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8 Santa Barbara Bank & Trust

9  
10 **IN THE UNITED STATES BANKRUPTCY COURT**

11 **CENTRAL DISTRICT OF CALIFORNIA**

12 In re ) CASE NO. ND11-15818RR  
13 William Arthur Bookout, )  
14 Debtor. ) (Chapter 13)  
15 ) **RESPONSE TO DEBTOR'S OBJECTION TO**  
16 ) **SECURED CLAIM OF SANTA BARBARA**  
17 ) **BANK AND TRUST; DECLARATIONS OF**  
18 ) **DOUGLAS LUTZ AND ROBERT**  
19 ) **FOROUZANDEH IN SUPPORT**  
20 )  
21 ) Date: April 13, 2012  
22 ) Time: 10:00 a.m.  
23 ) Place: 1415 State St.  
24 ) Santa Barbara, CA 93101  
25 ) Courtroom 201  
26 ) Judge: Robin L. Riblet

27  
28 COMES NOW, SANTA BARBARA BANK AND TRUST, N.A., f/k/a PACIFIC  
29 CAPITAL BANK dba SANTA BARBARA BANK AND TRUST (hereinafter "SBBT")  
30 and hereby responds to the Debtor's Objection to Secured Claim of  
31 Santa Barbara Bank and Trust ("the Objection") as follows:

32 **I**

33 **STATEMENT OF FACTS**

34 **A. SBBT's Loan to Debtor:**

35 On or about October 6, 2003, the Debtor William Bookout ("the  
36 Debtor") obtained a loan from First Bank of San Luis Obispo in the  
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1 amount of \$450,000. The loan was evidenced by a promissory note  
2 ("the Note") and was secured by a First Trust Deed against  
3 commercial real property located at 1311/1341 Paso Robles Street in  
4 Oceano California ("Paso Robles Property") and a Second Deed of  
5 Trust against commercial real property located at 470 Price Street  
6 in Pismo Beach, California ("Price Street Property"). SBBT became  
7 the successor in interest on the loan pursuant to a merger with  
8 First Bank of San Luis Obispo.

9 In May of 2006, the Debtor defaulted on the secured loan. In  
10 June of 2007, SBBT entered into a Forbearance and Workout Agreement  
11 ("Forbearance Agreement") to resolve the default, which at that time  
12 totaled fifteen (15) months in principal and interest payments due  
13 under the Note. Copies of the Forbearance Agreement, the Note and  
14 the Deeds of trusts to the Paso Robles Property and Price Street  
15 Property are attached to the Proof of Claim filed by SBBT on January  
16 9, 2012 attached to the Objection as Exhibit "A".

17 The Forbearance Agreement required that the Debtor, among  
18 other fees and costs, pay SBBT \$22,274.46, which would be applied to  
19 pay off the principal and interest for five of the fifteen payments  
20 that the Debtor had missed. The remaining ten missed payments on  
21 the variable interest rate Loan, totaling \$45,171.20, would be  
22 deferred by being added to and amortized into the total balance of  
23 the Loan (the "Deferred Amount").

24 The Forbearance Agreement also modified the interest rate on  
25 the Loan to a fixed rate of 6% as opposed to a variable interest  
26 rate, which at the time of the Forbearance Agreement was well in

1 excess of 6%. This interest rate modification lowered the Debtor's  
2 monthly payment amount. In the event of default, the Forbearance  
3 Agreement specifically set forth that the entire Deferred Amount  
4 would become due and payable within fifteen (15) days. Additionally  
5 upon default, SBBT, at its election, could revoke all of the  
6 benefits provided to the Debtor in the Forbearance Agreement.

7 The Debtor defaulted on the Forbearance Agreement in January  
8 of 2010 when he failed to make his January 2010 payment. In  
9 December 2010, SBBT recorded a Notice of Default on the Loan. In  
10 response, the Debtor began sending out mass communications to all of  
11 SBBT's Board of Directors, along with numerous other SBBT employees,  
12 making numerous unsubstantiated claims that SBBT had committed fraud  
13 in relation to the Loan and the Forbearance Agreement. SBBT  
14 investigated the Debtor's accusations and determined that they were  
15 all without merit. In attempt to resolve the dispute, SBBT engaged  
16 in a mediation proceeding with the Debtor in May of 2011 at which  
17 time the Debtor demanded that SBBT forgive the entire Note. SBBT  
18 rejected the Debtor's proposal.

19 After the unsuccessful mediation, the Debtor once again began  
20 to harass SBBT with telephone calls and mass communications to such  
21 a degree, that on June 27, 2011, the Santa Barbara Superior Court  
22 deemed that the Debtor's conduct was unlawful harassment and issued  
23 a Restraining Order against the Debtor which precluded him from  
24 contacting anyone at SBBT directly and that he was only to contact  
25 SBBT through its attorneys, Reicker, Pfau, Pyle & McRoy, LLP ("the  
26

1 Reicker Firm"). The duration of the Restraining Order was set for  
2 three years (the statutory maximum).

3 B. Debtor's First Chapter 11 Case:

4 The Debtor filed his First Chapter 13 Case to stop the SBBT's  
5 pending foreclosure proceeding on September 15, 2011. The Debtor's  
6 initial Chapter 13 Plan provided for monthly plan payments of  
7 \$3,427.88. The Plan was amended to increase the payment to  
8 \$4,421.09 to provide for the arrearages claimed by SBBT and the  
9 payment of another secured Class 3 claim, as well as, to provide for  
10 the 100% payment on the Class 5 unsecured claims.

11 The Debtor's Confirmation hearing on his First Chapter 13 case  
12 was continued from November 18, 2011 to December 16, 2011 at 10:00  
13 a.m. On December 15, 2011, the Debtor filed an objection to the  
14 claim of SBBT. At the confirmation hearing on December 16, 2011 the  
15 Debtor's Chapter 13 case was dismissed by the Court due to the  
16 Debtor's failure to make his December plan payment and failure to  
17 pay the December mortgage payment due to SBBT. An Order and Notice  
18 of Dismissal was entered December 20, 2011.

19 C. The Debtor's Current Chapter 13 Case:

20 On December 27, 2011, the Debtor filed this most recent  
21 Chapter 13 case. On January 9, 2012, SBBT filed its Proof of Claim  
22 in the amount of \$434,589 as Claim No. 1. A copy of the Proof of  
23 Claim is attached to the Debtor's Objection as Exhibit "1".  
24 Thereafter, the Debtor filed a motion for an order continuing the  
25 automatic stay under §362(c)(3)(B) due to the dismissal of the prior  
26 Chapter 13 case ("Stay Hearing").

1 At the hearing on the motion to continue the automatic stay on  
2 January 31, 2012, the court ordered that the stay be continued only  
3 as to the Price St. Property and only through February 29, 2012.

4 The Court entered the Order Continuing the Automatic Stay on  
5 February 21, 2012 ("the Stay Order"). The Stay Order allowed SBBT  
6 to immediately proceed with its foreclosure sale on the Paso Robles  
7 Property.

8 As set forth in the Declaration of Robert Forouzandeh,  
9 following the Stay Hearing, Mr. Forouzandeh spoke with Chris  
10 Gautschi, counsel for the Debtor, who confirmed that the Debtor did  
11 not object to the foreclosure on the Paso Robles Property and wanted  
12 SBBT to apply the proceeds to the Debtor's arrears on its secured  
13 loan and then to its attorney fees. After the proceeds were  
14 applied, SBBT would re-calculate and re-amortize the payment due  
15 under the loan.

16 On or about February 21, 2012, the Court entered an order  
17 continuing the stay on the Price St. Property to March 21, 2012  
18 pursuant to a stipulation entered into between the parties ("March  
19 Stay Order"). On February 21, 2012, Mr. Forouzandeh sent an email  
20 to Mr. Gautschi, informing him that the trustee's sale would proceed  
21 on February 22, 2012 on the Paso Robles Property and that the  
22 minimum bid would be \$189,000. A copy of the February 21, 2012  
23 email is attached to the Declaration of Robert Forouzandeh as  
24 Exhibit "A". Neither the Debtor nor his counsel objected to the  
25 minimum bid amount.  
26

1 On February 22, 2012, the Paso Robles Property was sold at a  
2 trustee's sale for \$189,000. On February 27, 2012, Mr. Forouzandeh  
3 sent an email to Mr. Gautschi informing him that the Paso Robles  
4 Property had sold for \$189,000 and \$131,323.83 was applied to the  
5 past-due principal and interest on the loan. The email further  
6 informed him that the balance of \$57,676.17 would be applied to  
7 credit the outstanding attorney fees and costs incurred by SBBT as a  
8 result of the Debtor's default as per their prior discussion and  
9 that his firm's fees and costs were in excess of \$58,700 due to the  
10 Debtor's conduct. While the full amount of SBBT's attorney fees and  
11 costs must be paid in order to cure the default on the loan<sup>1</sup>, as a  
12 gesture of good faith, SBBT has rescinded the Notice of Default on  
13 the Pismo Beach Property. After re-calculating and re-amortizing  
14 the loan and reserving its right to add the remaining unpaid  
15 attorney fees and costs, the new loan amount as of February 27, 2012  
16 was \$297,622.87 and the mortgage payment due on March 6, 2012 was  
17 \$3,277.21. A copy of the February 27, 2012 email from Mr.  
18 Forouzandeh to Mr. Gautschi is attached to the Declaration of Robert  
19 Forouzandeh as Exhibit "B".

## 20 II

### 21 DEBTOR'S OBJECTION TO CLAIM

22 Debtor asserts that SBBT's secured claim should be reduced by  
23 \$76,000 on the basis that "that is what the creditor valued the  
24 property in its claim and what it is marketing the property for now"  
25

26 <sup>1</sup> The total attorney fees and costs as of February 22, 2012 totaled 67,653.68, leaving a balance of \$9,977.51  
27 due.

1 and the claim should be "reduced by the amount of disallowed  
2 attorney fee charges".

3 A. Minimum Bid Price:

4 The Note attached to the objection to claim as Exhibit "1"  
5 (page 18 of the document) provides in Section 6 LENDER'S GENERAL  
6 POWERS:

7 "Without notice and without Borrower's consent, Lender may:

8 A. Bid on or buy the Collateral at its sale or the sale of  
9 another, at any price it chooses;"

10 Accordingly, there is no requirement under the Note for SBBT to set  
11 the minimum bid price at the amount that it listed in its claim or  
12 the amount the property is listed for now. In fact, as set forth in  
13 Mr. Forouzandeh's email to Mr. Gautschi attached as Exhibit "A" to  
14 his declaration, the minimum bid price of \$189,000 was based on  
15 taking the appraised value of the property (\$265,000) and deducting  
16 the standard 10% deduction taken by SBBT on all its foreclosure  
17 sales (\$26,500), less the amount for delinquent real property taxes  
18 that it was required to pay (\$9,274), and amount it estimated it  
19 would need to spend for demolition and repair (\$39,750) due to the  
20 extremely poor condition of the structures on the property. SBBT  
21 was well within the terms of its Note in setting the minimum bid  
22 price for the property. The Debtor's claim that SBBT's claim should  
23 be reduced by \$76,000 is simply without merit.

24 B. Attorney's Fees and Costs:

1 The Note attached to the objection to claim as Exhibit "1"  
2 (page 18 of the document) provides in Section 6 LENDER'S GENERAL  
3 POWERS:

4 **"Without notice and without Borrower's consent, Lender may:**

5 B. Incur expenses to collect amount due under this Note,  
6 enforce the terms of this Note, or any other Loan Document,  
7 and preserve or dispose of the Collateral. Among other  
8 things, the expenses may include payments for property taxes,  
9 prior liens, insurance, appraisals, environmental remediation  
costs, and **reasonable attorney's fees and costs**. If Lender  
incurs such expenses, it may demand immediate repayment from  
Borrower or add the expenses to the principal balance;"  
(emphasis added)

10 Likewise, the Deed of Trust attached to the objection as  
11 Exhibit "1" (pages 27-28 of the document) provides for the recovery  
12 of attorney fees or and expenses "whether or not there is a lawsuit,  
13 including attorney's fees and expenses for bankruptcy proceedings".  
14 In addition, the Forbearance and Workout Agreement entered into  
15 between SBBT and the Debtor also included an Attorney's Fees  
16 provision entitling SBBT to reasonable attorney's fees and legal  
17 costs, including legal proceedings such as bankruptcy, where SBBT is  
18 required to "retain counsel as a result of claims, actions or  
19 demands" which are "contrary to the Agreement". See Forbearance and  
20 Workout Agreement attached to the Objection as Exhibit "1" (page 13  
of the document).

21 The Debtor asserts that SBBT is not entitled to its attorney's  
22 fees and costs on the basis that the fees were not included in the  
23 creditor's proof of claim, foreclosure notices or opposition to the  
24 Debtor's plan. The Debtor cites Federal Rule of Bankruptcy  
Procedure 3002.1 in support of such an assertion.

25 Federal Rule of Bankruptcy Procedure 3002.1 applies in a  
26 chapter 13 case to claims that are (1) secured by a security



1 interest in the debtor's principal residence and (2) provided for  
2 under §1322(b)(5) of the Code in the Debtor's plan. Rule 3002.1(c)  
3 provides that:

4 "The holder of the claim shall file and serve on the debtor,  
5 debtor's counsel and the trustee a notice itemizing all fees,  
6 expenses or charges (1) that were incurred in connection with the  
7 claim after the bankruptcy case was filed, and (2) that the holder  
8 asserts are recoverable against the debtor or against the debtor's  
9 principal residence. The notice shall be served within 180 days  
10 after the date on which the fees, expenses, or charges are  
11 incurred."

12 The Paso Robles Property and Price Street Property were listed  
13 in the Debtor's Schedule A as commercial and commercial/mixed use  
14 property, respectively. The Debtor's Statement of Financial Affairs  
15 indicates the Debtor operated his business at the Price Street  
16 Property. Accordingly, it is unclear whether the loans were secured  
17 by the debtor's principal residence. Furthermore, even if such  
18 provision does apply, SBBT has 180 days from the date on which the  
19 post-petition fees, expenses or charges are incurred to comply with  
20 this provision. The 180-day deadline would not expire until June  
21 24, 2012.

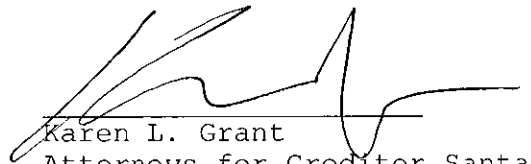
22 In Mr. Forouzandeh's February 27, 2012 email to Mr. Gautschi,  
23 attached as Exhibit "B" to the Declaration of Robert Forouzandeh,  
24 the Debtor's counsel was given notice of the attorneys fees and  
25 costs incurred by SBBT as a result of the Debtor's Default. SBBT  
26 further provided this information to the Debtor in it's Detailed  
27 Loan Billing Statement attached as Exhibit "3" to the Objection.  
28 These attorney fees and costs have now been amended to include the  
29 fees and costs incurred by SBBT to its Bankruptcy Counsel. Such  
30 fees and costs are ongoing as a result of the objection to claim now  
31 filed by the Debtor. The Debtor has not objected to the  
32 "reasonableness" of the attorney's fees but objects to allowance of  
33 the fees and costs based on the assertion that the Debtor did not

1 receive proper "notice" of the fees. This is contrary to the terms  
2 of the loan documents and is not supported under Federal Rule of  
3 Bankruptcy Procedure 3002.1, as the "notice" requirement for such  
4 fees has not expired.

5  
6 DATED: March 29, 2012

LAW OFFICES OF KAREN L. GRANT

7  
8 By:

  
Karen L. Grant  
Attorneys for Creditor Santa  
Barbara Bank & Trust

DECLARATION OF DOUGLAS LUTZ

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I, DOUGLAS LUTZ, declare as follows:

1. I am the Senior Vice President for the Loan Services Department of Santa Barbara Bank & Trust, N.A. ("SBBT"). I am currently the executive at SBBT in charge of handling the loan made by SBBT to Debtor William Bookout ("the Debtor"). I have personal knowledge of the matters set forth below, except as to matters stated on information and belief, and as to those matters I believe them to be true.

2. In 2003, SBBT's predecessor in interest issued a Small Business Administration ("SBA") loan to the Debtor (the "Loan"). The Loan is the subject of SBBT's Proof of Claim in this Chapter 13 Petition, a true and correct copy of which is attached to the objection to claim as Exhibit "1". The Loan was secured by a First Trust Deed against commercial real property located at 1311/1341 Paso Robles Street in Oceano, California ("Paso Robles Property") and a Second Deed of Trust against commercial real property located at 470 Price Street in Pismo Beach, California ("Price Street Property").

3. In May 2006, the Debtor defaulted on the Loan. After the Debtor missed 15 consecutive monthly payments on the Loan, SBBT, although not required to and as a gesture of good faith, entered into a Forbearance Agreement with the Debtor in July 2007, modifying the terms of the Loan.

4. The Forbearance Agreement required that the Debtor, among other fees and costs, pay SBBT \$22,274.46, which would be applied to

1 pay off the principal and interest for five of the 15 payments that  
2 The Debtor had missed. The remaining 10 missed payments on the  
3 variable interest rate Loan, totaling \$45,171.20, would be deferred  
4 by being added to and amortized into the total balance of the Loan  
5 (the "Deferred Amount").

6 5. The Forbearance Agreement also modified the interest rate  
7 on the Loan to a fixed rate of 6% as opposed to a variable interest  
8 rate, which at the time of the Forbearance Agreement was well in  
9 excess of 6%. This interest rate modification lowered The Debtor's  
10 monthly payment amount.

11 6. In the event of default, the Forbearance Agreement  
12 specifically set forth that the entire Deferred Amount would become  
13 due and payable within fifteen (15) days. Additionally upon  
14 default, SBBT, at its election, could revoke all of the benefits  
15 provided to The Debtor in the Forbearance Agreement.

16 7. The Debtor defaulted on the Forbearance Agreement in  
17 January of 2010 when he failed to make his January 2010 payment.  
18 The Debtor failed to make any payments on the Loan between January  
19 2010 and October 2011 (the only reason the Debtor commenced making  
20 payments in October 2011 was that he was required to do so after  
21 filing his first Chapter 13 Bankruptcy Petition with this Court).

22 8. In December 2010, SBBT recorded a Notice of Default on  
23 the Loan. In response, the Debtor began contacting various SBBT  
24 officials in response to the Notice of Default. Although the Debtor  
25 on countless occasions was instructed by SBBT to only contact SBBT's  
26 attorneys regarding the Loan, the Debtor sent mass communications to

1 all of SBBT's Board of Directors, along with numerous other SBBT  
2 employees. During these communications, the Debtor made numerous  
3 unsubstantiated claims that SBBT committed fraud in relation to the  
4 Loan and the Forbearance Agreement. SBBT investigated the Debtor's  
5 accusations and determined that they were all without merit.  
6 Nonetheless, SBBT attempted to negotiate with the Debtor and find a  
7 solution in which the Debtor could cure his default. On behalf of  
8 SBBT, I attended a mediation session with the Debtor in May 2011.  
9 Again, SBBT was not required to participate in any of these  
10 negotiations and could have immediately foreclosed upon the Debtor's  
11 properties. At all times, the Debtor's position has been that SBBT  
12 must forgive the entire balance of the Loan and make a substantial  
13 cash payment to the Debtor, while providing no consideration in  
14 return even though the principal balance of the Loan has at all  
15 material times been in excess of \$400,000. The Debtor prefaced his  
16 position with the threat that if SBBT did not forgive the entire  
17 Loan, he would bring a very "public" lawsuit against SBBT. Since  
18 there were no grounds for the Debtor to take such an extreme and  
19 unreasonable position, SBBT rejected this proposal.

20 9. After the May 2011 mediation, the Debtor continued to  
21 send barrages of emails and telephone calls to numerous SBBT  
22 officials, on many occasions numbering more than five per day to the  
23 same person. Most of the communications were repetitive and  
24 duplicative and it became apparent that the Debtor was simply  
25 attempting to harass SBBT employees and directors until SBBT  
26 appeased his unreasonable demands. All of the communications were