Dated: November 03, 2009
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

LAMAR CROSSING APARTMENTS, L.P.,

Debtor.

Case No. 09-30194-L
Chapter 11

Arvest Bank and BCP-Michigan, LLC,
Movants,
v.
Lamar Crossing Apartments, L.P.
Respondent.

(Motion to Dismiss)

ORDER DISMISSING BANKRUPTCY CASE AND ANNULLING AUTOMATIC STAY

BEFORE THE COURT is the motion of Arvest Bank and BCP-Michigan, LLC, to dismiss this bankruptcy case, vacate the order for relief, and/or determine that the automatic stay does not apply to a previous foreclosure sale. This bankruptcy court has jurisdiction to hear and finally determine the issues raised by the Movants because this is a core proceeding concerning the

administration of the bankruptcy estate and a request for modification of the automatic stay. *See* 28 U.S.C. § 157(b)(2)(A) and (G). The voluntary petition for relief under Chapter 11 of the Bankruptcy Code was filed September 16, 2009, at 9:37 a.m. Without knowledge of this filing, a foreclosure sale was conducted with respect to the unfinished apartment complex that is the sole asset of the Debtor at noon on the same day, September 16, 2009. The pending motion was filed September 17, 2009, and an expedited hearing was requested. The Court conducted a hearing on October 28, 2009. Arvest Bank was represented by attorneys Paul Matthews and John Heflin. BCP-Michigan was represented by attorney Kemper Durand. Attorney Samuel Jones appeared in opposition to the motion. Although Jones signed the petition as attorney for the Debtor, he has filed no application for approval of his employment in this Chapter 11 case. Further, in response to questions by the Court, Jones indicated that his engagement agreement is actually with Preston Byrd, an individual, who signed the petition as "Chief Manager."

Arvest Bank and BCP-Michigan assert that the bankruptcy case should be dismissed because neither Jones nor Byrd were authorized to sign or file the petition. Further, they assert that the petition, if authorized, was not filed in good faith. The Movants are correct. Preston Byrd, by his own admission, was never the Chief Manager of the Debtor. He was, and may still be, the Chief Manager of Horizon Holding Company, LLC ("Horizon"), which was, but is no longer, the sole General Partner of the Debtor. Jones, by his own admission, was not engaged to represent the Debtor.

Pursuant to the terms of the Lamar Crossing Apartments, LP, First Amended and Restated Agreement of Limited Partnership, dated as of June 14, 2007 (the "Limited Partnership Agreement"),[1] § 4.5(a)(iii), the Special Limited Partner (BCCC, Inc.) was given the right to:

> remove the General Partner and elect a new General Partner (A) on the basis of the performance and discharge of such General Partner's obligations constituting fraud, bad faith, gross negligence, willful misconduct or breach of fiduciary duty, or (B) upon the occurrence of a Material Event [a defined term for purposes of the Limited Partnership Agreement].

Notice of Default was given on May 8, 2008, by the Investor Limited Partner (Boston Capital Corporate Tax Credit Fund XXVI) to Horizon, indicating a number of defaults with respect to the Limited Partnership Agreement. On November 10, 2008, the Special Limited Partner gave Notice of Removal of the General Partner Pursuant to Section 4.5(a)(iii).[2] Notice was given to three individuals, including Byrd. On November 12, 2008, the Special Limited Partner caused to be filed with the Tennessee Secretary of State an Amendment to the Certificate of Limited Partnership, indicating that "Horizon Holding Company, LLC has withdrawn as General Partner and [was] replaced by BCP-Michigan, LLC as General Partner."[3]

In connection with a lawsuit styled, *James Hutton and Orson Sykes, individually and derivatively on behalf of Horizon Holding Company, LLC v. Preston Byrd, Horizon Financial Group, LLC, Donette Byrd, and the Preston Byrd Irrevocable Insurance Trust*, Cause No. CH-08-

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[1] Appended as Exhibit A to the Affidavit of BCP-Michigan, LLC, dated September 29, 2009, Trial Exhibit 4 (hereinafter, Trial Exhibits will be indicated by "Tr. Ex." followed by the exhibit number).

[2] Appended as Exhibit C to Tr. Ex. 4.

[3] Appended as Exhibit D to Tr. Ex. 5.

1063-III, a consent order was entered appointing Lucian Pera as receiver for Horizon.[4] Pera was charged to "take all actions necessary to preserve and safeguard the PILOT status and the tax credits available to the real estate development known as the Lamar Crossings Project." Further, Pera was empowered to determine that "the withdrawal of Horizon Holding Company, LLC's opposition to its removal as the General Partner on the Project is necessary to preserve and safeguard the PILOT status and the tax credits."[5] Pera, as Receiver, was given authority to bind Horizon. Pera did make the determination that removal of Horizon was necessary to preserve and safeguard the PILOT status and tax credits, and filed a Notice by Defendant Horizon Holding Company, LLC, of Withdrawal of Motion to Stay Its Removal as General Partner of Lamar Crossing Apartments, L.P.[6] Notwithstanding this notice, Pera reserved all rights of Holding to raise any and all defenses and counterclaims that might be available to it, and specifically indicated that the notice should not be deemed an admission of wrongdoing or that grounds existed for Horizon's removal as General Partner.[7] In another, related proceeding styled, *Lamar Crossing Apartments, LP, and Horizon Holding Co., LLC v. Arvest Bank,* Cause No. CH-09-1425-I, an order was entered on September 15, 2009, dissolving a previously entered Temporary Restraining Order and authorizing Arvest Bank "to proceed with the foreclosure scheduled for September 16, 2009."[8]

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[4] Tr. Ex. 1.

[5] Tr. Ex. 1.

[6] Appended as Exhibit A to Exhibit 1 to the Affidavit of Lucian Pera, Tr. Ex. 2.

[7] *Id.,* ¶ 6.

[8] Order to Dissolve Injunction and Deny Plaintiff's Motion for Contempt, Sanctions and Exension [sic] of Temporary Injunction, final paragraph, Tr. Ex. 3.

Byrd responded by causing to be filed the petition that commenced this Chapter 11 case on September 16, 2009, and by filing a "Certificate of Correction of Limited Partnership,"[9] with the Tennessee Secretary of State and with the Shelby County Register, in which in the various blanks of the form he states:

> This document was not authorized to be filed by the General Partner Horizon Holding Company, LLC, nor was it executed by a member of the General Partner Horizon Holding Company.
>
> This document was not authorized nor was it executed by a member of the General Partner entity Horizon Holding Company, LLC.
>
> Horizon Holding Company, LLC, is and always has been the General Partner for Lamar Crossing Apartments, LP, since its original filing.
>
> The document was not executed by a member or authorized representative of the General Partner Horizon Holding, LLC.
>
> The attached document should never have been filed.

This document was signed by Preston Byrd as "Chief Manager of HHC" and dated September 22, 2009, *after* the bankruptcy petition was filed. Thus, if it were effective at all, it was ineffective to change the status of Horizon on the date of the filing of the bankruptcy petition.

Byrd's claims that the filing of the Amendment to the Certificate of Limited Partnership by BCP-Michigan was unauthorized are without merit. The Limited Partnership Agreement clearly authorizes the Special Limited Partner to remove the General Partner and to elect another for cause. The Special Limited Partner did so, electing BCP-Michigan as successor General Partner. Further,

[9] Exhibit O to Debtor's Response to The Motion of Arvest Bank and BCP-Michigan, LLC, to Dismiss Case, to Vacate Order for Relief, and/or to Determine that Automatic Stay Does Not Apply to Foreclosure Sale, filed October 21, 2009.

in the Limited Partnership Agreement, the General Partner (Horizon) grants to the Special Limited Partner:

> an irrevocable (to the extent permitted by applicable law) power of attorney coupled with an interest to execute and deliver any and all documents and instruments on behalf of such General Partner and the Partnership as the Special Limited Partner may deem necessary or appropriate in order to effect the provisions of this Section 4.5 and to enable the new General Partner to manage the business of the Partnership.[10]

The Amendment to the Certificate of Limited Partnership was properly executed by a representative of BCCC, Inc., the Special Limited Partner, as attorney-in-fact for Horizon. At the time the bankruptcy petition was filed, the Special Limited Partner had taken all steps necessary to remove Horizon and substitute BCP-Michigan as General Partner for the Debtor. By the act of Pera as Receiver for Horizon, the motion to stay the removal of Horizon as General Partner was withdrawn. This occurred on December 8, 2008, well in advance of the filing of the bankruptcy petition. In addition, the Court heard the testimony of Peter Haley, an employee of BC Asset Management with personal knowledge of the facts to which he testified, to the effect that Arvest Bank has been in possession and control of the property of the Debtor since November 10, 2008, and that BCP-Michigan has acted as General Partner for Horizon since that time. The Court finds that at the time of the filing of the bankruptcy petition, BCP-Michigan was the General Partner of the Debtor, and Byrd was not authorized by the Limited Partnership Agreement to hire counsel for or sign the petition on behalf of the Debtor.

[10] Limited Partnership Agreement, § 4.5(b)(iii), Exhibit A to Tr. Ex. 4.

The Limited Partnership Agreement prohibits the General Partner from filing a petition in bankruptcy for the Partnership (the Debtor) without the consent of the Special General Partner.[11] The Special Limited Partner did not consent to the filing of the bankruptcy petition. For this additional reason, the filing of the bankruptcy petition was not authorized by the Limited Partnership Agreement.

A voluntary Chapter 11 case is commenced by the filing of a petition by an entity that may be a debtor under that chapter. *See* 11 U.S.C. § 301. A limited partnership is a person that may be a debtor under Chapter 11. *See* 11 U.S.C. §§ 109(d) and 101(41). The Bankruptcy Code does not specify who is authorized to file a voluntary petition in bankruptcy for a person, including a limited partnership, that is not a natural person. Instead, the general rule is that authority to bind a person to a voluntary petition is established by applicable state law. *See, e.g., Union Planters Nat'l Bank v. Hunters Horn Assoc. (In re Hunters Horn Assoc.)*, 158 B.R. 729, 730 (1993) (and cases cited therein). The Debtor, as a Tennessee limited partnership, is governed by the Tennessee Revised Uniform Limited Partnership Act, Tenn. Code Ann. § 62-2-202, et seq. Tennessee Code Annotated § 61-2-403 states: "Except as provided in this chapter *or in the partnership agreement*, a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners" (emphasis added). It has been said that, "the filing of a voluntary bankruptcy petition for a partnership is a management prerogative exercised by the entity or individual(s) having authority to act for the partnership." *Hunters Horn Assoc.*, 158 B.R. at 730. As we have seen, at the time that the petition was filed in this case, the persons with actual authority to file a bankruptcy petition for the Debtor according to the Limited Partnership

[11] *See* Limited Partnership Agreement § 6.2(a)(ix), Exhibit A to Tr. Ex. 4.

Agreement were BCP-Michigan, LLC, as General Partner, and BCCC, Inc., as Special Limited Partner. Neither of these entities authorized the filing of the bankruptcy petition, and the consent of both of them was required. Neither of these entities has expressed an interest in ratifying the actions of Byrd and Jones. To the contrary, BCP-Michigan has joined Arvest Bank in urging the Court to dismiss this bankruptcy case because the petition was filed without authority. The motion should be granted.

Further, the bankruptcy petition was not filed in good faith. The Debtor's bankruptcy petition was filed on the day of foreclosure, without authorization, immediately after the stay of foreclosure obtained by the Debtor and Horizon in the Chancery Court was dissolved as the result of omissions by the Debtor and Horizon. In addition, Arvest demonstrated that there are numerous false statements and omissions in the documents filed purportedly on behalf of the Debtor, including: (1) the false statement that Byrd is the Chief Manager of the Debtor; (2) the false statement that Horizon is the General Partner of the Debtor; and (3) the false statement that there were no lawsuits or administrative proceedings to which the Debtor was a party pending in the year proceeding the filing.[12]

A Chapter 11 bankruptcy case may be dismissed for cause. *See* 11 U.S.C. § 1112(b)(1). The Bankruptcy Code provides a non-exclusive list of conditions that may constitute "cause" for converting or dismissing a Chapter 11 case. *See* 11 U.S.C. § 1112(b)(4). In addition, it is widely recognized that "cause" for dismissal includes a lack of good faith in filing the petition. *See, e.g., Marrama v. Citizens Bank of Massachusetts,* 127 S. Ct. 1105, 1112 (2007); *Michigan Nat'l Bank v. Charfoos (In re Charfoos),* 979 F.2d 390, 392 (1992); *Matter of Winshall Settlor's Trust*, 758 F.2d

[12] *See* Tr. Ex.10, p. 3; Tr. Ex. 12, pp. 19, 29, and 31.

1136 (6th Cir. 1985), overruled on other grounds at *Toibb v. Radloff*, 501 U.S. 157, 111 S. Ct. 2197 (1991). Among the factors that a court may consider in determining that a Chapter 11 petition was not filed in good faith are the following:

> (1) the debtor has one asset;
> (2) the pre-petition conduct of the debtor has been improper;
> (3) there are only a few unsecured creditors;
> (4) the debtor's property has been posted for foreclosure, and the debtor has not been successful in defending against the foreclosure in state court;
> (5) the debtor and one creditor have proceed[ed] to a standstill in state court litigation, and the debtor has lost or has been required to post a bond which it cannot afford;
> (6) the filing of the petition effectively allows the debtor to evade court orders;
> (7) the debtor has no ongoing business or employees; and
> (8) the lack of possibility of reorganization.

Charfoos, 979 F.2d at 393, quoting *Little Creek Development Corp. v. Commonwealth Mtg. (In re Little Creek Development Corp.)*, 779 F.2d 1068, 1073 (5th Cir. 1986). Each one of these indicia of bad faith are present in the pending case. The Sixth Circuit has adopted no particular test for determining whether a Chapter 11 petition has been filed in bad faith relying instead on an inquiry into the totality of the circumstances. Under the facts and circumstances of this case, the Court has no difficulty in determining that the petition that commenced this Chapter 11 case was filed in bad faith, and that the case, for this additional reason, should be dismissed.

Finally, Arvest Bank and BCP-Michigan ask that the Court take some step to preserve the validity of the foreclosure sale conducted by Donald Bourland as Successor Trustee on September 16, 2009, without knowledge of the pendency of the bankruptcy case. The Movants ask that the order for relief be vacated and/or that the Court determine that the automatic stay does not apply to the described foreclosure sale. Cause for dismissing a Chapter 11 case may constitute cause for the less drastic measure of modifying the automatic stay. *See* 11 U.S.C. § 362(d)(1). Among

the ways that the Court may modify the automatic stay upon a finding of cause is to annul the stay. This is the appropriate remedy in this case. By annulling the stay, the Court intends that no stay came into effect upon the filing of the bankruptcy petition, thus no stay was in effect at the time of the foreclosure sale on September 16, 2009, and no stay is in effect now to prevent Bourland from recording the Successor Trustee's deed. Further, the Court finds that cause exists for the Court to order that the 10-day stay of the effectiveness of an order modifying the automatic stay set forth in Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure should not apply in this case. The Movants gave proof that the City of Memphis intends to make an offer to purchase the property of the Debtor as soon as stationery is available with the names of the newly-elected mayor and newly-appointed city attorney, and that Arvest Bank is prepared to accept that offer as the highest and best offer it is likely to receive.

For the foregoing reasons, the motion of Arvest Bank and BCP-Michigan, LLC, to dismiss the Chapter 11 bankruptcy case of Lamar Crossing Apartments, L.P, is **GRANTED**. Further, the automatic stay is **ANNULLED** such that no stay came into effect as the result of the unauthorized filing of the bankruptcy petition in this case. Finally, the annulment of the automatic stay shall take effect immediately upon entry of this order.

cc: Debtor
Preston Byrd
Samuel Jones
Paul A. Matthews (Arvest Bank)
Kemper B. Durand (BCP-Michigan, LLC)
Elizabeth Weller (City of Memphis)
Karen P. Dennis (United States Trustee)
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