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In re: *Magnale, LLC*
Chapter 12 Case No.: 17-61344

LETTER-DECISION AND ORDER

This matter comes before the Court on the motion of National Union Bank of Kinderhook ("Kinderhook") for entry of an order dismissing the chapter 12 case of Magnale, LLC ("Magnale" or "Debtor"), imposing sanctions against Debtor and/or its counsel for filing in bad faith, and granting stay relief regarding real property owned by Debtor pursuant to 11 U.S.C. §§ 105(a),

109(g), 349(a), and 362(d)(1) and (4) (the "Motion," ECF No. 6).[1] Debtor filed Opposition to the Motion on November 9, 2017 (the "Opposition," ECF No. 11), and Kinderhook filed a Reply to the Opposition on November 13, 2017 (the "Reply," ECF No. 13).

The Court first heard oral argument on the Motion on November 16, 2017, resulting in entry of an Interim Order on November 27, 2016 (the "Interim Order," ECF No. 16). The Court adjourned the matter to December 11, 2017, and following the hearing on that date, it further adjourned the matter to December 21, 2017. The Court again adjourned the matter to February 1, 2018, to coincide with a contested evidentiary hearing regarding Debtor's Motion to Use Cash Collateral filed on November 30, 2017 (the "Cash Collateral Motion," ECF No. 18), and confirmation of Debtor's Chapter 12 Plan filed on December 8, 2017 (the "Plan," ECF No. 26).

Before the Court could issue its scheduling order on the Cash Collateral Motion, however, Debtor noticed the Plan for confirmation on January 25, 2018, and, notwithstanding the scheduled evidentiary hearing, the Court required appearances on that date in order to hear preliminary arguments from counsel. Debtor, Mark W. Swimelar, Esq., Standing Chapter 12 Trustee ("Trustee"), Kinderhook, Internal Revenue Service ("IRS"), United States Department of Agriculture ("USDA"), and Mohawk Valley Rehabilitation Corporation ("MORECO") appeared through their respective counsel on that date. Following the same, the Court restored the Motion to its calendar on January 30, 2018. The parties appeared again before the Court through their respective counsel on that date. IRS and USDA supported the Motion, while Trustee and MORECO did not take a position with respect to the same. This Letter-Decision and Order constitutes the Court's findings of fact and conclusions of law to the extent required by Federal

[1] All chapter and section references are to the United States Bankruptcy Code, 11 U.S.C. §§ 101–1532 (2012) (the "Bankruptcy Code"). All CM/ECF docket references, unless otherwise indicated, are to the official docket in the present case maintained by the Clerk of the Bankruptcy Court.

Rule of Bankruptcy Procedure 7052. Any findings and conclusions rendered by the Court on that date are hereby incorporated by reference.

Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157(a) and (b). This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (G), and (O).

Factual Background

Debtor is owned and operated by a sole member, James Giombetti. Debtor operates an agritourism business located at 434 Bed Bug Hill Road in Fly Creek, New York (the "Property") under the d/b/a B&B Ranch. The Property consists of approximately 335 acres of land and buildings that Debtor purchased in 2012 for $1,400,000.00. Mr. Giombetti has since made capital improvements to the Property, but the parties' respective assertions regarding its fair market value differ markedly from approximately $5.2 million as advanced by Debtor to $1.7 million as advanced by Kinderhook.

The main building on the Property serves as Mr. Giombetti's residence and also contains 5 additional guest suites. Debtor's business centers around a high-end bed and breakfast and includes raising unique livestock and poultry, selling butcher boxes of Piedmontese beef, selling boxes of homemade pasta and red sauce, gardening, private farm-to-table dining, hosting sporting events, and an equestrian operation. Debtor's business model relies upon annual memberships that allow members to stay and dine at the Property with full use of Debtor's indoor and outdoor amenities. Memberships require payment of a one-time $100.00 initiation fee, and members are then obligated to spend an additional $400.00 annually on food and beverages. Members also gain access to Debtor's food subscription programs. Additionally, Debtor offers non-ranch members a buyers club membership to purchase gourmet food boxes from Debtor's online shop.

Kinderhook financed Debtor's purchase of the Property. Kinderhook indisputably holds a first secured position in the Property pursuant to two notes and mortgages. The first note and mortgage in the principal amount of $1,700,000.00 were executed on February 3, 2012, and modified on February 28, 2014. The second note and mortgage in the principal amount of $450,000.00 were executed on April 19, 2013, and modified on February 28, 2014. Debtor thereafter defaulted on its obligations and, in 2015, Kinderhook commenced a state court foreclosure action against Debtor. Following entry of a Judgment of Foreclosure and one day prior to the scheduled auction sale, Debtor filed for bankruptcy relief. Kinderhook's efforts to complete its foreclosure have since been frustrated by a series of bankruptcy filings by Debtor, thus prompting Kinderhook to now seek in rem relief as to the Property.

Debtor's Bankruptcy Filings[2]

Magnale's First Case, Case Number 15-61629

Magnale commenced its first case by filing a Voluntary Petition for chapter 12 relief on November 17, 2015, under Case Number 15-61629 ("Magnale I"). Magnale was represented by Justin A. Heller, Esq., Nolan & Heller, LLP, at the time of its initial filing. On December 15, 2015, Trustee filed a field report prepared by Gary W. Conklin ("Conklin"), Financial Consultant, following Mr. Conklin's visit to the Property. (Magnale I, ECF No. 16.) As part of his financial analysis, Conklin stated that extensive capital improvements were made to the Property and "financed by the first mortgagee, with no provisions being made to provide operating capital for the actual operations of the business. [Mr. Giombetti and his wife] also invested most of their cash in capital improvements, leaving them with no operating capital for operations." Conklin also

[2] The Court takes judicial notice of the dockets in Magnale's chapter 12 cases maintained by the Clerk of the Bankruptcy Court, including all pleadings and other documents filed, all orders entered, and all evidence and arguments made, proffered, or adduced at the hearings held before the Court during the pendency of these cases. FED. R. EVID. 201.

noted that the "operation is unique, in that it is a small vertically integrated enterprise that sells its production at retail prices either through using the farm production in the bed and breakfast enterprise or through direct sales of meat and other products to mail order clients." In conclusion, he determined that Magnale's operation could be successful if Magnale were able to reach an amiable agreement with Kinderhook, which would include either a modification of the terms of Kinderhook's debt or a "total refinancing."

Magnale then filed a Chapter 12 Plan on January 26, 2016. (Magnale I, ECF No. 18.) Magnale filed an Amended Chapter 12 Plan on February 22, 2016 (the "Magnale I Amended Plan," Magnale I, ECF No. 34). MORECO filed a Limited Objection to the same on March 3, 2016 (Magnale I, ECF No. 39), and Kinderhook filed an Objection to the same on March 4, 2016 (Magnale I, ECF No. 41). On April 6, 2016, Kinderhook filed a Motion for Relief from Stay under § 362(d)(1) (the "Magnale I First Stay Relief Motion," Magnale I, ECF No. 52), returnable on May 5, 2016, alleging a total debt due in the amount of $2,279,694.45, plus interest, and alleging Magnale was using Kinderhook's cash collateral without consent or authorization in violation of § 363. The Magnale I First Stay Relief Motion was adjourned and carried on the docket through June 30, 2016.

On April 7, 2016, the Court conducted a confirmation hearing on the Magnale I Amended Plan, which was confirmed by order issued May 3, 2016 (the "Magnale I Confirmation Order," Magnale I, ECF. No. 55). The Magnale I Confirmation Order provided for a six month term, monthly plan payments of $1,000.00 per month, and a 100% distribution to unsecured creditors. It also provided for payment in the amount of $210,000.00 to Kinderhook within 1 month of the Magnale I Amended Plan's effective date to pay down the debt collateralized by Magnale's personalty. Moreover, it required Magnale to obtain additional financing on or before completion of the Magnale I Amended Plan term to pay the balance of all claims in full.

On June 7, 2016, Kinderhook filed a second Motion for Relief from Stay under § 362(d)(1), (the "Magnale I Second Stay Relief Motion," Magnale I, ECF No. 62). Kinderhook alleged that Magnale had not made a single payment on either secured loan since August 1, 2014, and Magnale defaulted under the terms of the Magnale I Confirmation Order by failing to make the $210,000.00 payment to Kinderhook as well as the June 2016 plan payment. Debtor filed Opposition to the Magnale I Second Stay Relief Motion on June 23, 2016. (Magnale I, ECF No. 66.) The parties' subsequently filed a settlement letter on June 30, 2016 (Magnale I, ECF No. 69), having agreed to a 30-day conditional order (Magnale I, ECF No. 69). The Court issued an Order Conditionally Granting Kinderhook relief from stay on July 5, 2016. (Magnale I, ECF No. 71.) The Court therein extended Magnale's deadline to make the $210,000.00 payment to Kinderhook to July, 31, 2016, and conditionally terminated the automatic stay with respect to the liened collateral in the event Magnale failed to so.

On August 25, 2016, Trustee filed a Motion to Dismiss, alleging post-petition arrears in the amount of $4,000.00, failure to file monthly operating reports, and failure to obtain refinancing. (Magnale I, EFC. No. 74.) On September 9, 2019, Magnale responded by filing a Motion to Modify and Reply. (Magnale I, ECF Nos. 86 & 89.) Kinderhook filed a Response to Magnale's proposed modification on October 10, 2016 (Magnale I, ECF No. 101), and MORECO followed suit by filing a Limited Objection to Magnale's proposed modification on October 11, 2016 (Magnale I, ECF No. 103). The Court issued an Order Conditionally Granting the Trustee's Motion to Dismiss on October 24, 2016 (the "Conditional Order of Dismissal," Magnale I, ECF No. 105), therein requiring Magnale to bring the Magnale I Amended Plan current. On that date, the Court also issued an Order Approving Chapter 12 Plan Modification (the "Modification Order," Magnale I, ECF No. 106). The Modification Order extended the Magnale I Amended Plan term, authorized Kinderhook to prepare for an auction sale of cattle and proceed with its pending

state court foreclosure action, and permitted Debtor to accept financing from the Farm Services Agency ("FSA") in the amount of $250,000.00. Of that amount, $210,000.00 was earmarked to refinance Kinderhook's lien and $40,000.00 was earmarked for working capital. The Modification Order also required Magnale to obtain a written commitment from a qualified lender prior to January 30, 2017, for financing sufficient to pay off Kinderhook and MORECO's claims within 45 days of Magnale's receipt of the commitment.

On March 21, 2017, Trustee filed an Affidavit attesting to the fact that Magnale had failed to comply with the Conditional Order of Dismissal, and therefore requested that the Court dismiss the case. The Court issued an Order of Dismissal on May 2, 2017. (Magnale I, ECF No. 115.) Trustee filed his Final Report and Account on June 15, 2017, indicating that Magnale made total plan payments of $2,000.00 during the pendency of Magnale I. (Magnale I, ECF No. 118.) The Court issued an Order Closing Dismissed Case and Discharging Trustee on July 19, 2017. (Magnale I, ECF No. 121.)

Magnale's Second Case, Case Number 17-60611

Magnale commenced its second case by filing a Voluntary Petition for chapter 12 relief on May 8, 2017, under Case Number 17-60611 ("Magnale II"). At that time, Magnale was represented by Peter Alan Orville, Esq., Orville & McDonald Law, P.C. On May 9, 2017, Kinderhook filed a Motion to Dismiss, Impose Sanctions, and Grant Relief from Automatic Stay against Magnale. (Magnale II, ECF No. 4.) Magnale filed a Reply on June 14, 2017. (Magnale II, ECF No. 14.) Trustee also filed a Response in Support of Dismissal on June 19, 2017 (Magnale II, ECF No. 16), as amended on the same date (Magnale II, ECF No. 17), indicating therein that Magnale had been unable to obtain refinancing during the pendency of Magnale I, Magnale's operating reports and tax returns filed in that case showed significant losses, and Magnale did not appear to have any ability to make payments or to refinance in Magnale II. The Court heard

Kinderhook's motion on June 22, 2017, and orally dismissed Magnale II on alternate grounds. The Court issued an Order Dismissing Case pursuant to § 105(a) and the bar against simultaneous bankruptcy cases because Magnale I was still administratively open. (Magnale II, ECF No. 18.) Magnale II was closed on August 24, 2017.

Debtor's Third Case, the Current Case

Debtor commenced the current case by filing its third Voluntary Petition for chapter 12 relief on October 18, 2017 ("Magnale III"), with the continued assistance of Attorney Orville. This filing occurred one day prior to Kinderhook's rescheduled foreclosure sale of the Property. At the time of filing, Debtor owed FSA $251,334.56, IRS $16,835.38, and Kinderhook $2,484.172.60 per filed proofs of claim. On October 25, 2017, Kinderhook filed the Motion and Debtor again filed Opposition, which Kinderhook followed with its Reply. Following the initial hearing on the Motion on November 16, 2017, the Court issued the Interim Order and therein required Debtor to deliver a bank or certified check to Kinderhook's counsel in the amount of $13,500.00, on or before December 8, 2017. That payment represented Debtor's first post-petition mortgage payment. The Interim Order also directed Debtor to file a motion to use cash collateral by a date certain, with supporting exhibits, and monthly operating reports.

Debtor filed its Motion to Use Cash Collateral on November 30, 2017 (the "Cash Collateral Motion," ECF No. 18), together with an appraisal, 13 month projections, a 6 year financial history, and other exhibits. USDA, on behalf of FSA, filed an Objection to the Cash Collateral Motion on December 8, 2017. (ECF No. 25.) On the same date, Kinderhook filed Opposition to the Cash Collateral Motion (ECF No. 28), and Kinderhook's counsel filed a letter of default advising the Court that Debtor had failed to comply with the Interim Order (ECF No. 29). On December 11, 2017, however, Debtor's counsel filed a letter advising that Debtor did in fact timely make the post-petition mortgage payment to Kinderhook by wire transfer on the afternoon of December 8,

2017. (ECF No. 30.) On December 14, 2017, the Court issued a Scheduling Order setting an evidentiary hearing on Debtor's Cash Collateral Motion for December 21, 2017. (ECF No. 34.) On December 18, 2017, the Court issued a Limited Order Authorizing Debtor's Use of Cash Collateral on an Interim Basis (the "Second Interim Order," ECF No. 40), which required Debtor to deliver a bank or certified check to Kinderhook's counsel or make a wire transfer in the amount of $10,995.00, on or before January 8, 2018. That payment represented Debtor's second post-petition mortgage payment. On that date, the Court also issued an Amended Scheduling Order setting a final hearing on Debtor's Cash Collateral Motion for February 1, 2018. (ECF No. 41.)

Debtor filed the Plan on December 8, 2017, and noticed the confirmation hearing for January 25, 2018 (ECF No. 27). The Plan, inter alia, requires Debtor to make monthly payments in the amount of $20,000.00 for 60 months, to pay secured claims in full over a 10 year period, including Kinderhook, and to pay general unsecured creditors a 100% dividend. As a partial source of funding, the Plan relies upon a significant influx of income generated from the harvesting of timber on the Property.

FSA filed an Objection to Confirmation of Debtor's Chapter 12 Plan on January 17, 2018, on the grounds of § 109(g) ineligibility, ambiguity, commercial unreasonableness, inability to fund the Magnale III Plan as proposed due to legal restrictions prohibiting Debtor from harvesting timber or, if permitted, retaining the timber proceeds, and lack of feasibility. (ECF No. 45.) IRS also filed a Limited Objection to confirmation on January 18, 2018. (ECF No. 46.) MORECO filed an Objection to confirmation on January 18, 2018, addressing only the proposed treatment of its secured claim. (ECF No. 48.) Kinderhook filed its Objections to Confirmation of Proposed Chapter 12 Plan on January 18, 2018, premised in part upon a pre-petition arrearage owed to Kinderhook as of the date of filing of Magnale III in an amount of over $740,000.00, representing an increase of $416,782.32 since the filing of Magnale I. (ECF No. 51.) Kinderhook also alleges

that the Plan is neither feasible nor achievable as proposed based upon Debtor's monthly operating reports and projections and Debtor's legal inability to move forward with its forestry plan. Finally, Trustee filed an Objection to Confirmation on January 18, 2018, on grounds that, notwithstanding the proposed timber income, the Plan is infeasible by approximately $300,000.00. (ECF No. 57.)

On January 29, 2018, Debtor filed an Amended Chapter 12 Plan (the "Amended Plan," ECF No. 62), which eliminated funding from the proposed timber operation and again relies upon debtor-in-possession ("DIP") financing. The Amended Plan, inter alia, requires Debtor to make monthly payments in the amount of $22,500.00 for 60 months, to pay MORECO in full over a 7 year term, to obtain DIP financing in order to pay the Bank of Cooperstown in full, and to pay a 100% dividend to unsecured creditors. With respect to Kinderhook's debt, it provides for Debtor to pay down the principal using $250,000.00 of DIP financing and to pay the remainder at the contract rate of interest by making monthly payments of $13,500.00 for 10 years with a balloon payment at the end of the term. It also requires Debtor to maintain property insurance on the Property and remain current with real property taxes.

The Court heard preliminary arguments from counsel regarding confirmation and testimony from Mr. Giombetti on January 25, 2018. Mr. Giombetti testified that he ceased outside professional employment in 2016 in order to focus exclusively on Debtor's operations and growth, but he has since returned to full-time employment unrelated to Debtor. Mr. Giombetti verified that Debtor had approximately 300 members as of January 1, 2017, an occupancy rate in 2017 of approximately 22% to 35%, and that members historically spent an average of $1,000.00 per year. Debtor's projections call for an increase in membership to 500 members who will spend on average a minimum of $2,000.00 per year. Debtor's membership attrition rate is approximately 20%, although Mr. Giombetti testified that a significant number of members rejoin at a later date. Mr. Giombetti also testified that Debtor cannot meet the current demand for its beef and gourmet food

subscription boxes because it does not have the requisite disposable income to slaughter, process, store, and ship the beef or other products. Nevertheless, Mr. Giombetti predicted that Debtor will experience growth of its subscription boxes and revenue by tenfold between 2017 and 2018. In preparation for the same, Mr. Giombetti testified that he recently used personal funds to purchase and install a $14,000.00 walk-in freezer at the Property.

Notwithstanding that Debtor's monthly operating reports and tax returns show consistent losses during the course of its bankruptcies, notably while ignoring its mortgage, tax, and insurance obligations, Mr. Giombetti testified that he believes Debtor can increase its current lodging and subscription box memberships as set forth in its projections to support a viable plan and reorganize. In the meantime, Mr. Giombetti recognizes that he and his wife will have to continue to use personal funds, to the extent available, to satisfy certain obligations of Debtor, including its 2018 tax obligations due on January 31, 2018, in the amount of $47,313.56.

Stay Relief for Cause

> Section 362(d)(1) provides in relevant part:
> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

11 U.S.C. § 362(d)(1).

The creditor bears the initial burden of showing that it is entitled to relief for cause under this subsection. Once the creditor does so, the burden shifts to the debtor to show that the creditor's interest is adequately protected. 11 U.S.C. § 362(g).

The statute does not define "cause," so courts must determine whether cause exists based on the totality of the circumstances of each case. *United States v. Olayer (In re Olayer)*, Case No. 17-23386-GL, 2017 Bankr. LEXIS 4045, at *9 n. 58 (Bankr. W.D. Pa. Nov. 22, 2017) (citing *Baldino v. Wilson (In re Wilson)*, 116 F.3d 87, 90 (3d Cir. 1997)). Here, Kinderhook contends that

Debtor's unauthorized use of cash collateral, failure to propose a viable and confirmable plan as a matter of law based on its inability to either generate sufficient income to carry its existing debt load or to obtain significant DIP financing, failure to meet ongoing tax and insurance obligations, and difficulty making timely court-ordered adequate protection payments to date establishes cause.

The Court agrees for three primary reasons. First and foremost, Debtor failed to timely comply with the Interim Order requiring it to make a second post-petition mortgage payment as adequate protection to Kinderhook in the amount of $10,995.00, by January 8, 2018. In fact, as represented by Debtor's counsel at the hearing on January 30, 2018, Debtor did not schedule that payment for wire transfer to Kinderhook's counsel until the morning of the hearing. Although Debtor purportedly made the payment on the morning of the hearing, it was not done until after the Court restored the Motion and, even if Kinderhook's counsel received it on that date, it would have been late by 22 days. Second, Debtor also failed to provide proof of property and casualty insurance naming Kinderhook as a loss payee with respect to the Property or to provide proof of payment of the outstanding tax obligations due the following day. Third, based on Mr. Giombetti's preliminary testimony and the unrealistic projections proffered in support of Debtor's Plan, the Court need not conduct a full evidentiary hearing at the continued expense of the parties in order to determine that neither the Plan nor the Amended Plan are feasible and confirmable as a matter of law.[3] There is simply no indication in the record that Debtor's projections are sound or that its business model can be sustained or thrive given the inherent challenges associated with an agritourism business located in Central New York. Accordingly, the Court concludes that Kinderhook's secured interest in the Property is not adequately protected and that it is therefore entitled to stay relief pursuant to § 362(d)(1).

[3] As the Court noted on the record on January 30, 2018, the Amended Plan is not yet before it. However, for purposes of this Letter-Decision and Order, the Court considers its terms and confirmability.

In Rem Relief

Section 362(d)(4), as enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, and amended by the Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, provides in relevant part:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
> . . . .
> (4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either–
>
> (A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or
> (B) multiple bankruptcy filings affecting such real property.

11 U.S.C. § 362(d)(4).[4]

This provision gives the Court authority to grant in rem relief from the stay as to Debtor's interest in the Property, such that any and all future filings by any person or entity with an interest in the Property will not operate as an automatic stay for a period of two years after the date of the entry of such an order, provided that the order is recorded in compliance with applicable state laws governing notices of interest or liens in real property. *In re Montalvo*, 416 B.R. 381, 386 (Bankr. E.D.N.Y. 2009); 11 U.S.C. § 362(d)(4). Section 362(b)(20) creates a specific exception for the enforcement of a lien against or security interest in real property following the entry of a § 362(d)(4) order in a prior bankruptcy case prohibiting the application of the stay as to that property. 11 U.S.C. § 362(b)(20). "The purpose of the two year bar under § 362(d)(4) is to prevent parties from filing another bankruptcy case to reimpose the stay and frustrate secured creditor's enforcement rights." *In re Wilson*, Case No. 17-10770(1)(13), 2017 Bankr. LEXIS 3781, at *4

[4] As part of the Bankruptcy Technical Corrections Act of 2010, Congress amended subsection (d)(4) to substitute "hinder, or" for "hinder, and." Pub. L. No. 111-327.

(Bankr. W.D. Ky. Nov. 1, 2017) (citing 11 U.S.C. § 362(b)(20); *In re Alakozai*, 499 B.R. 698 (B.A.P. 9th Cir. 2013)). In a subsequent case, a party may move for relief from such an order based upon "changed circumstances or for other good cause shown." 11 U.S.C. § 362(b)(20). The secured creditor bears the burden of proof to show that it is entitled to in rem relief under this provision. *In re Olayer*, 2017 Bankr. LEXIS 4045, at *5 n.32 (citing *Mazza v. Bank of N.Y. Mellon (In re Mazza)*, Civil Action No. 14-cv-6423, 2015 U.S. Dist. LEXIS 134830, at *12 (E.D. Pa. Sept. 30, 2015)).

Kinderhook requests in rem relief under § 362(d)(4)(B). Accordingly, it must make a prima facie showing that Magnale III is part of a scheme to hinder, delay, or defraud Kinderhook. "Filing a bankruptcy petition as a means of stopping a foreclosure on real property qualifies as a plan to hinder or delay a creditor's rights to property." *In re Wilson*, 2017 Bankr. LEXIS 3781, at *4 (citing *Matter of McKanders*, 42 B.R. 108, 109 (Bankr. N.D. Ga. 1984)). "The mere existence of '[m]ultiple bankruptcy filings does not alone justify relief' unless they are part of a scheme." *In re Olayer*, 2017 Bankr. LEXIS 4205, at *5 (quoting *In re Gray*, 558 Fed. Appx. 163, 166 (3d Cir. Mar. 7, 2014)). Because "[s]trategically timing a bankruptcy to stay or cancel foreclosure proceedings can be a legitimate tactic within a debtor's arsenal," *id.* (citing *In re Kohar*, 525 B.R. 248, 257 n.7 (Bankr. W.D. Pa. 2015)), and the remedy afforded the secured creditor under § 362(d)(4) has an extraordinary impact, the Court must take a global view of a debtor's filings and overall reorganization efforts in order to determine whether the debtor commenced the pending case without the ability or the intention to reorganize, *id.* (citing *In re Mazza*, 2015 U.S. Dist. LEXIS 134830, at *14)). A non-exclusive list of factors the Court may consider includes strategically timed serial filings affecting the real property compounded by a lack of payments, failure to confirm a plan in prior cases, proposal of a highly-questionable plan in the present case,

failure to make post-petition payments to the secured creditor, and default under an interim order or stipulation. *In re Olayer*, 2017 Bankr. LEXIS 4045, at *5 (citing cases).

Without having to repeat the facts as set forth above, the Court finds that the majority of these factors are present in this case. The events in Magnale I, Magnale II, and Magnale III, taken together, demonstrate that Debtor does not have the means or ability to reorganize by virtue of a confirmable plan. Although Mr. Giombetti has marketed and attempted to sell or refinance the Property, his efforts have been unsuccessful over the course of the last several years. He testified that for Debtor to be successful, the business would need to grow exponentially to allow for reinvestment dollars to then expand or upgrade the Property and business model to ensure membership growth and profitability. As stated on the record by counsel for IRS and FSA at the hearing on January 30, 2018, Mr. Giombetti's vision simply does not coincide with the economic realities Debtor currently faces. Under these circumstances, the Court cannot ignore Debtor's lack of any meaningful progress towards reorganization and its inability to timely comply with several court orders issued since Debtor first entered bankruptcy in 2015. In fact, Debtor has accumulated significant additional indebtedness since the filing of Magnale I, notwithstanding Mr. and Mrs. Giombetti's financial contribution to the business from their personal savings and retirement monies. Given the history and timing of these filings, the Court may infer that Magnale III is part of a scheme to hinder or delay Kinderhook's foreclosure efforts. Accordingly, the Court must find that relief is appropriate under § 362(d)(4)(B).

[INTENTIONALLY LEFT BLANK]

Conclusion

For the reasons set forth above, Kinderhook's Motion is granted in part as to the relief requested pursuant to § 362(d). The Court will issue a separate order consistent with this Letter-Decision and Order. To that end, Kinderhook's counsel is hereby directed to submit a proposed order in conformance with this Letter-Decision and Order to include a description of the Property and such other information as may be required by the Otsego County Clerk within 7 business days.

It is SO ORDERED.

Dated: February 8, 2018
Utica, New York

/s/DIANE DAVIS
Hon. Diane Davis
United States Bankruptcy Judge