**The relief described hereinbelow is SO ORDERED.**

**SIGNED this 29th day of October, 2020.**


Robert D. Berger
United States Bankruptcy Judge

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**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF KANSAS**

In re:

**VITA CRAFT CORPORATION**,

Debtor.

Case No. 19-22358
Chapter 11

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**ORDER DENYING MOTION FOR RELIEF FROM STAY**

This matter comes before the Court on secured creditor BMO Harris Bank's motion for relief from the automatic stay. The Court conducted evidentiary hearings via Zoom on July 16-17, 2020, and heard the parties' closing arguments over the telephone on July 23, 2020. The parties submitted proposed findings of fact and conclusions of law on August 25, 2020. For the reasons that follow, the motion for stay relief will be denied.

Debtor Vita Craft Corporation ("Vita Craft") has manufactured high-end stainless-steel cookware for 80 years. Some of Vita Craft's products are distributed in the United States, but the majority of its sales are to customers in Asia. Vita Craft's two largest customers are Vita Craft Japan ("VCJ")[1] and Celebrity China and Cookware ("Celebrity").

Vita Craft's real property (the "Real Estate") consists of three parcels on 1.68 acres in downtown Shawnee, Kansas. One parcel is improved with Vita Craft's manufacturing and warehousing plant, which was built in stages in 1946, 1955, 1966, 1977, and 1988. The second parcel is improved with an old service station that has been converted to retail/warehouse space and used as an outlet store. The third parcel is a 16-space parking lot across the street from the plant. Although the Real Estate is zoned as Town Square Commercial, which is limited to non-industrial uses, its use by Vita Craft for cookware manufacturing has been grandfathered in by the City of Shawnee. However, because the grandfather clause only applies to Vita Craft, no other entity would be permitted to use the Real Estate for manufacturing purposes.

BMO Harris Bank ("BMO") is Vita Craft's largest creditor. Vita Craft has three loans from BMO: one revolving credit note and two smaller term notes, with original principal amounts of $3,700,000, $400,000, and $100,000, respectively. The three notes are secured by Vita Craft's real estate ("Real Estate"), inventory

[1] Vita Craft's parent company is Imura International USA, which is owned by Mamoru Imura. Mr. Imura is the CEO of both Vita Craft and VCJ.

("Inventory"), and machinery and equipment ("M&E"), and are governed by a "Loan Agreement" between Vita Craft and BMO. Vita Craft's bankruptcy was set into motion when BMO decided not to renew the large note, which matured on June 30, 2019. At that time, Vita Craft owed approximately $2.5 million on the three notes combined, having paid down the principal by approximately $500,000 since June 2017.

Vita Craft filed a voluntary Chapter 11 petition on November 1, 2019. In the Schedule A/B attached to its petition, Vita Craft valued the Real Estate at $1,700,000, the Inventory at $2,059,001.04, and the M&E at $3,862,664.44. At the November 8, 2019, hearing on its "first-day" motions, Vita Craft informed the Court that its goal was to locate a buyer for Vita Craft by the end of the year.

On November 13, 2019, this Court entered an agreed order regarding the use of cash collateral. The order required Vita Craft to make three monthly adequate-protection payments to BMO of $10,417 each, with the first payment due on November 18, 2019. Vita Craft made the payments on November 22, 2019, December 30, 2019, and February 24, 2020.

Sometime around January 10, 2020, Celebrity's owner, Garry Fowler, offered to purchase 100% of the stock in Vita Craft for $850,000. Vita Craft notified BMO of Fowler's offer; BMO declined it.

On January 21, 2020, with Vita Craft having failed to make its third adequate-protection payment by the 18th of the month, BMO filed a motion for relief from the automatic stay. The motion cited no basis (statutory or caselaw)

upon which to grant stay relief; BMO simply argued that stay relief was appropriate because (1) Vita Craft had not made its adequate-protection payments on time and (2) the purchase offer obtained by Vita Craft (presumably Fowler's) was not acceptable to BMO.

On January 31, 2020, Vita Craft disclosed (in its December 2019 monthly operating report) that it was "unable to pay the first of two installments on property taxes of $40,330, which was due on December 20, 2019."

On February 24, 2020, following the expiration of this Court's first cash-collateral order, Vita Craft moved for a second such order. In its motion, Vita Craft proposed new monthly adequate-protection payments of $3,300.84, which Vita Craft calculated as the monthly interest accruing on $850,000 (the value of the secured portion of BMO's claim, according to Vita Craft) under the interest rate provided by the Loan Agreement.[2] BMO objected to the motion, arguing that adequate protection should remain at the earlier $10,417 monthly amount until the parties and this Court could determine the value of the Collateral.

On February 27, 2020, the Court held a preliminary hearing on BMO's motion for stay relief. BMO's counsel informed the Court, regarding Fowler's $850,000 offer, that "we're about a million dollars away from something that would

[2] The Loan Agreement between BMO and Vita Craft provides for an annual interest rate of LIBOR plus 300 basis points. On January 21, 2020, when BMO filed its motion for stay relief, the LIBOR was 1.66%. Vita Craft calculated that the monthly interest on $850,000, accruing at the Loan Agreement rate, would therefore be $850,000*0.0466/12, or $3,300.84 per month.

be accepted." The motion was subsequently continued to July 16, 2020, due to the COVID-19 pandemic.

On March 2, 2020, Vita Craft filed a revised Schedule A/B, this time valuing the Real Estate at $650,000, the Inventory at $91,999.58, and the M&E at $12,000.

The COVID-19 pandemic caused Vita Craft's offices and manufacturing facility to close between March 17, 2020, and May 15, 2020, under executive orders from Johnson County and the state of Kansas.

At a hearing on April 23, 2020, Vita Craft proposed to escrow $4,637 each month for the eventual payment of real estate taxes. BMO declined the offer.

On May 4, 2020, Vita Craft filed a disclosure statement and proposed plan of reorganization ("Plan"). The Plan proposes to pay BMO $850,000 over five years as a secured claim and 10% of the remaining $1,613,332.65 in unsecured debt. The $850,000 secured claim includes a $683,910 balloon payment to BMO at the end of Year 5; Vita Craft plans to fund approximately $600,000 of the balloon payment with a new loan secured by the Real Estate. The Plan includes a repair budget of $17,272 for Year 1; $22,755 for Year 2; $23,490 for Year 3; $24,240 for Year 4; and $25,050 for Year 5 (a total of $112,807 budgeted for repairs over the five years of the Plan). The Plan also includes $78,000 for property taxes in Year 1, but only $40,000 in Years 2 through 5; it thus depends on a successful appeal of Vita Craft's county property-tax assessment. Although the Plan budgets $80,000 for professional fees and $150,409 for "miscellaneous" expenses over five years, it contains no specific budget for the tax appeal.

On June 18, 2020, BMO filed a document styled "Supplemental Suggestions in Support of BMO's Motion for Relief from Automatic Stay" (the "Supplemental Suggestions"). Citing depositions conducted on June 15 and 16, 2020, the Supplemental Suggestions allege that Vita Craft is not maintaining the Collateral; that the value of the Collateral is declining such that BMO is not adequately protected; and that the Plan contains no budget for necessary repairs to the Collateral. Vita Craft objected to the Supplemental Suggestions, arguing that BMO had filed them without court authorization and in violation of the Federal Rules of Civil Procedure; that BMO's allegations of collateral deterioration were unsupported; and that this Court should disregard BMO's attempt to raise new bases for stay relief weeks before the evidentiary hearing.

On June 29, 2020, BMO filed a proof of claim for $2,463,332.65.

On July 10, 2020, BMO objected to confirmation of Vita Craft's proposed plan under 11 U.S.C. § 1129(a)(3), (7), and (11).

On July 28, 2020, Vita Craft filed a revised Plan Ballot Summary showing that all voting claimants in Classes 3B (Allowed Unsecured Convenient Claims), 3C (Allowed Unsecured Ordinary Course Claims), and 3D (Allowed Unsecured Wage Claims of Former and Current Employees) had unanimously voted in favor of confirmation of Vita Craft's Plan.

On August 10, 2020, Vita Craft disclosed (in its June 2020 monthly operating report) that its property tax arrearage had increased from $40,330 to $80,660. Vita Craft also disclosed a number of unpaid bills totaling $9,695.95, mostly for utilities.

On September 9, 2020, Vita Craft disclosed (in its July 2020 monthly operating report) that the $80,660 property tax had still not been paid. Vita Craft also disclosed that the total amount it owed for unpaid bills (again mostly for utilities) had increased to $18,438.51.

**A. EVIDENTIARY HEARING**

The Court conducted an evidentiary hearing via Zoom on July 16 and 17, 2020. The parties stipulated to admit Exhibits 1, 2, 6 through 22, 24 through 37, 39 through 53, 55, 56, 58 through 65, and 72 through 75 into evidence.

BMO's first witness was Christopher Allen, a relationship manager for the special accounts management unit within BMO's risk management group. Allen testified that BMO had declined to renew the Revolving Credit loan in June 2019 because VCJ, Vita Craft's largest customer, planned to reduce its purchases from Vita Craft.[3] He explained:

> At maturity there was no clarity with regard to what was going to happen to the business going forward. There would be no basis on which to renew the loan absent any insight as to what—how the business was going to perform going forward, and so one would prudently not renew, automatically renew.

Allen also testified that, based on the values listed in Vita Craft's amended Schedule A/B and the amount of BMO's claim, there was no equity cushion in the Collateral. When questioned about the usefulness of property appraisals, Allen stated that BMO considers an appraisal "stale" after 12 months, and acknowledged

[3] Allen's understanding was that VCJ planned to temporarily reduce its purchases because VCJ's banks had instructed it to lower its inventory levels.

that BMO's most recent appraisal of the Real Estate, dated April 29, 2019, was stale under that policy as of the hearing date. However, Allen testified, BMO nevertheless "chose not to re-appraise the real estate" after Scott Belke, the MAI appraiser who conducted the April 29, 2019, appraisal, turned down the job.

Belke, whose appraisal was admitted into evidence as Exhibit 33, was BMO's next witness. Belke determined in his appraisal that the Real Estate had a current market value of $1,700,000; a disposition value of $1,445,000, and a liquidation value of $1,105,000 as of April 29, 2019. According to Belke, these values differ based on the length of time within which the property must be sold: liquidation value is for a sale within 90 days, disposition value is for a sale within six months, and current market value is for a sale within nine months. Citing "Marshall & Swift," Belke estimated that Vita Craft's manufacturing space had 10 years left of "remaining economic life." However, Belke also identified certain items of "deferred maintenance," a term he defined as:

> Items of wear and tear on a property that should be fixed now to protect the value or income-producing ability of a property, such as a broken window, a dead tree, a leak in a roof, or a faulty roof that must be completely replaced. These items are almost always considered curable.[4]

Belke listed items of deferred maintenance for the Real Estate:

> Most purchasers of the subject property would deem repair of the parking lots necessary. The condition of the exterior walls must now be addressed to preserve the continuity of the structure (repair widening cracks, tuckpointing, scrapping, sealing, repainting). The roof

[4] Belke's appraisal quotes *The Dictionary of Real Estate Appraisal* (6th ed. 2015), for this definition of "deferred maintenance."

> over the 1946 eastern extension leaks profusely into the manufacturing area below. Downspouts must be repaired to preserve the wall repairs and proper drainage. Interior items (broken bathroom fixtures, damaged ceilings, mold, damaged insulation backing, etc.) need to be addressed.

Belke estimated that these items would cost a little over $200,000 to resolve.[5] His report concluded:

> Overall, the subject property is nearing the end of its useful life if deferred maintenance is not resolved and perhaps some upgrades undertaken. . . . The rather unusual (dysfunctional) design with numerous additions and the lack of maintenance and upgrades, results in a fair quality North Johnson County industrial property in generally poor to fair condition. Deferred maintenance was readily visible at the time of inspection . . . . Resolution of these issues will extend the useful life of the building.[6]

As to whether the cost of deferred maintenance would remain the same over time, Belke testified:

> Looking down those items, I—I think you would logically assume that things would get worse over a period of time for these specific issues. Asphalt paving, people are going to continue to drive across it, it's going to continue to deteriorate. The roof isn't going to get any better. The exterior walls, the—the issues with the paint, whether that shearing increases, wouldn't be sure about that, and then the other minor issues.

Belke testified that he had declined BMO's request for a follow-up appraisal in 2020 because "that request did not include that there might be a court case involving

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[5] A table on page 44 of Belke's appraisal lists the items of deferred maintenance and the estimated cost of each, with a total estimate of $200,130.

[6] Belke testified that resolution of deferred maintenance would *extend* the remaining 10-year economic life of the property, not that it was necessary to *achieve* those 10 years.

this . . .” and “. . . there were some parameters there that I should’ve known about along the way.” He continued:

> Professional, I have issue with whether you can be unbiased in a court situation. As soon as somebody contacts you and says this is in litigation and I’m on this side, and you’re—you’re wondering, okay, are you the high value or the low value? I think it’s very hard to preserve unbiased in that situation. We’re as appraisers to—to guard the public trust, and I find it difficult to do that.
>
> There—there is a way. I know that it’s important to have valuation and I think there’s a way to do that. You get your appraisal and the other side gets their appraisal and then a third appraiser looks at that, an independent appraiser. He’s not hired by either of them and he looks at them and he decides what’s—what’s the best value there.
>
> Secondly, I have a personal reason. I just promised my wife when I turned 60 I was not going to do any more testifying. And I passed 60, so . . .
>
> Q. And yet you find yourself here today, sir.
>
> A. Yes, I find myself here today talking about an appraisal that was not intended for this use or for these intended users.

Regarding property taxes, Belke reported that “[t]he subject property is over-assessed for 2019” and that “an appeal is warranted.” On cross-examination, Belke testified that the identity of his client could “possibly” affect his valuation, although he “came into this assignment as an unbiased person.”

BMO’s third and final witness was Timothy Roy, an appraiser employed by the firm Capitale Analytics. Roy has a bachelor’s degree in journalism and approximately seven years of appraisal experience. Before he began working for

Capitale Analytics in October 2016, he worked for a small auction firm in Fort Wayne, Indiana. Roy appraised Vita Craft's machinery and equipment ("M&E") and its inventory ("Inventory") on June 12, 2019. His reports were admitted into evidence as Exhibits 25 and 26. Roy estimated that the M&E had a fair market value of $830,250, an orderly liquidation value of $421,000, and a forced liquidation value of $226,000.[7] He elaborated as to the stability of those estimates:

> In terms of prospective value, the only asset which will depreciate further with age is the ultrasonic washing system, which is only three years old. It will likely lose market value[8] at a rate of perhaps 5%-8% per year until it reaches about 10-12 years of age . . . . All other assets have reached a point of relative value stability, such that an appraisal of the same package of assets in one year (or even several years) may produce similar results.

Roy testified that Vita Craft's manufacturing area "was not environmentally controlled and it wasn't well controlled for dust or air either that I would say." He explained how that might affect M&E value:

> So regardless of whether that specifically affected the machine, a buyer is going to assume that it affected the machine. So it—it's almost less important than it's leaking on the machine. It's more important that a buyer would see a machine that's in a leaky building and wonder about the maintenance of that machine.

[7] According to Roy's report, "orderly" liquidation includes 90 to 120 days to find a buyer or buyers, whereas "forced" liquidation is an "auction scenario." Both assume an "as-is, where-is" sale that must take place "as of a specific date."

[8] Roy estimated that the ultrasonic washing machine had a fair market value of $275,000, an orderly liquidation value of $150,000, and a forced liquidation value of $75,000.

Roy testified that he had "[n]ot particularly" noticed any change in the condition of the M&E between his June 2019 appraisal and an October 2019 follow-up visit.

As to the Inventory, Roy estimated a net orderly liquidation value of $487,952. However, subsequent emails between Roy and Allen revealed that Roy thought the market for both the M&E and the Inventory was becoming "weaker" with the passage of time. On December 11, 2019, Roy told Allen via email that some of the Inventory "might have crossed into illiquid beyond scrap." On March 10, 2020, he told Allen that the values of both the M&E and the Inventory were "likely to drop significantly" from their June 2019 appraisal levels. As to the M&E, Roy explained at the hearing that a change in the market had occurred "[i]n the late summer, early fall of 2019" because "[p]eople started to prepare for a recession" and "equipment manufacturers started to catch up on their timeline for providing new equipment." As to the Inventory, he explained:

> [The appraisal report's estimate that the net orderly liquidation value of the Inventory was $487,952 is] highly dependent on . . . the assumptions made in the report, which are that Vita Craft is operating in some limited capacity; that management is cooperative; that current customers are still in good standing with Vita Craft, et cetera, et cetera.
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> So I don't want to confuse this with the idea of the bank coming in, foreclosing and just starting to sell things off on their own, because that's not the situation that was considered.
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> . . .
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> The point of the assignment was to advise the bank various—you know, in no uncertain terms that the amount of collateral they had was in the hundreds of thousands of dollars as opposed to in the, you know, $3.5

million, which was on the books.

On cross-examination, Roy agreed that the Inventory might have nothing more than scrap metal value, depending on "the actual quantities and categories."

At the conclusion of BMO's evidence, Vita Craft moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 52. The Court denied the motion.

Vita Craft's first witness was MAI appraiser[9] Robin Marx. Marx, who testified that appraisal was an "essential service" as defined by Johnson County and the state of Kansas during the COVID-19 shutdown, appraised the Real Estate on March 10, 2020. He estimated the value of the land at $600,000 and the total value of the Real Estate (land and building improvements) at $850,000.[10] When asked about the stability of those estimates over the next five years, Marx explained:

> You've got—the city has just got through investing some, I don't know, 40 or $50 million in the Nieman row corridor. You know, it's early in its life cycle of re-development and, therefore, I would have confidence that the land value is going to go up. And if I had to forecast, I'd say 2 percent is reasonable.
>
> The building, we're going to eat into that economic life of ten years. So if you said five years from now on a straight-line basis that land—the building value is going to go to a hundred and a quarter. But, overall, in general it's probably going to go up.

[9] Marx explained that MAI certification is the highest level of certification in the appraisal profession.

[10] Unlike Belke's appraisal, which provides three different values depending on how long the Real Estate could remain on the market, Marx's appraisal contains only one value. However, Marx's appraisal also estimates that the Real Estate would be on the market for "approximately 12 months," which suggests that he is providing an estimate of "fair market value" as that term is used by Belke.

Like Belke, Marx identified items of "deferred maintenance," which Marx defined as "those things that the typical seller would do right before they would sell to get the highest price and that which a buyer would do immediately after the purchase to maintain their investment." However, Marx was of the opinion that $200,000 in repairs was too much; he thought that deferred maintenance would cost between $40,000 and $50,000. The difference stems from the extent of the repairs that each appraiser thought appropriate: for example, where Belke would tear off and replace a roof, Marx would simply patch it; where Belke would re-pave a parking lot, Marx would patch it. Marx explained:

> I think even—it was mentioned that Miller Stauch thought 400,000 or plus should be spent. Well, you start doing parking lots and new roofs and—and coping, et cetera, et cetera, it's—there's no limit the amount of money you could spend on a building. The question, again, gets back to necessary or economic. And this, it's not that kind of a building.
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> . . .
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> So I—I would just say real quickly that anybody can—it's easy to spend a lot of money on a building. The question is, are you going to get it back? And I don't think so. Clearly the—and investors wouldn't re-pave the—they'd patch. Patch is the name of the game I'd call it at this caliber of building.

Marx also disagreed with Belke as to the relationship between deferred maintenance and economic life; whereas Belke stated that $200,000 in repairs would *extend* economic life beyond 10 years (*see* note 6 *supra*), Marx stated that $40,000 to $50,000 in repairs was necessary to *achieve* a 10-year economic life.

As to county real-estate taxes, Marx testified that they have a linear relationship with property values, and agreed with Belke that the Real Estate was over-appraised. On cross-examination, Marx clarified that the $850,000 value he assigned to the Real Estate was based upon speculation for redevelopment; he acknowledged an email he sent to Vita Craft's counsel on March 24, 2020, in which he opined that the value would be approximately $1.1 million if the Real Estate could continue to be used for manufacturing purposes.

Vita Craft's second witness was Bob Lane of Kaw Valley Companies. Lane is in the demolition business—both interior and "total structure." He testified that although he did not know the value of the M&E or the Inventory, it would cost approximately $250,000 to remove those items from Vita Craft's property (i.e., to leave the Real Estate "broom-clean").

Vita Craft's third witness was Karl Eberle, a former executive at John Deere and Harley-Davidson. Eberle has a bachelor of science degree in electrical engineering and 40 years of manufacturing experience. At the time of his retirement from Harley-Davidson, Eberle was the Senior Vice President of Worldwide Manufacturing, a position in which he was responsible for purchasing hundreds of millions of dollars' worth of manufacturing equipment. He elaborated on his manufacturing experience:

> [A]t Harley Davidson and as well as John Deere, I was responsible for the acquisition of most of the manufacturing equipment. I would say if I had to put a number to it, it was in the 3-to-500-million-dollar range of new equipment and facilities I was responsible for. . . .

> [O]n a number of occasions, especially at Harley, I was asked to go to several smaller companies and take a look at whether they were a good candidate for an acquisition from a manufacturing perspective, and that's what I did. . . .
>
> Most of this period, I reported to the CEO of Harley. . . .
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> Most of the time when I would go to a facility, I would go myself. And, again, I've had 40 years of direct manufacturing experience and feel very, very comfortable ascertaining from a macro perspective the overall value or cost that may be associated with – with an acquisition. . . . I've never been directly involved in [cookware manufacturing], but the presses and the equipment are very similar. So, for example, they have polishing equipment there to polish the cookware where we used similar equipment to polish gas tanks and very similar process.

Eberle, who visited Vita Craft twice, on October 23, 2019, and May 26, 2020, appeared at the hearing to testify "from a macro perspective" as to "overall value or cost." He testified that it would be "impossible" for removal of the M&E to be "cost-neutral," meaning that the cost of removing the M&E would exceed any sale proceeds. Eberle believed that to be the case "especially if you take into consideration any potential abatement issues that may arise"; he was "highly confident there's abatement issues that are going to have to be dealt with" that "could be very detrimental to the overall property value depending on what the abatement may be." Eberle agreed with Lane that it would cost at least $250,000 to remove the M&E, but "would have said we better reserve about half a million dollars because of the abatements and the additional cost it's going to take to get everything out of that building." Eberle testified that because of these costs, the "best use and best value" of the M&E is its current use by Vita Craft. As to Vita

Craft's repair budget, Eberle testified that "if [the M&E] continues to be used for what it's used for today or has been, you wouldn't have to budget anything more than fixes fail," and that such continued operation "could go on indefinitely." He thought that the Inventory would have not have much scrap value due to contamination from "mixed metals" and "buried chips." On cross-examination, Eberle acknowledged that he was not providing dollar estimates as to either the value of the M&E or the cost to remove it. He also acknowledged that the M&E was poorly maintained. On re-direct, Eberle testified that he was "95 percent confident" that the cost of removing the M&E would be more than the proceeds of selling the M&E, and that he was "a hundred percent confident" that would be the case if the cost of abatement were added to the cost of removing the M&E. On re-cross, he acknowledged that his confidence was based on his overall experience "of doing this a number of times" rather than specific, individual values or costs.

Vita Craft's fourth witness was its president, Gary Martin. Martin has been employed by Vita Craft for over 27 years and has worked in manufacturing for 48 years. He testified that Vita Craft had reduced the principal due on BMO's loans from $7.5 million in 2006 to less than $2.5 million in 2019. He stated that some of Vita Craft's employees have worked there for more than 35 years. He explained that Vita Craft uses a "local mom and [pop] shop" called Interstate Tool and Die to make replacements parts for its (admittedly old) equipment. Martin testified that a "structural crack" photographed by Belke and referenced by Marx had been on a building wall "as long as I can remember" and that a post had been placed in that

area "to protect that corner of the building." He thought it was "highly possible" that the crack predated any of Vita Craft's loans from BMO. Martin stated that the proposed plan was "very skinny," but "doable" and "conservative." He thought that Vita Craft's attorney fees and expert costs would be paid by Imura International, Vita Craft's parent company, but acknowledged on cross-examination that there is no written agreement to require such payment.

Martin also testified about the losses shown on Vita Craft's income statements between 2017 and 2019. He explained that in 2004, Vita Craft had launched a line of "RFIQ" cookware, or cookware that used radio frequency identification ("RFID") components. Martin described the RFID cookware:

> The RFID inventory was a project of a new product that the owner, Mr. Imura, brought with him at the time to be developed by Vita Craft Corporation. It also went by the name of RFIQ for radio frequency intelligence. RFID is—was more like the name used because it used RFID technology. It consists of special pan materials so that an embedded [sensor] could be located in the center of the pan and attached to a receiver that was in the handle and it would broadcast a signal that was controlled by a recipe card that was—that would control the stove because the stove would read it with an antenna and this was designed for induction ranges.

Martin explained that the RFID cookware was not a commercial success, and that Vita Craft had been left with a large amount of unsold RFID inventory when the product line "tanked" in 2006. Vita Craft retained the RFID inventory until 2017, when it sold that inventory to VCJ for less than it had cost to produce it. Thus, said Martin, even though Vita Craft's income statements showed "book losses" between 2017 and 2019, Vita Craft had not lost any money in the cash-flow sense; in fact,

Vita Craft's cash flow during those years was sufficient to pay down the principal on its loans from BMO by approximately half a million dollars.

Martin testified that after BMO declined to renew the large revolving note when it matured on June 30, 2019, Vita Craft shut down completely. However, Vita Craft re-opened on a limited basis after three weeks due to customer demand. Martin explained that although his intent had been to "wind down" the company, customers still wanted Vita Craft cookware:

> [T]he demand did not go away. We kept getting more orders and we kept getting more requests: "Can you do more?" "Can you do more?" And I had all kinds of people that called me and it was—it was very heart warming. So we started to look at saying, okay, well, maybe 90 days is not enough time. Maybe we just need – need to keep going. We need – you know, let's – let's find out, you know, what can we do.
>
> . . .
>
> [W]hen I talk with our distributors and customers, the concern was, you know: Are you going to be there? Are you going to survive? Can you reorganize? We loved your cookware. I can't find anything any better.
>
> They could all leave. You could go buy cookware anywhere from anybody practically, but not the kind of cookware I make, not to that quality. They all could have left but they—there's—they're staying with it. You call it loyalty. You call it brand loyalty.

Martin testified that VCJ had committed to ordering at least $500,000 in product per year over the five years of Vita Craft's proposed Chapter 11 plan. On cross-examination, Martin explained that the differences between Vita Craft's original Schedule A/B and its amended Schedule A/B resulted from "going from a book value to a real world value" for the Real Estate, M&E, and Inventory. He acknowledged

that cracks on the west side of Vita Craft's plant "look[] like they have widened a little bit and they do need attention." He also acknowledged that Vita Craft did not have a written commitment from VCJ to order a certain amount of product.

Vita Craft's fifth and final witness was Garry Fowler, owner of Celebrity China & Cookware. Fowler testified that he has spent his entire career—50 years—in the cookware industry. After retiring as vice-president of sales of Hycite, a cookware company with current sales of over half a billion dollars per year, Fowler bought Celebrity, a company that supplies housewares to cookware distributors. Fowler acknowledged that Celebrity could obtain less-expensive cookware from manufacturers other than Vita Craft:

> If you want to go with Asian products as an example which is much lower quality, you can find a much lower price also. But the—our company has—that's probably the secret to the success of our company at Celebrity China is that we are top of the line. You can go out and find product that is not as good, very, very easily, but you're not going to find any product that's better. Vita Craft's motto was manufactures the world's finest cookware and that's what they do.

Fowler testified that he would put $200,000 into Vita Craft immediately upon plan confirmation. He explained that the balloon payment due at the end of the plan would be paid with a new $600,000 loan, using the Real Estate as collateral. On cross-examination, Fowler stated that approximately 50 percent of Celebrity's sales come from cookware and that Celebrity would not receive a discount on Vita Craft product if he owned Vita Craft. He explained that Celebrity could obtain cookware from other manufacturers (without a $200,000 investment), but:

> I've been in the industry for 50 years. I've sold product by four different manufacturers. The Vita Craft product is by far the best product I've sold from all those manufacturers. . . . [S]ince July of last year, Gary Martin and the staff of Vita Craft have reaffirmed their commitment to Vita Craft and the Vita Craft customers of which I'm one. What they've done – been able to do over the last 13 months with very little money and no support whatsoever but they fought to survive and maintain the commitments that they've made to me as a customer was a very crucial factor to having confidence that with a little support this company could continue on and rebound and resurrect itself.

Fowler stated that he was "certainly" prepared to supplement the $200,000 cash infusion if necessary.

**B. APPLICABLE LAW**

Section 362(d) of the Bankruptcy Code[11] governs BMO's motion for relief from the automatic stay:

> 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;
>
> (2) with respect to stay of an act against property under subsection (a) of this section, if—
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective

[11] All statutory references in this order are to Title 11, United States Code (the "Bankruptcy Code").

reorganization.

As the party opposing stay relief, Vita Craft has the burden of proof on all issues except that of its "equity in property," where the burden is on BMO. *See* 11 U.S.C. § 362(g). However, BMO bears the initial burden of *going forward*—that is, BMO must first establish a prima facie case that it is entitled to stay relief under § 362(d) before the ultimate burden of proof shifts to Vita Craft. *See In re Elmira Litho, Inc.*, 174 B.R. 892, 900-02 (Bankr. S.D.N.Y. 1994).

**1. BMO's "Supplemental Suggestions"**

Although it originally filed its motion for stay relief on January 21, 2020, BMO did not raise the issues of deferred maintenance and collateral deterioration until it filed its "Supplemental Suggestions" on June 18, 2020, ostensibly under Fed. R. Civ. P. 15(d). Vita Craft argues that the Supplemental Suggestions are procedurally improper and ought not be considered by this Court. Although Vita Craft is correct that Rule 15(d) does not apply to BMO's motion for stay relief,[12] Vita Craft identifies nothing in the Federal Rules of Civil Procedure or Bankruptcy

[12] A motion for stay relief is not a "pleading," but a contested matter. Fed. R. Bankr. P. 9014(c) lists the rules applicable to contested matters; Fed. R. Bankr. P. 7015 (the procedural vehicle through which Fed. R. Civ. P. 15 would apply in bankruptcy) is not among them. Thus, the parties' arguments regarding Rule 15, and whether that rule permits amendment of a "pleading" to conform to the evidence adduced at trial, are inapposite. *Cf. Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 456-57 (10th Cir. 1982) ("Even where there is no consent, and objection is made at trial that evidence is outside the scope of the pretrial order, amendment may still be allowed unless the objecting party satisfies the court that he would be prejudiced by the amendment. In the absence of a showing of prejudice, the objecting party's only remedy is a continuance to enable him to meet the new evidence.") (citations omitted).

Procedure that would prevent BMO from supplementing its motion for stay relief with additional arguments. Because BMO filed its Supplemental Suggestions four weeks before the evidentiary hearing on its motion for stay relief, and because Vita Craft presented ample evidence and argument as to deferred maintenance and its effect on the value of the Collateral, the Court will consider the Supplemental Suggestions in ruling on BMO's motion for stay relief.

However, "[t]he majority view and the pronounced trend in the case law is that a creditor's right to adequate protection begins on the motion date." *In re Alliance Well Serv., Inc.*, 551 B.R. 903, 907 (Bankr. D.N.M. 2016). "These cases point to the language in §§ 362(d) and 363(e) that place the burden on creditors to take protective action." *Id.* Here, because BMO did not raise the issues of deferred maintenance and collateral deterioration until June 18, 2020, BMO's right to adequate protection from those issues did not begin until that date.[13]

[13] Put differently, BMO did not meet its initial burden of going forward under § 362(d)(1) until it filed the Supplemental Suggestions; had this Court ruled on BMO's motion for stay relief before then, the Court would have denied the motion.

### 2. Section 362(d)(1): Adequate Protection

"Adequate protection" ensures that a creditor receives the value for which it bargained prebankruptcy. *MBank Dallas, N.A. v. O'Connor (In re O'Connor)*, 808 F.2d 1393, 1396 (10th Cir. 1987). To establish a prima facie case that it is entitled to stay relief for lack of adequate protection—i.e., to meet its initial burden of going forward under § 362(d)(1)—BMO must offer proof of either (1) a decline in the value of the Collateral or (2) the threat of such a decline. *See Elmira Litho*, 174 B.R. at 902. Such "threats" include the debtor's failure to maintain property insurance, to keep the property in a good state of repair, or to pay property taxes. *See id.* at 902 n.9; *In re Anthem Commc'ns/RBG, LLC*, 267 B.R. 867, 871 (Bankr. D. Colo. 2001). Because the right for which BMO bargained outside of bankruptcy is the right to foreclose on the Collateral and apply the proceeds to payment of Vita Craft's debt, the relevant "value" for adequate-protection purposes is the *foreclosure* value of the Collateral. *Cf.* 11 U.S.C. § 506(a)(1) (providing that the value of a creditor's interest "shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest"); 4 *Collier on Bankruptcy* ¶ 506.03[7][a] (Richard Levin & Henry J. Sommer, eds., 16th ed.) ("[F]or adequate protection purposes, the better view is that the value . . . should be determined in accordance with a hypothetical foreclosure sale method. In applying that method, it is appropriate to deduct any applicable costs of sale in arriving at the ultimate value.").

BMO argues that the unresolved items of "deferred maintenance" identified by Belke and Marx establish a lack of adequate protection. Vita Craft responds that BMO's argument "conflates condition with deterioration." While Vita Craft is correct in a general sense, some of the deferred-maintenance items—for example, roof leaks and wall cracks—are not necessarily static, and may worsen with the passage of time. As to these items, then, condition fairly *implies* deterioration. Moreover, the parties agree that Vita Craft is not paying its property taxes. BMO has therefore established a *prima facie* case that it is entitled to stay relief for lack of adequate protection under § 362(d)(1).

The ultimate burden of establishing that BMO's interest in the Collateral is adequately protected thus shifts to Vita Craft. Here, Vita Craft has offered BMO monthly adequate-protection payments of $3,300.84 (which Vita Craft revised downward to approximately $2,776 at a March 26, 2020 hearing) (the "Monthly Payments") and has offered to escrow an additional $4,637 per month for property taxes.[14] There is no dispute as to the amount of Vita Craft's property taxes, and the Court holds that $4,637 per month adequately protects BMO against the non-payment of those taxes. The issue, then, assuming Vita Craft is escrowing $4,637 per month, is whether the Monthly Payments adequately protect BMO against the "threat" posed by unresolved items of deferred maintenance to the foreclosure value of the Collateral.

[14] Under § 361(1), adequate protection may be provided by periodic cash payments.

The Court holds that they do. The Collateral has three components: Real Estate, M&E, and Inventory. There is no evidence that deferred maintenance has any effect on the Inventory. The only evidence that deferred maintenance affects M&E came from Roy, who testified that its main effect would be on buyers' *assumptions*—i.e., that a potential buyer would assume that a leaky roof, for example, had damaged the M&E regardless of whether any damage had actually occurred.[15] This distinction (buyer assumptions versus actual damage) is important because all of the deferred maintenance identified by BMO existed *before* BMO filed its Supplemental Suggestions; in other words, if deferred maintenance caused the value of the M&E to decline, the decline in value occurred *before*, not after, the Supplemental Suggestions were filed by BMO.[16] And because the decline in value had already occurred, there is nothing to adequately protect going forward; BMO points to no authority (and this Court is unaware of any) that would require Vita Craft to take measures to *increase* the value of BMO's collateral, even if those measures would be cost-effective.

More generally, this distinction demonstrates why looking to deferred maintenance, in asking whether BMO is adequately protected, answers the wrong

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[15] Roy also testified that he did "[n]ot particularly" notice any change in the condition of the M&E between June 2019, when he conducted the appraisal, and his follow-up visit in October 2019. This testimony suggests that there has been no particular change in the condition of the M&E since BMO filed the Supplemental Suggestions in June 2020.

[16] In fact, in light of Martin's testimony about how long the items of deferred maintenance identified by Belke and Marx have remained unresolved, any decline in value probably occurred years before Vita Craft filed its Chapter 11 petition.

question. "Deferred maintenance" (as defined by either party) simply asks whether a repair would be cost-effective; i.e., whether a repair would increase the value of the Collateral more than it would cost to perform. However, to say that a repair fits this description says nothing about whether the cost of the repair would be expected to *increase* over time, or whether leaving the repair undone would cause any *ongoing* damage to the Collateral. Some deferred maintenance—for example, a broken urinal or a stained ceiling tile—appears static; one would not reasonably expect these items (unlike, for example, a cracked wall or a pothole) to get worse over time (thus increasing the cost of repair) if left unresolved. Nor would one reasonably expect these items (unlike, for example, a leaky roof) to damage other aspects of the Collateral over time if left unresolved. If the damage was already done before BMO's right to adequate protection arose, there is nothing to adequately protect going forward. In other words, and to expand on Vita Craft's argument: deferred maintenance is about *condition*, whereas adequate protection is about *deterioration*. "Condition" describes a single point in time, "deterioration" describes a *change* in condition *over* time.[17] In any event, to the extent that deferred maintenance affects the value of the M&E, the Court finds that the change in value was complete when BMO filed the Supplemental Suggestions. Therefore, and because the record contains no other evidence that the value of the M&E has

[17] The distinction between these concepts is like the one between speed and acceleration: to say that a car is traveling at 25 mph says nothing about whether the car is speeding up, slowing down, or traveling at a constant rate of speed.

changed since BMO filed the Supplemental Suggestions, BMO's interest in the M&E is adequately protected without payment from Vita Craft.

As to the Real Estate, the Court finds that its foreclosure value is $850,000 minus cleanup costs (i.e., the actual cost of rendering the Real Estate "broom-clean"). Moreover, because the Real Estate has two components: land and improvements; the Court finds that the foreclosure value of the "Land" is $600,000, and the foreclosure value of the "Improvements" is $250,000 minus cleanup costs. There is no evidence that deferred maintenance negatively affects the value of the Land; in fact, Marx testified that the Land can reasonably be expected to appreciate by 2% per year. In assessing whether BMO is adequately protected as to the Improvements, then, the Court will add $1,000 per month[18] to the monthly payments offered by Vita Craft.

Given Lane's undisputed testimony (supported by Eberle) that it would cost $250,000 to render the Improvements "broom-clean," the foreclosure value of the Improvements is minimal. Although Belke testified "you would logically assume" the items of deferred maintenance he identified "would get worse over a period of time," Eberle testified that there was no noticeable change to the Improvements between his first visit in October 2019 and his second visit in May 2020. Furthermore, Martin testified that a wall crack identified by Belke had existed "as

[18] $600,000*.02=$12,000. The value of the Land is therefore expected to increase by $12,000 between March 2020 (the date of Marx's appraisal) and March 2021, or $1,000 per month since June 18, 2020, when BMO filed the Supplemental Suggestions.

long as I can remember," though it had "widened a little bit" over the years. The weight of the evidence demonstrates that the unresolved items of deferred maintenance identified by Belke and Marx have caused, since June 18, 2020, a minimal decline in the (minimal, if any) foreclosure value of the Improvements. Vita Craft has thus proved (particularly in light of Marx's undisputed testimony that the Land is appreciating in value) that the monthly payments it offers (whether the $3,300.84 proposed in its motion or the $2,776 proposed by its counsel at the March 26, 2020 hearing) will adequately protect BMO against this minimal decline. *Cf. O'Connor*, 808 F.2d at 1396-97 (observing that the "concept" of adequate protection is a question of fact, "to be decided flexibly on the proverbial 'case-by-case' basis") (citations omitted). Therefore, BMO's motion for stay relief under § 362(d)(1) will be denied.

**Section 362(d)(2): Necessary to an Effective Reorganization**

By arguing that Vita Craft's proposed Plan is not confirmable, BMO is implicitly asking for stay relief under § 362(d)(2). Because it is undisputed that Vita Craft lacks equity in the Collateral, Vita Craft has the burden of proving that the Collateral is "necessary to an effective reorganization" to avoid stay relief under § 362(d)(2). This requires a showing that "the property is essential for an effective reorganization *that is in prospect*," meaning "a reasonable possibility of a successful reorganization within a reasonable time." *See United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 375-76 (1988) (citation omitted). For purposes of plan confirmation, the "value" of BMO's interest in the Collateral is not

foreclosure value, but *replacement* value. *See Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 962-63 (1997).[19]

Here, the Court finds that the replacement value of the Real Estate at the time of Marx's appraisal was $1,100,000 minus projected environmental remediation costs.[20] Since the only evidence as to the replacement value of the M&E and the Inventory was from Roy,[21] since Vita Craft appears to have sold some

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[19] Adequate protection is about giving a secured creditor the benefit of its prebankruptcy bargain—i.e., the right to foreclose on collateral and apply the proceeds to a loan. Thus, the "proposed disposition or use" of the collateral for purposes of § 506(a) is foreclosure in the adequate-protection context. In contrast, when the issue is whether a Chapter 11 plan may be confirmed under § 1129(b), the "proposed disposition or use" of the collateral is no longer foreclosure; rather, it is retention of the collateral by the debtor. Thus, the relevant "value" of the property under § 506(a), in the § 1129(b) cramdown context, is replacement value rather than foreclosure value.

[20] Neither Belke nor Marx incorporated potential remediation costs into his appraisal, but both acknowledged, as did Eberle, that the Real Estate might have serious environmental issues. For example, Belke reported that one of the three parcels was a service station before Vita Craft converted it to an outlet store, and that a leaking underground storage tank had been removed from the property in 1996.

[21] The Court found Eberle's testimony as to the overall value of the M&E highly credible. However, in comparing sale proceeds to removal cost, Eberle was testifying about the M&E from the perspective of Vita Craft as a *seller*—replacement value, though, is about Vita Craft as a *buyer*. Furthermore, Eberle only gave testimony "from a macro perspective," as he put it, as to the overall value of the M&E. He did not offer any testimony as to the value of the ultrasonic washing machine in particular, which would appear to have some significant positive value even if the replacement value of the rest of the M&E is zero under current market conditions. (The replacement value of any item of M&E cannot be less than zero, as there is no requirement that the M&E be bought or sold together; in that case, a rational buyer would simply choose not to buy the particular item. Likewise, the foreclosure value of any item of M&E cannot be less than zero, as nothing in the Loan Agreement or the facts of this case makes foreclosure of the M&E an all-or-nothing proposition; in that case, a rational lender would simply choose not to foreclose on that particular item.)

of the Inventory since Roy appraised it, and since Roy acknowledged that a change in the market for those items occurred around the beginning of 2020 that rendered his estimates unreliable in any event, the Court is unable to make factual findings at this time as to the likely replacement value of the M&E or the Inventory as of the effective date of Vita Craft's plan. *Cf.* 4 *Collier on Bankruptcy* ¶ 506.03[10] (Richard Levin & Henry J. Sommer, eds., 16th ed.) ("In general, courts generally agree that, for purposes of determining the amount of a secured creditor's claim in the cramdown context, the relevant collateral should be valued as of the effective date of the plan.").

Because the Plan only values BMO's secured claim at $850,000, the Plan may not—depending on the replacement value of the Collateral as of the effective date—be confirmable as written. This does not mean that BMO is entitled to stay relief under § 362(d)(2); the Court finds, in light of all the evidence, that Vita Craft nevertheless has a reasonable possibility of a successful reorganization within a reasonable time. This does mean, though, that Vita Craft may need to propose a new plan that incorporates the replacement value of the Collateral as of the effective date of that plan (if different from $850,000). Additionally, because "the purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes," *In re Pikes Peak Water Co.*, 779 F.2d 1456, 1460 (10th Cir. 1985) (citation omitted), a confirmable plan may need to include certain written commitments: (a) from VCJ and Celebrity to purchase minimum amounts of Vita Craft product as projected in Vita Craft's pro forma; (b) from Fowler (or a third party, such as Imura

International) to pay Vita Craft's attorney fees and expert costs if Vita Craft's actual cash flow is insufficient for such payment; and (c) from Fowler (or a third party, such as Imura International), to pay the balance of Vita Craft's property taxes if Vita Craft's tax appeal does not succeed and Vita Craft's actual cash flow is insufficient for such payment.[22] Furthermore, if Vita Craft intends to use both the Land and the Improvements as collateral to obtain a new loan at the end of its plan, a confirmable plan will likely include a budget for the deferred maintenance items identified by Marx (which must be resolved, according to Marx, for the Improvements to reach their 10-year expected economic life).[23]

**C. CONCLUSION**

For all of the foregoing reasons, BMO's motion for stay relief is hereby denied.

IT IS SO ORDERED.

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[22] According to Belke, Johnson County assessed the value of the Real Estate in 2019 at $1,824,570 for property tax purposes. As an alternative to appealing that valuation, Vita Craft might ask this Court to determine the amount of the tax pursuant to 11 U.S.C. § 505(a).

[23] In making these observations (which are not a definite list), the Court is not ruling on whether the Plan (or any other plan, whether proposed by Vita Craft or not) is actually confirmable under § 1129, except to the extent necessary to rule on BMO's motion for stay relief under § 362(d)(2).