

UNITED STATES BANKRUPTCY COURT

Eastern District of California

**Honorable Ronald H. Sargis**

Chief Bankruptcy Judge

Sacramento, California

March 15, 2016 at 1:30 p.m.

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1. [11-23583](#)-E-13 LUGENIA JOHNSON CONTINUED MOTION TO DISMISS  
DPC-1 James Keenan CASE  
1-20-16 [[53](#)]

**Tentative Ruling:** The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling.**

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Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on January 20, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

**The court's decision is to grant the Motion to Dismiss and dismiss the case.**

David Cusick, the Chapter 13 Trustee, filed the instant Motion to Dismiss on January 20, 2016. Dckt. 53. The Trustee seeks dismissal due to the Debtor's delinquency in plan payments.

**DEBTOR'S ATTORNEY'S OPPOSITION**

Debtor's counsel filed an opposition on January 19, 2016. Dckt. 57. Debtor's counsel states that the Debtor died last year. Debtor's counsel states that the Debtor's daughter has been in contact with the attorney but has not followed up on substitution paper work or made plan payments. The Debtor's attorney claims that he will contact the daughter to determine her intentions.

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**FEBRUARY 17, 2016 HEARING**

At the hearing, Debtor's counsel reported that he is in communication with the deceased Debtor's daughters and they will be promptly acting to prosecute this case. Dckt. 59. The Trustee concurred in the court continuing the hearing rather than dismissing the case. The court continued the hearing to 1:30 p.m. on March 15, 2016.

**DISCUSSION**

Since the court continued the hearing, no supplemental papers have been filed nor has a Motion to Substitute been filed.

The Trustee seeks dismissal of the case on the basis that the Debtor is \$6,310.23 delinquent in plan payments, which represents multiple months of the \$2,099.18.00 plan payment. Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

This bankruptcy case was filed on February 12, 2011. January 2016 was the sixtieth month of the case. The last payment from the "Debtor" was received on October 19, 2015. Debtor's counsel states that Debtor died "last year," without disclosing the date of death. From the response, it appears that it may have been late in 2015.

Unfortunately, the Debtor's successor has not provided evidence that the delinquency has been cured. Additionally, no Motion to Substitute a Personal Representative for the deceased Debtor has been filed.

It has been demonstrated that with the death of the Debtor, this Chapter 13 case cannot be further administered as a bankruptcy case.

Cause exists to dismiss this case. The motion is granted and the case is dismissed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss is granted and the case is dismissed.

2. 16-20089-E-13 JEFFREY STEWART AND AMENDED MOTION FOR RELIEF FROM  
SMR-1 MADIAH ALMUSTAFA-STEWART AUTOMATIC STAY  
Scott Shumaker 2-16-16 [[47](#)]

RICO DD, INC. VS.

**Tentative Ruling:** The Motion for Relief From the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).**

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Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on January 18, 2016. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion for Relief From the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

**The Motion for Relief From the Automatic Stay is granted.**

Movant filed an amended motion for relief from automatic stay in accordance with this continued motion on February 17, 2016. Dckt. 47. The Amended Motion (Dckt. 47) states with particularity the grounds upon which Movant bases the requested relief:

- A. Movant is the owner of the commercial real property located at 3630 Morse Avenue, Sacramento, California 95821.

- B. Movant seeks relief from the automatic stay of 11 U.S.C. § 362(a).
- C. Movant seeks to pursue state court remedies to recover possession of the commercial real property.
- D. Movant acquired title to the property for \$280,000.00 from Leonard R. Perillo I, LLC.
- E. Leonard R. Perillo Investment I, LLC acquired the property from a trustee's sale on June 26, 2015.
- F. On January 8, 2016, Debtor commenced the instant Chapter 13 bankruptcy case.
- G. David Cusick is the Chapter 13 Trustee in Debtor's Chapter 13 case.
- H. As a result of the bankruptcy filing, certain acts (presumably an order enforcing the stipulation order from Movant's unlawful detainer action against Debtor) and proceedings against Debtor are stayed.
- I. The motion is filed on the basis of a lack of adequate protection and for cause.
- J. Debtor has no equity or interest in the commercial property.
- K. Debtor occupies the commercial property as a tenant, operating a board and care facility.
- L. Debtor has not offered to cure past defaults and provides no assurance of future performance.
- M. Continuation of the automatic stay will work a real and irreparable harm to the Movant herein.
- N. Debtor's possession of property is not necessary to an effective reorganization.
- O. Debtor's contention that they are in a lawsuit to recover the commercial property is false.

Motion, Dckt. 47.

#### **Debtor's Opposition to Movant's Amended Motion**

Debtor filed an opposition to Movant's Amended Motion on March 2, 2016. Dckt. 60. Debtor's Opposition states the following:

1. Movant has failed to state with particularity the grounds for relief sought. Movant has simply alleged inadequate protection as a legal conclusion, and does not address the fact that Debtor has accounted for treatment of Movant's claim within his proposed Chapter 13 Plan. Furthermore, Movant has failed to address the equity in the property, as Debtor values the commercial property at \$550,000.00.

2. Movant has failed to provide proper foundation for the declaration of Kelly Engineer. Engineer asserts facts that are not within his knowledge, for which there is no basis, including. Engineer lacks knowledge to know that the acquisition of commercial property was at arms-length, that Debtors remain on the property, that certain statements were made by Movant's attorney, and that Debtor's have not paid Movant. Engineer's declaration also is silent on how Movant would suffer harm from Debtor's possession. Engineer is identified as the secretary of the a company, Movant herein, and not vice-president as he represented.
3. Movant has failed to provide proper foundation for the declaration of Sid Rosenberg. Several documents sought to be authenticated by Rosenberg are uncertified public documents. Movant has not established itself as owner of the commercial property subject to this motion. Furthermore, Rosenberg makes statements he has no knowledge of, including that Debtor's have not made their monthly installments pursuant to a stipulation order.
4. The Motion fails to cite any admissible evidence.
5. Assuming that Movant had made a sufficient showing of entitlement for relief, Debtor asks that the Motion be provisionally denied to allow superior court litigation involving both parties. Debtors are the owners of the commercial property subject to this motion, and have filed a lawsuit for wrongful foreclosure and fraudulent trustee's sale. Debtors seek leave to file a second amended complaint in that case.

#### **Movant's Reply**

Movant filed a reply on March 8, 2016. Dckt. 65. The Movant states the following:

1. Debtors cannot provide adequate protection. While Debtors have filed a plan, they have yet to make any payments under the plan and are \$2,011.00 delinquent. Furthermore, there is cause because, while Debtor had its rights terminated pursuant to a stipulation order, Debtor continues to benefit from the stipulation order while not paying for the property as agreed. The stay has caused the Movant to suffer because it has not been able to recover its property.
2. Debtors lack any interest or equity in the property. Debtors fail to state how valuing the property at \$550,000.00 creates equity for them. Furthermore, the sale price of \$290,000.00 in the Trustee's sale was less than the prior obligation of \$305,357.00.
3. Records attached by Debtor as Exhibit 11 to show recorded ownership of the property by the Debtors has not been certified and is not admissible evidence. Even assuming an ownership interest, Debtors ownership was subject to a deed of trust held by Tranquillity Care, LLC , and was foreclosed upon. Any interest is therefore possessory in nature.

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4. Debtors attack on the admissibility of Movant's evidence is baseless. With regards to the contested exhibits A, B, D, H, and J, certification is provided on the back of the final page, and will be provided at the date of this hearing. Furthermore, Engineer is both secretary and vice-president of the company, Movant herein.
5. The issues Debtor seeks to litigate are have been dismissed and resolved. Parties agreed to a stipulation order pursuant to an unlawful detainer action. The stipulation order was not the product of fraud, nor was the Debtor "strong-armed" into a settlement. Debtor's occupancy rights were terminated with the stipulation order.

### **Discussion**

The Amended Motion, which now states grounds with particularity present the court with a much clearer, and simpler set of issues. Movant is the owner of the commercial real property located at 3630 Morse Avenue, Sacramento, California. Movant obtained title through an entity which purported to have obtained title through a non-judicial foreclosure sale. Debtors purport to be in possession of the Property and assert that the automatic stay prevents Movant from proceeding in state court to assert its rights to possession of the property as the purported owner.

It is asserted, that because of the alleged non-judicial foreclosure sale Debtors have no interest in the Property. Further, Debtors have no right to retain possession of the Property.

### **Review of Debtors' Opposition**

In opposing the Motion, Debtors did not heed the comments of the court at the prior hearing that it was a foregone conclusion that they should win because of the Movant's prior pleading difficulties. First, Debtor state there is a "glaring problem" because they are "in the dark" about whether relief is sought pursuant to 11 U.S.C. § 362(d)(1) [for cause, including lack of adequate protection] and § 362(d)(2) [lack of equity and not necessary for an effective reorganization]. Since it is common for a party to lead an opposition with its best argument, this first opposition sets the stage for the balance of the opposition.

While the Motion is not pleaded the most clear format, the court quickly distills the following with respect to Debtor's first basis for opposition:

- A. Movant asserts that it is the owner of the Property. Dckt. 47; Motion, p. 2:3.
- B. Debtors right to occupy is based on an agreement with a prior owner. *Id.*, p. 2:4-6.
- C. Movant traces its title through a deed it obtained from Leonard R. Perillo Investment I, LLC ("Perillo"). *Id.*, p. 2:7-8.
- D. Movant traces the Perillo interest to a foreclosure sale which is alleged to have occurred in June 2015. *Id.*, p. 12-15.
- E. Debtors allege that they are litigating a right to recover the

Property, citing to Schedules A/B filed in this case. *Id.*, p. 2:22-23. (On Schedule A/B Debtors state that they allege that there was a "wrongful foreclosure.")

- F. That the person on title when the foreclosure occurred was Blessing Care, LLC, not Debtors. *Id.*, p. 2:27-28.
- G. Movant has commenced an unlawful detainer action to obtain possession of the Property. *Id.*, p. 3:10-12.
- H. In the unlawful detainer proceeding a stipulation was entered into and an order entered thereon, which concluded Debtors' asserted interests, if any, in the Property. *Id.*, p. 3:12-19.
- I. "The motion is filed on the basis of a lack of adequate protection and for cause," asserting: (1) Debtors lack standing to assert any interest in the Property; (2) Debtors do not hold title to the Property; and (3) any interest of Debtors is merely possessory. *Id.*, p. 4:3-6.

At this juncture, the court notes that the words "lack of adequate protection" and "cause" are well known terms under the Bankruptcy Code and found in 11 U.S.C. § 362(d)(1). Debtor's contention that they are shooting in the dark is not because the Motion fails to identify the 11 U.S.C. § 362(d)(1) grounds.

- J. It is alleged that the former owner of the Property, Blessings Care, LLC is not a debtor in this case. Further, Debtors have not shown a basis for personally asserting the rights of the former owner. *Id.*, p. 4:7-10.
- K. The Motion further states that relief is sought pursuant to 11 U.S.C. § 362(d)(2). *Id.*, p. 4:11-12. The Motion then further states,

"Furthermore, based upon the foregoing, it is clear that debtors have no form of equitable interest in the Subject Property. As such relief from the automatic stay should be ordered on grounds of a lack of equity in the Subject Property in accordance with the provisions of 11 U.S.C. § 362 (d)(2) (A).

Finally, inasmuch as debtors only interest in the Subject Property is a possessory interest as tenants of the former owner, such interest is not necessary for an effective reorganization."

On this point, it is clear that Movant has alleged that Debtors do not now have any interest in the Property, Debtors did not previously have any interest in the Property, and Debtors were not the owners of the Property when the foreclosure occurred. Further, that it is alleged that Debtors current possessory is not necessary for an *effective* reorganization. No piercing beam of light is required to drive back the darkness to understand that Movant alleges that Debtors do not have any equity in the property and it is not

necessary for an effective reorganization.

With respect to the contention that Movant has failed to plead the basic legal grounds and Debtors are "in the dark" as to such grounds, that opposition is rejected. To the extent that Debtors are "in the dark," it is because they choose to ignore the plan language of the Motion.

Debtors then go on to argue the value of the property, ignoring Movant's contention that it is the owner of the Property, not merely a creditor. Movant asserts that the foreclosure bell has rung and the person who formerly owned the property had those ownership rights terminated by the foreclosure sale.

#### **Objection to Movant's Declarations**

The court having taken Kelly Engineer, Movant's witness, to task for the prior declaration, Debtors pile on contending that he is once again giving non-credible testimony. The court goes to the Declaration for consideration of this opposition. Mr. Engineer, in relevant part, testifies to the following:

- A. Mr. Engineer is the Vice President of Movant. Dckt. 49; Declaration, p. 1:1.
- B. Mr. Engineer authenticates the books and records of Movant. *Id.*, p. 1:27-28, 2:1-3.
- C. Mr. Kelly testifies as to the purchase agreement by which Movant asserts it purchased the Property. He also authenticates the grant deed. *Id.*; p. 2:6-8, 11-15.
- D. Debtors are in possession of the Property. *Id.*, p. 2:16-17.
- E. The Notice of Vacate was served for Movant by Movant's counsel, and authenticates the notice. *Id.*; p. 2:21-22, 25-28.
- F. Movant commenced an unlawful detainer action to obtain possession of the Property, and authenticates the unlawful detainer complaint. *Id.*; p. 3:1-4, 4-6.
- G. That Mr. Kelly was present at the trial for the unlawful detainer when a stipulation was reached whereby Debtor Madihan Amihan Almustafa-Stewart agreed to vacate the Property. *Id.*, p. 3:13-16.
- H. He further authenticates and states that he signed the Stipulation and Order which resolved the unlawful detainer proceeding, and authenticates said Stipulation and Order. *Id.*, p. 3:17-21.
- I. That Debtor Madihan Amihan Almustafa-Stewart failed to comply with the Stipulation by defaulting in the monthly payments. *Id.*, p. 3:23-24.

Debtors attack the testimony contending that Mr. Engineer provides his legal conclusion that there was an arms length sale of the Property to Movant and he fails to provide a copy of the purchase and sale contract. That might be relevant if the issue before the court was to determine the respective rights and interests of the parties - it is not. Mr. Engineer has

authenticated the deed by which Movant asserts its interest in the Property for which it wants relief from the stay. How it acquired that interest is not at issue, but only whether Movant shows some colorable interest for which the relief from the automatic stay is requested.

Debtor attack Mr. Engineer's statement under penalty of perjury that he is the vice president of Movant. Debtors argue that the paralegal for their attorney has looked on the internet and Mr. Engineer is not listed as a Vice President by the Nevada Secretary of State, but may be the "secretary." Debtor then theorize that as secretary Mr. Engineer could authenticate documents but nothing more. Debtor's offer no support for this contention.

Debtors' opposition ignores Mr. Engineer's other testimony that he attended the unlawful detainer action and was the person who executed the Stipulation and Order for Movant. For the summary issues which are the subject of a motion for relief from the stay, this "maybe he is, maybe he isn't" attack by Debtors does not provide any opposition of substance.

Debtors then attack the declaration of Movant's counsel, stating that he has not, and cannot, properly authenticate exhibits. Specifically, Debtors Object to Movant's counsel's testimony. Movant's counsel testifies that the copies of the certified documents which are included as exhibits have been reviewed by him and are true and accurate copies of the certified documents. Debtors contend that since the certification is not on the same page as the writing of the document, then Movant's counsel's testimony is ineffective.

As with "being in the dark" as to whether relief was sought pursuant to 11 U.S.C. § 362(d)(1) or § 362(d)(2), Debtor's opposition misses the mark by a wide margin. For the documents which Movant's counsel testifies are accurate copies of the certified copies, he states that they are accurate copies - nothing more and nothing less. It would not be uncommon for some public officials to put a certification on the back of a document so as not to create confusion that the certification stamp was part of what was filed or recorded.

Glaring in its absence is any contention by Debtors that the copies provided are not actually true and accurate copies of the documents. Debtors have some of the documents and could easily review for free others (such as the grant deed at the County Recorder's Office). Rather than an opposition of substance, Debtors merely say they are not convinced, so that should be the applicable rule used by the court.

#### **Opposition Based on Motion Not Citing Evidence**

Debtors go further to create their own special pleading rules, contention that the Motion must be denied because "The Motion makes factual statements but no reference therein to admissible evidence." Dckt. 60; Opposition, p. 5:9. Debtors cite to no rule imposing such a requirement. A motion, similar to a complaint is to allege facts (which Debtor admits by saying that there are "factual statements"), but is not required to state or cite to the evidence or argue the law.

#### **Debtors' State Court Litigation - Automatic Stay in Lieu of Preliminary Injunction**

Debtors then state that even if Movant has shown grounds for relief, this

court should allow the automatic stay to remain in place as a litigation injunction while they litigate issues in the state court. Debtor contend that the Property was sold in violation of an injunction. Further, that Debtors can defeat any contention that Movant is a bona fide purchaser for value.

Debtor are now pursuing a wrongful foreclosure action concerning the property in state court. Debtors intend to seek leave to file a second amended complaint in the state court action. Debtors then recite extensive, non-bankruptcy case or bankruptcy law related theories and claims for the rights which they seek to assert in state court.

These opposition arguments prove too much - this dispute has little if anything to do with a Chapter 13 case, but are complex non-bankruptcy law issues which Debtors seek to litigate. Instead of obtaining the proper injunctive relief from the state court judge, Debtors are cutting the corner and using the unique automatic stay provisions as part of the state court litigation (a free preliminary injunction).

### **Basis For Debtors Asserting an Interest in the Property**

Debtors direct the court to review the Declaration of Debtor Madihan Stewart-Almustafa (Dckt. 61) to blunt the allegations that Debtors were not the owners of the Property when the alleged foreclosure occurred. In her Declaration, this Debtor states on the issue of ownership of the Property:

- A. Declarant is an owner of the Property. Dckt. 61; Declaration, p. 2:2.
- B. Declarant is a party to a lawsuit alleging a wrongful foreclosure on the Property. *Id.*, p. 2:11-12.
- C. Declarant states that she is asserting various state law claims against the creditor and party who purchase the Property at the foreclosure sale. *Id.*, p. 2:18-23.
- D. Declarant testifies that she obtained an Ex Parte Order restraining Medallion from conducting a foreclosure sale. *Id.*, p. 2:24-25.
- E. Declarant testifies as to various other state law claims which she asserts concerning the Property and the alleged wrongful foreclosure sale.
- F. Declarant testifies that she now seeks to set aside the Stipulation in the unlawful detainer proceeding, contending that though she entered into it, because she did not any "hard evidence" that Movant was not a BFP, she executed the settlement. *Id.*, p. 22-23.
- G. Declarant states the various other grounds by which she believes that she can have the foreclosure set aside.
- H. Declarant directs the court to the proposed Chapter 13 Plan, which she states provides "adequate protection," though she does not state what is the adequate protection and how it is "adequate."
- I. Declarant asserts that she acquired title to the property pursuant

to a grant deed between herself, Blessing Care, LLC, and Tranquilly Care, LLC. *Id.*, 4:22.5-23.5. Declarant does not provide a copy of such deed, but a printout from the County Recorder's website showing the "filing."

Debtor offers no explanation as to why she does not have a copy of the deed by which she asserts she was given title in June 2015. Clearly, she could have authenticated such a copy, a certified copy not being required when the order testifies as to the deed he or she received. While objecting to evidence presented by Movant as to where the certification stamp is located, Debtors present the court with a screen shot of a webpage and not a copy of the deed. This amended motion and the hearing was not a surprise and a quick trip to the County Recorder's Office could have produced a certified copy of the deed, if Debtors have no copy of such an important document. The absence of such document and presenting the court with a screen shot of a webpage is not credible evidence.

### Chapter 13 Plan

While not providing the court with any testimony of the "adequate protection" to be provided in the plan, Debtors direct the court to the proposed plan. The Chapter 13 Plan was filed on February 9, 2016. Dckt. 39. The Chapter 13 Plan provides:

- A. Debtors shall make monthly plan payments of \$2,011.00.
- B. The Plan payments shall be made for sixty months.
- C. Debtor's attorney has been paid \$2,000.00 to date and will be paid an additional \$2,000.00 through the plan.
- D. Movant will be paid \$1,500.00 a month as an adequate protection payment while Debtors pursue the state court wrongful foreclosure litigation.

The court notes that no provision is made to pay the secured claim for which the allegedly wrongful foreclosure was conducted. No creditor is listed for such a claim in the Plan.

- E. Class 2 Secured Claims:
  - 1. Golden 1 will receive payments for its claim secured by Debtors Cadillac STS.....\$174.88 a month;
  - 2. Wells Fargo Dealer Services will receive payments for its claim secured by Cadillac Escalade.....\$82.92 a month;
  - 3. RPM Lender Services will receive payments for its claim secured by Jaguar Vaden Plas.....\$114.61 a month.
- F. Class 3 Collateral Surrenders.....None
- G. Class 4 Secured Claims
  - 1. PLM Lenders, Debtor's Residence.....Direct payment by

Debtors of \$4,000.00 a month.

- H. Class 5 Claims.....None
- I. Class 6 Unsecured Claims.....None
- J. Class 7 General Unsecured Claims
  - 1. 0.00% dividend for \$95,000 of claims.

Debtors "plan" appears to ignore the secured claim which relates to the foreclosure. Instead, Debtors do not provide for it, assert that the order of the State Court pursuant to the Stipulation of Debtor is not valid and should be set aside, and in lieu of getting a state court injunction Debtors will pay \$1,500.00 a month adequate protection payment.

Debtors' declaration in support of confirmation provides no explanation as to why or how \$1,500.00 is a proper "adequate protection payment." Declaration, Dckt. 41. Debtor's testify in the declaration that they believe that the Property is worth \$465,000 and that Zillow "values" the property at \$550,000.00. If an investor desired a 6% return on the real estate investment of \$500,000 (splitting the Zillow-Debtors values), that would be \$30,000 a year, which is \$2,500 a month. Debtors propose slightly more than half that amount.

More significantly, the Motion to Confirm and the Declaration contain extensive discussions of all the state law litigation which is at the heart of this bankruptcy case, and little about a bankruptcy reorganization.

The court also notes that Debtors have not addressed why, if the state court issued an order staying the foreclosure sale, why the persons who violated that order have not been flailed by the state court judge whose order was violated. The state court judge has both civil correction and criminal punitive sanction powers for violation a state court judge's order. Debtors remain moot as to what they have done to enforce the orders they have already obtained from the state court judge.

**CAUSE HAS BEEN SHOW FOR RELIEF FROM THE STAY**

The court begins its consideration of granting relief from the automatic stay to allow the adjudication of claims, rights, and interests (of the estate in property) in a state court forum by first considering the broad grant of federal court jurisdiction by Congress pursuant to the Constitutional mandate for a uniform bankruptcy law. U.S. Const. Art. I, Section 8. In 28 U.S.C. § 1334 Congress provides a broad grant of federal court jurisdiction providing that the federal district court (and bankruptcy judges in exercising federal judicial power, 28 U.S.C. § 157(b)) has:

- A. Original and exclusive jurisdiction of all cases under title 11;
- B. Original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.
- C. Exclusive jurisdiction - (1) of all the property, wherever located,

of the debtor as of the commencement of such case, and of property of the estate; and (2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code.

28 U.S.C. § 1334(a), (b), and (e).

Even with the grant of exclusive jurisdiction, Congress provides for discretionary and mandatory abstention of a federal court exercising the grant of federal jurisdiction over the non-bankruptcy court. 28 U.S.C. § 1334(c). For discretionary abstention, Congress provides,

Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. § 1334(c)(1).

This is contrasted to the specific federal law case or controversy (which the bankruptcy law provisions of U.S. Const. Art. I, Section 8 provide for purposes of 28 U.S.C. § 1334) limitations for federal intrusion on the judicial power of the states. The United States Constitution, Art. III, Sec. 2, Cl. 1, provides in pertinent part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties...to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In considering the exercise of the broad federal jurisdiction provided under 28 U.S.C. § 1334 for bankruptcy cases, the court considers it in light of the possible core and non-core (related to) jurisdiction issues. See *Stern v. Marshall*, 564 U.S. \_\_\_\_\_, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011). This court has previously addressed the issue of when a bankruptcy court judge should utilize federal bankruptcy jurisdiction to adjudicate issues between parties which determination will have no bearing on the bankruptcy case and do not concern Bankruptcy Code issues. See *Pineda v. Bank of America, N.A. (In re Pineda)*, 2011 Bankr. LEXIS 5609 (Bankr. E.D. Cal 2011), *affrm. Pineda v. Bank of America, N.A. (In re Pineda)*, 2013 Bankr. LEXIS 1888 (B.A.P. 9th Cir. 2013). Such jurisdiction should be carefully used by the federal courts to the extent necessary and appropriate to effectuate the goals, policies, and rights relating to bankruptcy cases, and not as a device to usurp state courts of general jurisdiction or the district as the trial court for federal matter and diversity jurisdiction.

As discussed by the court in *In re Castlerock Properties*, 781 F.2d 159 (9th Cir. 1985), In this case, several factors could constitute

"cause." A clear congressional policy exists to give state law claimants a right to have claims heard in state court. See 28 U.S.C. § 1334(c). If the case were brought today, it would be heard in state court. Id. § 1334 (c) (2). More importantly, a state court trial is about to take place involving the very same issues. Under these circumstances, the district court did not abuse its discretion in terminating the stay, thus allowing the entire case to be determined in one forum.

The Ninth Circuit Court also addressed modifying the automatic stay when the Bankruptcy Case was interposed in an effort to thwart the state court proceedings. The opinion in *In re Tucson Estates, Inc.*, 912 F.2d 1162 (9th Cir. 1990), held that "cause" existed to modify the stay to allow state court litigation to proceed when the parties were moving toward concluding that action and the debtor was attempting to use the bankruptcy case to avoid the entry of an adverse judgment.

Where a bankruptcy court may abstain from deciding issues in favor of an imminent state court trial involving the same issues, cause may exist for lifting the stay as to the state court trial. See *In re Castlerock Properties*, 781 F.2d 159, 163 (9th Cir. 1986).

...  
 In deciding to lift the stay partially, the bankruptcy court made specific factual findings that provide a fully developed record and strongly support lifting the stay of the litigation entirely to allow the entry of judgment. (Execution of any judgment, of course, is another matter.) The bankruptcy court found that the debtor and officers waited until six years after the commencement of the state court litigation and until they had lost a very important summary judgment motion, to file for bankruptcy. The delay suggests that the filing's purpose was to avoid an unfavorable state court judgment  
 ...

The *In re Tucson Estates* Opinion discusses 12 factors (from *In re Republic Reader's Serv., Inc.*, 81 Bankr. 422, 429 (Bankr. S.D. Tex. 1987)), commonly considered in determining whether a bankruptcy or district court should allow modify the automatic stay and allow the state court action to proceed. A chart of these factors and application to the present Motion is set out below.

Factors	Application to Motion Before the Court [Addressed in Detail in narrative following this chart]
(1) The effect or lack thereof on the efficient administration of the estate if a Court recommends abstention	Allowing the state court to proceed does not negatively impact the administration of this bankruptcy case. The state law claims and Property are not used to fund any payments to creditors.

<p>(2) The extent to which state law issues predominate over bankruptcy issues</p>	<p>There are only state law issues in dispute. Further, the use of the automatic stay is intended to "overrule" a stipulation of one of the Debtors and the final order of the state court judge issued thereon (which order was not appealed and has not been revoked).</p>
<p>(3) The difficulty or unsettled nature of the applicable law</p>	<p>The state law issues relating to the contentions of fraud and wrongful foreclosure will be factually complex, though the law not unduly difficult. No party is seeking to have the bankruptcy court determine any of those issues, but merely have the automatic stay operate as a stay of a state court order in one action while Debtors pursue another action against Movant.</p>
<p>(4) The presence of a related proceeding commenced in state court or other nonbankruptcy court</p>	<p>The state court action in which Debtor stipulated and the order to be stayed, and the action for fraud and wrongful foreclosure are pending, and the latter is an action in which the state court judge may enjoin Movant's enforcement of rights pursuant to the order in the prior state court action.</p>
<p>(5) The jurisdictional basis, if any, other than 28 U.S.C. § 1334</p>	<p>None.</p>
<p>(6) The degree of relatedness or remoteness of the proceeding to the main bankruptcy case</p>	<p>The recovery from the fraud litigation and value of the Property if recovered are not included in the Chapter 13 Plan or being administered as part of this bankruptcy case.</p>
<p>(7) The substance rather than form of an asserted "core" proceeding</p>	
<p>(8) The feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court</p>	
<p>(9) The burden of [the bankruptcy court's] docket</p>	

(10) The likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties	
(11) The existence of a right to a jury trial	
(12) The presence in the proceeding of nondebtor parties	

**Consideration of Application of Automatic Stay  
To Pending State Court Proceedings**

It is clear based on the evidence presented, by both Movant and Debtors, that the state court litigation and the state court litigation Debtors now intend to pursue have little to do with bankruptcy. Rather, the evidence presented demonstrate that the bankruptcy filing is merely a tactical part of litigation war going on (or to be prosecuted) in state court.

Debtor Madihah Stewart-Almustafa admits that she stipulated to resolve the state court litigation and a state court order exists thereon. But now, based on subsequent information she has obtained, she now believes that her stipulating to that resolution was improvident. Further, Debtors believe that they have other non-bankruptcy state law claims to prosecute against Movant and others.

Debtors demonstrate that they want to use the automatic stay to "overrule" the state court judge's order based on Debtor Madihah Stewart-Almustafa stipulation in the state court. Further, that while Debtors seek to litigate their various wrongful foreclosure claims, Debtors want to use the automatic stay to retain possession of the Property - defeating the stipulation and order of the state court concerning possession.

As stated by the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings which address issues arising only under 11 U.S.C. Section 362(d). *Hamilton*, 2005 Bankr. LEXIS 3427 at \*8-\*9 (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief.

The fight Debtors want to have, and assert as their opposition, goes to the ownership of the Property. That is not determined in connection with a motion for relief from the stay. Further, Debtors oppose the Motion premised on a series of other state law claims which they seek to assert. These are well beyond the summary nature of relief from stay proceedings.

**Chapter 13 Plan**

Debtors are not seeking to conduct the litigation and assert ownership rights in the Property for the benefit of the estate (and creditors) and fund the plan with the litigation "winnings." Instead, the current Chapter 13 plan

seeks to use the bankruptcy to enjoin Movant and the state court from enforcing the existing order which have not been appealed or vacated. The Chapter 13 Plan does not provide for the monies recovered through the litigation to fund the plan. Instead, Debtor merely makes minimal payments, provides for a 0.00% dividend, and then pockets all of the litigation proceedings. This is no indicative of debtors filing a bankruptcy case in good faith, debtors proposing a plan in good faith, and debtors prosecuting a bankruptcy case in good faith.

Compounding this, the Plan clearly is intended to allow Debtors to continue to use the Property for Debtors' own financial gain, the Debtors retain their two Cadillacs and their Jaguar, retain their home by making a \$4,000.00 a month payment, and make no payments to other creditors (Debtor diverting to themselves all of the value of the Property and litigation proceeds if they win.)

Rather than using the very broad and extraordinary grant of federal jurisdiction pursuant to 28 U.S.C. § 1334 for bankruptcy cases to advance bankruptcy related purposes, Debtors are seeking to have the federal courts impose the federal super-injunction (the automatic stay) to overrule final orders of the state court. While that may occur in situations where the bankruptcy purpose is served, in this case Debtors are using it to circumvent state court law concerning injunctions and not engaging in a good faith reorganization.

The court also notes that even though this case was filed on January 8, 2016, and the Debtors vigorously argue that they have righteous claims, that state court orders have been violated, and they are going to actively litigate, they talk of seeking leave to file an amended state court complaint at some later date.

In looking at Schedule I (Dckt. 35), Debtors report the following income:

Source of Income	Debtor Jeffrey Stewart Employment Status - Retired	Debtor Madihah Aminah Almustafa-Stewart Employment Status - Self
Wages, Salary, Commissions	\$0.00	\$0.00
Net Income From Rental or Business	\$7,404.00	\$0.00
Pension/Retirement	\$2,379.00	\$0.00
	-----	-----
All Income	\$9,783.00	\$0.00

Based on the information under penalty of perjury on Schedule I Debtor Madihah Aminah Almustafa-Stewart has no income, though she is the one who purports to have an interest in the real property on which the business is operated.

However, on the Chapter 13 Statement of Monthly Income (Dckt. 35 at 40) Debtors state under penalty of perjury that during the six months preceding the commencement of the bankruptcy case Debtor Jeffrey Stewart averaged monthly gross income of \$19,625.50. Further, that there were no "ordinary and necessary operating expenses," thereon it is further stated that Jeffrey Stewart's monthly net income averaged \$19,625.00 during the six month prior to the commencement of this case.

Again, on the Chapter 13 Statement of Monthly Income discloses that Debtor Madihah Aminah Almustafa-Stewart had \$0.00 average monthly income during the six months preceding the commencement of this bankruptcy case.

On Schedule I Debtors do not list \$19,625.00 monthly net income. Additionally, the court could not located the required schedule showing the Debtor's gross business income, the necessary expenses, and computation of Debtors' monthly net income.

These statements of income are inconsistent with the statements by Debtor Madihah Aminah Almustafa-Stewart that:

- A. "I also was/am the principal officer for Blessings Care, LLC and Tranquility Care, LLC." Dckt. 61; Declaration, p. 2:2-3.
- B. "This property is my and my husband's primary source of income. The disabled tenants in this care home pay monthly rent which will be used to fund the Chapter 13 Plan." *Id.*, 5:5-6.
- C. "On June 16, 2015, prior to any supposed sale of the property, I became a recorded owner of the property pursuant to a grant deed between myself, Blessings Care, LLC, and Tranquility Care, LLC." *Id.*, p. 4: 22.5-23.5.
- D. Blessing Care, LLC (from 2014-2016) and Tranquility Care, LLC (2011-2015) are the businesses owned by Debtors. Dckt. 35; Statement of Financial Affairs, Question 24.

From the Statement of Financial Affairs Debtor Madihah Aminah Almustafa-Stewart has, and had, no income from the two limited liability companies. The Statement of Financial Affairs states, under penalty of perjury that Debtors personally operated a business from which their income was generated, not that they had an interest in limited liability companies which operated businesses and Debtors received distributions of profits from those limited liability companies. Dckt. 35; Statement of Financial Affairs, Question 4.

On Schedule J, Debtors state under penalty of perjury that they have no business related assets. *Id.*; Schedule A/B, Question 37. Though purporting to operating a business for which Jeffrey Stewart receives almost \$20,000.00 a month in net income, Debtor further states that there are no business assets to generate that much net income.

While Debtors contend that some business is being operated, by some entity, which generates some income which will be used to fund the payments for Debtors' attorneys' fees, payment of the \$4,000.00 a month mortgage, and the three car payments for the two Cadillacs and the Jaguar, who and what the

business is (from the statements under penalty of perjury on the Schedules and Statement of Financial Affairs) is as clear as mud. It appears that who has, who operates, and who profits from the business is a "fluid concept" for Debtors. Under penalty of perjury Debtors state that they have no business assets.

It also appears that title to the Property is asserted to have been transferred into Debtor Madihah Aminah Almustafa-Stewart, who purports to have no income from the business operated thereon, on the eve of her filing suit to try and stop the foreclosure sale on the Property. This appears to show a very fluid concept of ownership, interests, business, prosecuting litigation by Debtors.

### **Interests of Comity and Exercise of Federal Court Jurisdiction**

This court is never reluctant to properly exercise the supreme law of the land and insure that federal court jurisdiction is exercised to fulfill the broad goals of the Bankruptcy Code. Congress turns many state law concepts on their head and herd state law issues for which federal court jurisdiction would not otherwise exist under Article III, Section 2 of the Constitution, but for one of the persons involved having filed bankruptcy.

But in exercising that power, the federal courts must make sure that there are actual, bona fide federal law (bankruptcy) issues which are being served thereby. Here, Debtors have demonstrated that the predominate (and quite possibly only) reason for the bankruptcy case is for the automatic stay to "overrule" the stipulation of Debtor Madihah Aminah Almustafa-Stewart and order concerning possession of the Property issued by the California State Court judge. Debtors want the bankruptcy laws to trump the normal state law process of either appealing an order or vacating a final order of the trial judge.

Then, while using the automatic stay in lieu of a stay pending appeal or state court preliminary injunction, Debtors want to have a Chapter 13 "plan" which provides for paying nothing to creditors with unsecured claims, with the Debtors paying only their \$4,000.00 mortgage and payments for their two Cadillacs and a Jaguar, and have the Debtors take all of the proceeds of the litigation which they are protecting with the automatic stay.

This use offends the court and the concept of Comity and respect for the sovereign states and the state judicial process. As sought by Debtors, the automatic stay works an abuse of the federal judicial process.

### **The Interests of Movant Are Not Adequately Protected**

Movant's interests which Debtors seek to stay are not only the ownership interests in the Property, but also the interests in the stipulation made by Debtor Madihah Aminah Almustafa-Stewart and the order issued by the state court judge in the unlawful detainer action. Debtors begrudgingly ("We are loathe to give Rico any money at all under the circumstances but...." Dckt. 41; Declaration, p. 5:8) propose to make an "adequate protection payment" of \$1,500.00 while they litigate the wrongful foreclosure and fraud action, and Debtor's Stipulation and order thereon in the unlawful detainer are indefinitely held in abeyance.

The \$1,500.00 amount is not reasonable adequate protection for deprivation of the Property as valued by Defendant. This is even more striking in light of the \$20,000.00 a month of net income that Debtors state is generated by them (or some entity they own) from the Property.

Further, Debtors do not address adequately protecting the interests of Movant in the Stipulation and state court order. Debtors seek to have Congress and this court effectively enjoin the state court judge from enforcing the Stipulation and order. This is not a case in which the stay merely holds off a foreclosure sale and Debtors are restructuring the debt through a plan. Instead, Debtors block the state court from acting on its order based on Debtor's Stipulation.

It is clear that Debtors have various avenues in the State Court to seek relief. If, as Debtors repeatedly allege the foreclosure sale is in violation of a State Court injunction, it will be a short corner to turn for the state court judge to rain sanctions down on the parties violating the injunction. To the extent that there has been fraud in obtaining the Stipulation from Debtor, that state court judge can, and would, move swiftly to address such fraud in that judge's court. If nothing else, in connection with the righteous wrongful foreclosure and fraud claims, the state court can structure a preliminary injunction and the necessary reasonable protection to be provided Movant based on the merits of the claims (violation of injunction, fraud, and wrongful foreclosure).

#### **Modification of the Automatic Stay**

Cause exists to modify the automatic stay to allow Movant to assert and litigate its rights to possession of the real property commonly known as 3630 Morse Avenue, Sacramento, California. Further, to modify the stay to allow Movant to deal with, take possession of, and dispose of personal property located on the Morse Avenue Property as provided under California law in connection with unlawful detainer proceedings.

No other or additional relief is granted by the court.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by Rico DD, Inc. ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are immediately vacated to allow Rico DD, Inc., its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to assert and litigate its rights to possession of

the real property commonly known as 3630 Morse Avenue, Sacramento, California.

**IT IS FURTHER ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are modify the stay to allow Movant to deal with, take possession of, and dispose of personal property located on the Morse Avenue Property as provided under California law in connection with unlawful detainer proceedings.

No other or additional relief is granted.