

  
Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
April 05, 2019

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

\* \* \* \* \*

In re: ) Case No.: 19-10661-MKN  
          ) Chapter 13  
JERMARK K. V. DUCA and GLENNA M.S. )  
DUCA, )  
          ) Date: April 3, 2019  
          ) Time: 1:30 p.m.  
Debtors. )

**ORDER REGARDING MOTION FOR RELIEF FROM AUTOMATIC STAY AND SETOFF FILED BY HAWAII STATE FEDERAL CREDIT UNION<sup>1</sup>**

On April 3, 2019, the court heard the Motion for Relief from Automatic Stay and Setoff Filed By Hawaii State Federal Credit Union (“MRAS”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

**BACKGROUND**

On February 5, 2019, Jermark K. V. Duca and Glenna M. S. Duca (“Debtors”) filed a voluntary joint Chapter 13 petition (“Petition”). (ECF No. 1).

On February 7, 2019, Debtors filed some, but not all, of their schedules of assets and liabilities (“Schedules”). (ECF No. 11). On their property Schedule “A/B,” Debtors listed a single-family residence located at 8681 Windy Canyon Court, Las Vegas, Nevada 89113 (“Residence”). They also listed three separate bank accounts maintained at Hawaii State Federal Credit Union (“HSFCU”) containing a total amount of \$5,192.42 (“Bank Accounts”).

<sup>1</sup> In this Order, all references to “ECF No.” are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “NRS” are to provisions of the Nevada Revised Statutes.

1 On March 22, 2019, Debtors filed their remaining Schedules, including amendments to  
2 their prior Schedules, along with their statement of financial affairs (“SOFA”). (ECF No. 23).  
3 On their amended Schedule “A/B,” Debtors listed the value of their Residence at \$350,000. On  
4 their Schedule “C,” Debtors claimed the funds in their Bank Accounts as exempt under NRS  
5 21.090(1)(z). On their Schedule “D,” Debtors listed Flagstar Bank as having a claim in the  
6 amount of \$315,042.58, secured by an interest in the Residence. On their Schedule “E/F,”  
7 Debtors listed HSFCU as having three separate unsecured claims in the amounts of \$40,000,  
8 \$29,543, and \$9,175.<sup>2</sup>

9 On March 22, 2019, Debtors also filed a proposed Chapter 13 Plan #1 that was noticed for  
10 confirmation to be heard on May 23, 2019. (ECF Nos. 26 and 29). On the same date, Debtors  
11 filed under penalty of perjury their Official Form 122C-1 Chapter 13 Statement of Your Current  
12 Monthly Income and Calculation of Commitment Period (“Form 22C-1”), as well as their  
13 Official Form 122C-2 Chapter 13 Calculation of Your Disposable Income (“Form 22C-2”).  
14 (ECF No. 25).

### 15 DISCUSSION

16 HSFCU filed the instant MRAS on February 28, 2019, i.e., 23 days after the case was  
17 commenced. (ECF No. 15).<sup>3</sup> Upon the filing of the Petition, the automatic stay arose under  
18 Section 362 to stay “the setoff of any debt owing to the debtor that arose before the  
19 commencement of the case...against any claim against the debtor.” 11 U.S.C. § 362(a)(7).  
20 Upon the filing of the Petition, HSFCU placed an “administrative hold” on the Bank Accounts in  
21 light of the aggregate claims it has against the Debtors, approximating \$80,535.30. See Caluya  
22 Declaration at ¶ 7. HSFCU now seeks relief from stay for “cause” under Section 362(d)(1) so  
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24 <sup>2</sup> In Part 4, Question 11 of their SOFA, Debtors attest that on 02/4/2018, HSFCU setoff  
25 the amount of \$5,100 under the description “Money Has Been Taken After File Of Emergency  
26 Bankruptcy.” This appears to be incorrect inasmuch as the Debtors did not file their current  
voluntary Chapter 13 petition until February 5, 2019, and it does not appear that a setoff has  
occurred in any amount.

27 <sup>3</sup> The MRAS is accompanied by the supporting Declaration of Gordon Caluya (“Caluya  
28 Declaration”) as well as a notice of hearing. (ECF Nos. 15 and 16).

1 that it can setoff the amounts held in the Bank Accounts against its unsecured claims against the  
2 Debtors.<sup>4</sup>

3 Debtors do not allege that the administrative hold placed on the Bank Accounts  
4 constituted a completed setoff or any other act in violation of the automatic stay. Compare  
5 Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 22-23 (1995).<sup>5</sup> Debtors argue, however,  
6 that a setoff otherwise permissible under applicable law may be disallowed on equitable grounds.  
7 See Opposition at 2:15-22, citing In re Faasoa, 576 B.R. 631 (Bankr. S.D. Cal. 2017). HSFCU  
8 does not contest this point of law, but argues that equitable grounds do not exist in this case. See  
9 Reply at 2:16 to 3:12.

10 Debtors argue that the \$5,192.42 contained in the Bank Accounts “are approximately  
11 equivalent to the Debtors’ disposable income for a month.” Opposition at 2:19-20. According to  
12 Part 2 of their Form 22C-1, the Debtors’ current monthly income is \$5,809.48. According to  
13 Part 2 of their Form 22C-2, however, Debtor’s disposable income is -\$1,566.43, once their  
14 allowed expense deductions under Section 707(b)(2)(A) are applied.<sup>6</sup> Debtors argue that if the  
15 setoff is permitted, they would be unable to afford their mortgage payment and other necessities.  
16 See Opposition at 2:20-22.

17 HSFCU maintains that under the loan documents supporting its claims, it has a statutory  
18 security interest in the sums held in the Bank Accounts. Debtors do not suggest otherwise. In  
19 requesting access to the funds to meet their housing and vehicle expenses, Debtors suggested at  
20 the hearing that HSFCU can simply be allowed a secured claim equal to the \$5,192.42 currently  
21 in the Bank Accounts, and an unsecured claim equal to the balance of HSFCU’s claim. Because

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22 <sup>4</sup> Debtors have filed a written opposition to the MRAS (“Opposition”) to which HSFCU  
23 has filed a response (“Reply”). (ECF Nos. 21 and 32).

24 <sup>5</sup> There also is no dispute that the funds in the Bank Account were claimed as exempt, but  
25 that they remain property of the bankruptcy estate at this time. Compare Mwangi v. Wells Fargo  
26 Bank (In re Mwangi), 764 F.3d 1168 (9th Cir. 2014).

27 <sup>6</sup> At the hearing, Debtors’ counsel represented that Mr. Duca lost his job on March 25,  
28 2019, and that the Debtors’ current monthly income had been reduced to less than \$2,500.  
Counsel for HSFCU confirmed that the Debtors had testified to that effect at their meeting of  
creditors held on April 2, 2019.

1 HSFCU's only collateral would be the Debtors' claim to the funds in the Bank Accounts,  
2 however, the collateral value would be reduced dollar for dollar for any amount withdrawn by  
3 the Debtors. In essence, once the funds in the Bank Accounts are gone, they're gone. Without  
4 substitute or additional collateral, HSFCU's secured claim would not be adequately protected.

5 In Chapter 13, a debtor's access to funds is essential to confirming and performing a  
6 proposed plan. Additionally, a debtor's performance and completion of a confirmed plan is  
7 essential to obtaining a Chapter 13 discharge. In this instance, the record before the court  
8 demonstrates the Debtors' need for the funds in the Bank Accounts, but does not demonstrate  
9 that the lender's setoff rights under non-bankruptcy law should be abridged.

10 Under these circumstances, the court concludes that cause exists under Section 362(d)(1)  
11 to modify the automatic stay so that HSFCU can exercise its setoff rights with respect to the  
12 Bank Accounts. Because the Debtors may have equity in their Residence or other means to offer  
13 adequate protection to HSFCU, however, the court will permit the setoff to occur no earlier than  
14 April 30, 2019.

15 **IT IS THEREFORE ORDERED** that the Motion for Relief from Automatic Stay and  
16 Setoff Filed By Hawaii State Federal Credit Union, Docket No. 15, be, and the same hereby is,  
17 **GRANTED AS PROVIDED IN THIS ORDER.**

18 **IT IS FURTHER ORDERED** that the automatic stay in the above-captioned case is  
19 **MODIFIED** pursuant to 11 U.S.C. § 362(d)(1).

20 **IT IS FURTHER ORDERED** that Hawaii State Federal Credit Union may exercise any  
21 available setoff rights against the subject accounts of the above-captioned debtors, Jermark K. V.  
22 Duca and Glenna M. S. Duca, no earlier than April 30, 2019. No additional relief is granted by  
23 this Order.

24 Copies sent via CM/ECF ELECTRONIC FILING

25 Copies sent via BNC to:

26 JERMARK K. V. DUCA

27 GLENN M.S. DUCA

28 8681 WINDY CANYON ST.

LAS VEGAS, NV 89113