



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
August 07, 2019

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:)	Case No.: 18-15993-MKN
)	Chapter 11
SYNTHESIS INDUSTRIAL HOLDINGS 1)	
LLC,)	
)	Date: July 10, 2019
Debtor.)	Time: 10:30 a.m.
)	

ORDER REGARDING MOTION TO RECONSIDER, VOID, REVOKE, OR MODIFY PLAN, ECF NO. 46 AND VOID OR ALLOW OBJECTION TO CLAIM 5-1¹

On July 10, 2019, the Court heard the Motion to Reconsider, Void, Revoke, or Modify Plan, ECF No. 46 And Void or Allow Objection to Claim 5-1 (“Motion”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On October 5, 2018, a voluntary petition for Chapter 11 reorganization (“Petition”) was filed by Synthesis Industrial Holdings 1 LLC (“Debtor”), along with its schedules of assets and liabilities (“Schedules”), Statement of Financial Affairs (“SOFA”), and other required

¹ In this Order, all references to “ECF No.” are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. References to documents filed in any other proceeding will include the same identifier. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “FRBP” are to the Federal Rules of Bankruptcy Procedure. All references to “FRCP” are to the Federal Rules of Civil Procedure. All references to “FRE” are to the Federal Rules of Evidence.

1 information. (ECF No. 1).² On the same date, a notice of the Chapter 11 filing was issued
2 scheduling a meeting of creditors for November 8, 2018, and notifying creditors of the deadline
3 to file proofs of claim by February 6, 2019, and government units by April 3, 2019 (“Bankruptcy
4 Notice”). (ECF No. 3).

5 On October 8, 2018, a “Statement Regarding Authority to Sign and File Petition” was
6 filed. (ECF No. 7). The Petition filed on behalf of the Debtor is signed by Christopher Craig
7 (“Craig”) as a member of the Debtor. Attached to the Petition is a “Resolution of Members”
8 (“Resolution”) that identifies Craig as a member of the Debtor. The Resolution is also signed by
9 Mickey Griffin, but does not identify what his or her role is to the Debtor. The Resolution
10 authorizes the Debtor to file a voluntary Chapter 11 petition and authorizes and directs Debtor to
11 employ Andrew J. Van Ness (“Van Ness”), as attorney and the law firm of Hunter Parker LLC.

12 On October 8, 2018, an application to employ attorney Van Ness of Hunter Parker, LLC,
13 as attorney for Debtor, was filed. (ECF No. 5). On November 26, 2018, an order was entered
14 approving the employment and retention of Van Ness of Hunter Parker, LLC. (ECF No. 25).

15 On October 9, 2018, amended Schedules, amended SOFA, and amended 20 Largest
16 Unsecured Creditors, were filed. (ECF No. 8). In both its original and amended Schedule A/B,
17 Debtor listed its only real or personal property asset as “11604 Azul Celeste Place, Las Vegas,
18 Nevada 89138, APN: 137-35-416-061” (the “Property”) and having a value of \$240,000. In both
19 its original and amended Schedule D, Debtor listed “US Bank, NA, as Trustee for the RMAC
20 Trust, Series 2016-CTT, 60 Livingston Ave, EP-MN-WS3D, Attn: an officer, mang’g or gen agt,
21 agt, Saint Paul MN 55107” (“US Bank”), as having a disputed claim in the amount of \$419,300,
22 secured by real property listed as “11604 Azul Celeste Place, Las Vegas, Nevada 89138, APN:
23 137-35-416-061,” i.e., the Property.

24 On October 9, 2018, Debtor also filed its “First Disclosure Statement” (“Disclosure
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26 ² The court takes judicial notice under FRE 201 of the documents of public record filed in
27 this bankruptcy proceedings as well as other judicial proceedings. See U.S. v. Wilson, 631 F.2d
28 118, 119 (9th Cir. 1980); see also Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv.,
LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) (“The Court may consider the
records in this case, the underlying bankruptcy case and public records.”).

1 Statement”) and “First Plan of Reorganization” (“Plan”) along with an ex parte application for
2 conditional approval of Debtor’s Disclosure Statement, along with the declaration of Van Ness,
3 in support thereof. On October 15, 2018, an order was entered denying conditional approval of
4 Debtor’s Disclosure Statement without prejudice. (ECF No. 18). The order permitted the
5 Debtor to renew the request after completion of the meeting of creditors that was scheduled for
6 November 8, 2018.

7 On October 19, 2018, instead of renewing the motion for conditional approval after
8 completion of the meeting of creditors, Debtor filed a notice of hearing setting a hearing on
9 approval of the Disclosure Statement for December 5, 2018. (ECF No. 19). On December 12,
10 2018, an order was entered approving the Disclosure Statement and set a hearing on plan
11 confirmation for February 13, 2019. (ECF No. 30).

12 On December 19, 2018, Debtor filed an amended certificate of service attesting that the
13 approved Disclosure Statement, proposed Plan, and a ballot to accept or reject the proposed Plan
14 had been served by first class mail on “US Bank, NA, as Trustee for the Account No.
15 403115920, RMAC Trust, Series 2016-CTT, 60 Livingston Ave, EP-MN-WS3D, Attn: an
16 officer, mang’g or gen agt, agt, Saint Paul, MN 55107,” as well as other creditors in the case.

17 On January 31, 2019, Debtor filed a declaration from attorney Van Ness attesting that
18 various ballots accepting the Plan had been received, none of which included US Bank, NA, as
19 Trustee for the RMAC Trust, Series 2016-CTT (“Ballot Tabulation”). (ECF No. 36). On the
20 same date, Debtor also filed a memorandum in support of confirmation (“Confirmation Brief”)
21 along with a declaration from Craig in support of plan confirmation. (ECF Nos. 37 and 38).

22 On February 7, 2019, Debtor filed proof of claim 5-1 (“POC 5-1”) in the secured amount
23 of \$50,000, ostensibly on behalf of “US Bank, NA, as Trustee for the RMAC Trust, Series 2016-
24 CTT.” The proof of claim is signed under penalty of perjury by Craig. Attached to POC 5-1 is a
25 certificate of service attesting that attorney Van Ness served a copy of the proof of claim by first
26 class mail to “US Bank, NA, as Trustee for the Account No. 403115920, RMAC Trust, Series
27 2016-CTT, 60 Livingston Ave, EP-MN-WS3D, Attn: an officer, mang’g or gen agt, agt, Saint
28 Paul, MN 55107.”

1 On February 13, 2019, the plan confirmation hearing was continued to permit the Debtor
2 to submit evidence attesting as to the value of the Property.

3 On February 13, 2019, Debtor submitted declarations from an appraiser as well as an
4 additional declaration from Craig. (ECF Nos. 42 and 43).

5 On February 28, 2019, an order was entered confirming the Plan (“Confirmation Order”).
6 (ECF No. 46).

7 On March 25, 2019, Debtor filed a motion for entry of a final decree to close the case
8 (“Closure Motion”) that was noticed to be heard on May 1, 2019. (ECF Nos. 51 and 52).

9 On April 17, 2019, an objection to the Closure Motion was filed by Rushmore Loan
10 Management Services, LLC, as loan servicer for U.S. Bank National Association, as Trustee for
11 the RMAC Trust, Series 2016-CTT (“Rushmore”). (ECF No. 57).

12 On May 1, 2019, the hearing on the Closure Motion was continued to July 10, 2019, in
13 anticipation of the filing of the instant Motion.

14 On May 21, 2019, the instant Motion was filed by Rushmore and noticed to be heard on
15 July 10, 2019. (ECF Nos. 61 and 62).

16 On June 10, 2019, an opposition to the Motion (“Opposition”), along with the declaration
17 of attorney Van Ness (“Van Ness Declaration”), was filed by Debtor. (ECF Nos. 67 and 68).

18 On July 3, 2019, a reply to the Opposition (“Reply”) was filed by Rushmore. (ECF No.
19 69).

20 **APPLICABLE LEGAL STANDARD**

21 FRBP 2002 generally governs “notice” of matters that typically concern all parties, such
22 as the deadline for filing proofs of claim and notice of a hearing on plan confirmation. Such
23 notice may be given by first class mail. FRBP 2002(g)(1) provides that “Notices required to be
24 mailed under Rule 2002 to a creditor, indenture trustee, or equity security holder shall be
25 addressed as such entity or an authorized agent has directed in its last request filed in the
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1 particular case.” (Emphasis added). A “request filed in the particular case” may consist of a
2 proof of claim filed by the creditor. See FRBP 2002(g)(1)(A).³

3 FRBP 7004 also governs service of process in adversary proceedings and contested
4 matters. See FRBP 9014(b). Under FRBP 7004(b)(3):

5 Service may be made by first class mail upon a domestic or foreign corporation or
6 upon a partnership or other unincorporated association, by mailing a copy of the
7 summons and complaint to the attention of an officer, a managing or general
8 agent, or to any other agent authorized by appointment or by law to receive
service of process and, if the agent is one authorized by statute to receive service
and the statute so requires, by also mailing a copy to the defendant.

9 (Emphasis added).

10 The difference between these rules is that notice can be addressed to the entity’s name
11 only, while service must be directed “to the attention of an officer, a managing or general agent
12 or to any other agent authorized by appointment or by law to receive service of process.” Thus,
13 there is insufficient service under FRBP 7004(b)(3) when not directed “to the attention of” an
14 appropriate individual or officer.

15 DISCUSSION

16 The instant Motion seeks relief from the Confirmation Order obtained by the Debtor, as
17 well as POC 5-1 that was filed by the Debtor. Rushmore maintains that relief is available under
18 FRCP 60(b), applicable in bankruptcy proceedings under FRBP 9024. See Motion at 5:9-10.
19 That Rushmore would seek relief from both the Confirmation Order as well as POC 5-1 is not
20 surprising. Even though the Debtor originally scheduled the value of the Property at \$242,953
21 and scheduled US Bank as having a disputed secured claim in the amount of \$419,300, Debtor’s
22 confirmed Plan provides for US Bank’s lien against the Property to be released upon the
23 payment of \$50,000. Any remaining balance of US Bank’s claim would be paid zero. The
24 Motion therefore seeks to “reconsider, void, revoke, or modify” the confirmed Plan.

25 ³ This provision governs notices required to be mailed to a creditor under FRBP 2002.
26 The notice must be addressed “as such entity or an authorized agent has directed in the last
27 request filed in the particular case.” (Emphasis added). In this case, POC 5-1 was filed by the
28 Debtor, rather than US Bank. Debtor is not the authorized agent of US Bank. Under these
circumstances, there is no evidence that US Bank ever filed a request that notice of any
proceeding, including plan confirmation, be mailed to the address specified POC 5-1.

1 Additionally, the Motion seeks to “void” POC 5-1 that allegedly was filed by the Debtor on US
2 Bank’s behalf in the secured amount of \$50,000, or, to allow Rushmore to object to the claim.⁴

3 Rushmore alleges that the Debtor engaged in behavior, prior and during the bankruptcy,
4 in an attempt to fraudulently violate US Bank's due process rights.⁵ Among other things,
5 Rushmore asserts that a grant deed to the Property executed by its prior owners was not recorded
6 until immediately prior to the filing of the Petition, thereby concealing notice of commencement
7 of the Chapter 11 case. See Motion at 1:21 to 2:4; see also Grant, Bargain, Sale Deed attached as
8 Exhibit “G” to Motion.⁶

9 Rushmore also argues that Debtor’s filing of POC 5-1 does not establish personal
10 jurisdiction over US Bank, nor does it satisfy the service requirements applicable under FRBP
11 7004. See Motion at 5:23 to 7:4, citing In re 701 Mariposa Project, LLC, 514 B.R. 10, 15
12 (B.A.P. 9th Cir. 2014). In 701 Mariposa, the bankruptcy appellate panel for this circuit
13 explained that “it is beyond dispute that the bankruptcy court has personal jurisdiction over any
14 creditor whose proof of claim has been objected to because the creditor consents to the
15 bankruptcy court’s personal jurisdiction by filing a claim, thereby enabling the bankruptcy court
16 to allow or disallow the claim and to determine the creditor's entitlement...” Id. at 16-17.
17 Moreover, the proof of claim at issue in that case was filed by the debtor, rather than the creditor.
18 In such circumstances, the 701 Mariposa court concluded that the service requirements under
19 FRBP 7004 apply where the creditor has “not otherwise engaged in any conduct that could be
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21 ⁴ As the holder of the claim, nothing prevents US Bank from filing an amended proof of
22 claim that supersedes POC 5-1.

23 ⁵ Rushmore does not seek revocation of the Confirmation Order based on fraud pursuant
24 to Section 1144. Such a request must be made within 180 days of entry of an order. In this
25 instance, the Confirmation Order was entered on February 28, 2019, and the instant Motion was
26 filed on July 10, 2019, well within that deadline to seek relief. A proceeding to revoke a Chapter
11 confirmation order is an adversary proceeding under FRBP 7001(5).

27 ⁶ The document reflects the notarized signature of Eric J. Yugar, dated September 18,
28 2017, conveying the Property to the Debtor. The face of the document reflects that it was
recorded in the county records on October 4, 2018, one day before the Debtor commenced this
Chapter 11 proceeding.

1 construed as consent to the bankruptcy court’s personal jurisdiction.” Id. at 16. In short, a
2 debtor cannot avoid the applicable requirements for effective service of a third party by a filing a
3 proof of claim for that party.

4 More important, because a properly filed proof of claim is deemed allowed unless a party
5 in interest objects, see 11 U.S.C. § 502(a), the filing of a proof of claim by a debtor pursuant to
6 FRBP 3004 can lead to mischief. If a claim is deemed allowed under the status and amount in a
7 proof of claim filed by a debtor, then the debtor’s attempt to bind the creditor to substance of that
8 claim must be free of self-dealing. This is particularly true in Chapter 11 when a debtor proposes
9 a plan that admittedly impairs a creditor’s claim by altering the creditor’s rights under Section
10 1124(1), and then invokes the process of cramdown under Section 1129(b) consistent with the
11 same proof of claim.⁷

12 Due process requires, at a minimum, notice “reasonably calculated, under all the
13 circumstances, to apprise interested parties of the pendency of the action and afford them an
14 opportunity to present their objections.” Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S.
15 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Rushmore alleges that due process was not
16 satisfied here because US Bank and Rushmore received no notice to adequately protect their
17 interests during the bankruptcy.

18 Debtor argues that US Bank is the actual beneficiary under the deed of trust securing the
19 obligation that it listed in its Schedules, and notice was sufficient upon service to US Bank rather
20 than Rushmore. See Opposition at ¶¶ 4, 5, 9, 43. It maintains that the Confirmation Order
21 includes a finding that the address provided was constitutionally sufficient notice. Id. at ¶¶ 32
22 and 33. Debtor asserts that it complied with FRBP 7004(b)(3) by serving US Bank by first class
23 mail to the attention of an officer, managing or general agent, or appointed agent authorized by
24 law to accept process. See Van Ness Declaration at ¶¶ 5, 6, and 7, and Exhibit “1” to
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26 ⁷ As previously discussed at note 3, supra, POC 5-1 was not filed by US Bank, and any
27 notice addressed in reliance on the address in that proof of claim did not satisfy FRBP
28 2002(g)(1)(A).

1 Opposition.⁸ Moreover, Debtor argues that US Bank unreasonably delayed in seeking relief
2 from the Confirmation Order.⁹

3 The court having considered the written arguments as well as the record presented,
4 concludes that relief from the Confirmation Order is required.

5 Both parties to this Motion agree that the Debtor was required to comply with FRBP
6 7004 to obtain entry of the Confirmation Order. See Motion at ¶¶ 56 and 57; Opposition at ¶¶
7 46, 49, 50, 56, and 57; Reply at 2:6-16. Objections to plan confirmation are contested matters
8 governed by FRBP 9014. See FRBP 3020(a). For contested matters not otherwise governed by
9 the bankruptcy rules, the relief requested also must be sought by motion. See FRBP 9014(a). In
10 this instance, Debtor's plan placed the claim of US Bank in Class 1, see Plan Confirmation Brief
11 at 7:4-5, impaired the claims in Classes 1 through 6, see id. at 8:20, and the Debtor received
12 accepting ballots only in Classes 5 and 6. Id. at 23:5-9. No ballot was cast by US Bank. See
13 Ballot Tabulation at ¶11. If no ballot is received in an impaired class, the class is deemed to
14 reject plan treatment and confirmation is permitted only by cramdown. See generally 7 COLLIER
15 ON BANKRUPTCY, ¶ 1126.04 (Richard Levin and Henry J. Sommer, eds., 16th ed.); see also In re
16 M. Long Arabians, 103 B.R. 211, 215 (B.A.P. 9th Cir. 1989). Debtor specifically requested that
17 it be permitted to seek cramdown in the event an impaired class rejected the Plan. See Plan
18 Confirmation Brief at 28:10-12. Because the Debtor sought cramdown of the dissenting classes

19 _____
20 ⁸ Attorney Van Ness attests that US Bank was the subject of an adversary proceeding
21 commenced in the United States Bankruptcy Court for the District of Massachusetts,
22 denominated Adversary Proceeding No. 19-04008 ("Massachusetts Adversary"). See Van Ness
23 Declaration at ¶¶10, 11 and 16, and Exhibits 3 and 4 to Opposition. He attests that defendant
24 "U.S. Bank, as Trustee for the RMAC Trust 2016-CTT" was served in that proceeding and
25 made an appearance, and that he has relied on the same address in serving US Bank in the instant
26 Chapter 11 proceeding. Id.

27 ⁹ FRCP 60(c) requires that relief under 60(b)(1), (2), and (3) be sought within one year,
28 and that relief under 60(b)(4), (5), and (6) be sought within a reasonable time. The Confirmation
Order was entered on February 28, 2019, and the instant Motion was filed on July 10, 2019. US
Bank and Rushmore filed their objection to the Closure Motion on April 17, 2019, less than sixty
days after entry of the Confirmation. That objection raised the same concerns as the instant
Motion. Under these circumstances, the relief requested by the instant Motion is sought within a
reasonable time.

1 in its proposed Chapter 11 plan, its request for plan confirmation was a contested matter
2 governed by FRBP 9014 that required proper service under FRBP 7004.

3 As previously discussed, Debtor's counsel has attested that he served US Bank by first
4 class mail at the address indicated in the Schedules, allegedly in compliance with FRBP
5 7004(b)(3). Debtor's evidence, however, also demonstrates that its service on US Bank did not
6 comply with FRBP 7004(h). US Bank is an insured depository institution whose status is a
7 matter of public record.¹⁰ FRBP 7004(h) requires service to be made by certified mail addressed
8 to an officer of such an institution unless: (1) the institution has appeared in the case by its
9 attorney, (2) the court orders otherwise after application by the debtor, or (3) the institution has
10 submitted a written waiver of its entitlement to service by certified mail. In this case, there is no
11 record of US Bank ever appearing through its counsel prior to entry of the Confirmation Order.
12 There is no record of the Debtor filing a noticed application or obtaining an order permitting it to
13 serve US Bank by first class mail. There is no record of US Bank waiving, in any fashion, its
14 entitlement to service by certified mail. As a result, Debtor was required to serve US Bank in
15 compliance with FRBP 7004(h) and it simply did not do so.¹¹

16 Moreover, Debtor's response to the instant Motion also illustrates its fundamental
17 misunderstanding of its obligation to comply with FRBP 7004(h). Debtor's counsel has
18 submitted a copy of the complaint filed in the Massachusetts Adversary as evidence of the
19 validity of the address to which US Bank was mailed the documents in this Chapter 11

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21 ¹⁰ See FDIC BankFind – U.S. Bank National Association,
<https://research.fdic.gov/bankfind/detail.html> (accessed July 31, 2019).

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23 ¹¹ Nothing in FRBP 7004(h) suggests that the certified mail requirement for an insured
24 depository institution depends on the capacity in which the institution has been identified in
25 connection with a contested matter. Debtor maintains that US Bank is acting solely as a trustee
26 of the "RMAC Trust, Series 2016-CTT" rather than as a bank. See Opposition at 2:12-15. No
27 controlling or even persuasive authority, however, is cited for this distinction. Moreover, the
28 prospect of great mischief arises when a Chapter 11 debtor in possession files a proof of claim
without authorization from a creditor and then uses the address in the proof of claim to provide
notice of the plan confirmation hearing. Rather than being "reasonably calculated" to afford the
creditor an opportunity to object to disparate treatment of its claim, this manner of service
promotes the opposite.

1 proceeding. See note 6, supra. Unfortunately, Debtor ignores the certificate of service attached
 2 to the summons in the Massachusetts Adversary, clearly attesting that US Bank was served by
 3 both “Certified and Regular, first class, United States mail...” (Emphasis added). In other
 4 words, Debtor’s own example, contained in its own exhibit, illustrates that US Bank, in the same
 5 alleged capacity, was required to have been served by certified mail in order to comply with
 6 FRBP 7004(h).¹²

7 Under these circumstances, it is unnecessary to resolve whether the Debtor used the
 8 correct address for US Bank. It also is unnecessary to resolve whether Rushmore should have
 9 been served in addition to, or instead of, US Bank. Debtor concedes that it never served
 10 Rushmore and concedes that it only served US Bank by first class mail, rather than certified mail
 11 as required by FRBP 7004(h). As a result, the Confirmation Order was obtained by improper
 12 service and is void under FRCP 60(b)(4).

13 **IT IS THEREFORE ORDERED** that the Motion to Reconsider, Void, Revoke, or
 14 Modify Plan, ECF No. 46 And Void or Allow Objection to Claim 5-1, brought by Docket No.
 15 61, be, and the same hereby is, **GRANTED**.

16 Copies sent via CM/ECF ELECTRONIC FILING
 17 Copies sent via BNC to:
 18 SYNTHESIS INDUSTRIAL HOLDINGS 1 LLC
 19 ATTN: OFFICER OR MANAGING AGENT
 1520 WINDHAVEN CIRCLE
 20 LAS VEGAS, NV 89117

21 # # #

22 ¹² In its response to the Motion, Debtor cites Frates v. Wells Fargo Bank, N.A. (In re
 23 Frates), 507 B.R. 298 (B.A.P. 9th Cir. 2014), for the proposition that “compliance with Rule
 24 7004(h) was all that was required” in that case. See Opposition at 12:14-15. Debtor then
 25 concludes that “As was the case in *Frates*, the Debtor served USBT in accordance with the
 26 Bankruptcy Rules, and no additional service was required under the FRBP.” Id. at 12:18-21. In
 27 Frates, however, the appellate court concluded that the debtors therein had complied with FRBP
 28 7004(h) by serving the subject bank “by certified mail and addressed to the attention of an
officer” of the bank. 507 B.R. at 302 (emphasis added). The appellate court expressly observed
 that “If Debtors had simply mailed the notice and motion to a non-officer by regular mail to an
 address listed in the POC, this method would not comport with Rule 7004(h).” Id. at 303 n.4
 (emphasis added). So even if the Debtor in this case has cited Frates for the correct proposition,
 it clearly has not done all that was required to satisfy FRBP 7004(h).