/G and HomeStreet.

16 When the Debtor attempted by its Presentation of an Order Confirming Plan extending
17 the Drop Dead Date for HomeStreet and T/G (without a motion to amend the plan) to as late as
18 March 15, 2012, the Order was refused. While HomeStreet is voluntarily forbearing while the
19 debtor attempts to sell the property pursuant to the Plan, there is no written stipulation or
20 agreement from HomeStreet to be stayed by Court Order to an extended date as late as March 15,
21 2012. The Settlement Agreement, Plan and March 4, 2011 transcript of the hearing on
22 confirmation indicate no such agreement. There is nothing in the record indicating HomeStreet’s
23 consent to extension of the stay to March 15, 2012.

24 **2.4 Support for Sale.**

25 HomeStreet joined in the Motion for approval of bidding procedures and a sale of the
26 property which is slated for presentation to this Court for approval of the sale on August 12,
2011. HomeStreet’s joinder in the Motion on bidding procedures is consistent with its

1 willingness to forebear while this sale is processed, but it is not a basis to assume a stipulation to
2 be bound to a stay extension for an additional 9 months.

3 **III. RECONSIDERATION UNDER RULE 59.**

4 HomeStreet respectfully directs this Court’s attention to the record of the case.
5 Specifically the terms of the Plan and the transcript of the hearing on March 4, 2011. There is no
6 indication in the Plan or the transcript of the March 4th hearing that HomeStreet would be
7 separately bound by any extended stay. There is no pleading in which HomeStreet has consented
8 to the involuntary stay inserted by T/G counsel as part of this Court’s June 8th Order on
9 confirmation.

10 **3.1 May 25th Hearing.**

11 The clarifying amendments made to the Order confirming plan by the Court on May 25,
12 2011 were to be solely based upon the terms of the Plan and the transcript of the March 4, 2011
13 hearing. The Debtor’s proposed order was not consistent with the Court’s March 4th rulings and
14 was rejected. This Court ruled that T/G would not be bound by an extension of the drop dead
15 date. The Court ruled correctly because there was no provision for extension of the Drop Dead
16 Date under the Plan or the record of the March 4, 2011 hearing—as to any party not merely to
17 T/G. When bank counsel rose at the May 25th hearing to clarify that HomeStreet would not be
18 singled out for an involuntary extension of a stay, the Court admonished: “Mr. Jackson, you
19 need to sit down right now.” Transcript May 25, 2011 p. 24, line. 19.

20 However, later in the hearing T/G counsel clarified the status of the matter:

21 Your Honor, Susan Ford again. If
22 I may just jump in very briefly, because I feel that
23 the pending non-judicial foreclosure by T&G is being
24 mischaracterized. T&G got relief from stay -- Your
25 Honor ordered that -- long ago. And then that was just
26 simply deferred, and **the plan confirmation order was to
allow not only T&G, but HomeStreet to go ahead and
exercise those state law remedies after the drop-dead
date, March 15th.**

And so T&G, in exercising the non-judicial

1 remedy of foreclosure, is doing nothing wrong. They're
2 only exercising rights that have been previously
3 granted to them by this Court.
4 Transcript May 25, 2011 pp. 30, line 23 through p. 31 Line 10. [emphasis
5 added}

6 The Statement of T/G's counsel on the record at the May 25th hearing is consistent with
7 the record in this case and should have been incorporated in the proposed order confirming plan.

8 Thus, entry of an Order on confirmation and the approval of the hand written
9 interlineations by T/G counsel not agreed to by opposing counsel was manifest error and the
10 Order on Confirmation should be amended to strike the involuntary extension of the stay ("Drop
11 Dead Date") against HomeStreet.

12 **3.2 The Bankruptcy Court Does Not Have Authority to Rewrite a Plan.**

13 A bankruptcy court cannot through the order confirming plan alter the terms of the plan
14 submitted by the proponent. *In matter of Davis Offshore, L.P.*, --- F.3d ----, 2011 WL 2410498,
15 5th Cir. (Tex.), June 16, 2011.

16 In its oral decision of March 4, 2011, the Court did not alter the terms of the Plan. The
17 record reflects a dialogue with counsel present clarifying certain terms and ambiguities. The
18 corrections and additions to the Plan were consistent with the Plan.

19 However, the Order submitted to the Court by T/G counsel and signed by the Court did
20 materially alter the terms of the Plan by binding HomeStreet to a stay far beyond the Plan's Drop
21 Dead Date of March 15, 2011.

22 **IV. RELIEF FROM ORDER UNDER 9024**

23 **4.1 Violation of Court Rules.**

24 The attempt to allege consent to a proposed order on a one day negative notice email is a
25 violation of this court's rules on presentation of orders requiring 7 days prior notice. Counsel
26 essentially invented her own procedure, set arbitrary and unreasonable deadlines, and then
implied to the court by her correspondence that the Order was agreed. This behavior is not one
to be condoned or encouraged. It is the practice in this District to obtain specific and affirmative

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1 written consent to an order by all counsel. Absent such consent, the order is set for presentation
2 in accordance with the rules.

3 The Order submitted also was misleading in stated that the Order was presented by
4 Elizabeth Shea, one of the Debtor's counsel when in fact the Order was not presented by Ms.
5 Shea at all it was "presented" if that is even the proper term by Susan Ford, T/G's counsel.
6 There was no effort to correct this misrepresentation despite multiple interlineations on the Plan
7 and Proposed Order.

8 The violation of the rules of court is a particularly egregious act because there was
9 absolutely no basis for an emergency. T/G counsel's impatience with the debtor's delay in
10 submitting an order does not justify the unilateral and wholly unjustified imposition of arbitrary
11 deadlines on other counsel or the violation of this Court's rules.

12 To the extent that this Court signed the Order on the basis that it believed the form of
13 order and accompanying plan corrections was agreed, this was incorrect and would be a basis for
14 setting aside and correcting the order and interlineated plan corrections to reflect Ms. For's own
15 statement at the May 25, 2011 hearing. Neither HomeStreet nor T/G are stayed after March 15,
16 2011.²

17 V. CONCLUSION.

18 The entry of an order binding HomeStreet involuntarily to a stay longer than set forth in
19 the Plan was not consistent with the record and thus not based upon facts supporting the change
20 to the Drop Dead Date in the Plan. Further, such a material alteration in the terms of the Plan by
21 a confirmation order is not permitted.

22 The failure to comply with the Court rules on presentation of the Order is a procedural
23 defect, and is a second basis for the Court, absent a formal plan modification, to strike the Order,
24 or in the interests of time and efficiency, amend the Order so that as T/G counsel stated on May
25

26 ²T/G are in separate personal bankruptcies. Except as to the adversary proceeding, certain
HomeStreet enforcement actions are subject to the stays in those cases.

1 25th: “the plan confirmation order was to allow not only T&G, but HomeStreet to go ahead and
2 exercise those state law remedies after the drop-dead date, March 15th.”

3 Respectfully submitted,

4 DATED this 22nd day of June, 2011.

5 FOSTER PEPPER PLLC

6 /s/ Dillon E. Jackson

7 Dillon E. Jackson, WSBA #1539
8 Christopher M. Alston, WSBA #18823
9 Attorneys for Plaintiff HomeStreet Bank
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