

UNITED STATES BANKRUPTCY COURT

Eastern District of California

**Honorable Ronald H. Sargis**

Chief Bankruptcy Judge

Sacramento, California

May 24, 2016 at 1:30 p.m.

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1. **15-20369-E-13** JANITA LAL MOTION FOR RELIEF FROM  
HEB-1 Peter G. Macaluso AUTOMATIC STAY  
4-12-16 [[22](#)]  
LARRY FONG VS.

**Final Ruling:** No appearance at the May 24, 2016 hearing is required.  
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on April 12, 2016. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion for Relief from Automatic Stay 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion for Relief from Automatic Stay is granted.**

Jerry Yuen Fong and Carol Fong (Creditor"), seeks relief from the automatic stay to may proceed only against the available insurance assets of Debtor Janita Lal ("Debtor") in the personal injury case filed in the Sacramento Superior Court, Case No. 34-2014-00161417. Recovery will be limited to available insurance coverage, if any. The moving party has provided the Declaration of Stephen Robertson, Creditor's counsel, to introduce evidence to authenticate the documents upon which it bases its claim.

A party may seek relief from stay when the party needs to obtain a judgment against the debtor in name only in order to recover from the debtor's insurer. *IBM v. Fernstrom Storage & Van Co. (In re Fernstrom Storage & Van Co.)*, 938 F.2d 731 (7th Cir. 1991). When the court is reasonably confident

May 24, 2016 at 1:30 p.m.

that the policy proceeds will be sufficient to satisfy the creditor's claims paid under the policy, the court should grant relief from the stay to permit an action. Because the policy proceeds will be available only to the creditors with claims covered by the policy, there is no depletion of assets that would otherwise be available to general, unsecured claims, and there is no reason to delay the creditor seeking to recover under the policy. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.)

Given that the movant would not seek to enforce any judgements against the debtor and will proceed against the debtor only to the extent its claims can be satisfied from the debtor's insurance proceeds, the court concludes that cause exists for the granting of relief from the automatic stay.

The Chapter 13 Trustee also filed a non opposition on April 14, 2016. FN.1.

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FN.1. The court notes that on May 17, 2016, the Creditor filed a "Notice of No Opposition to Motion for Relief From Automatic Stay. Dckt. 29. The "Notice" is merely indicating to the court that no opposition has been filed, a fact that is obvious when reviewing the docket. The court is concerned that such "Notices" may have more nefarious intentions, an attempt by attorneys to give the illusion of non-opposition of other parties. There is no requirement that a moving party file a statement that no opposition has been filed.  
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The court shall issue a minute order terminating and vacating the automatic stay, pursuant to 11 U.S.C. § 362(d)(1), to allow the movant to prosecute the claims against the debtor, but not enforce any judgments against the debtor or the estate other than against available insurance coverage, if any.

No other or additional relief is granted by the court.

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 for Relief From the Automatic Stay filed by the Creditor 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 vacated to allow Jerry Yuen Fong and Carol Fong, its agents, representatives, and successors to allow the movant to prosecute the claims against the debtor, but not enforce any judgments against the debtor or the estate other than against available insurance coverage, if any.

No other or additional relief is granted.

2. [15-27079](#)-E-13 LANNES SHARMAN  
DBJ-1 Michael O'Dowd Hays

CONTINUED MOTION FOR RELIEF  
FROM AUTOMATIC STAY  
3-29-16 [[21](#)]

MICHAEL AND LINDA HOLMES VS.

**Final Ruling: No appearance at the May 24, 2016 hearing is required.**

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Local Rule 9014-1(f)(1) 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 March 29, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay 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). The defaults of the non-responding parties are entered.

**The Motion for Relief From the Automatic Stay is continued to 1:30 p.m. on June 28, 2016.**

Michael and Linda Holmes ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 15071 Pinon Road, Magalia, California (the "Property"). Movant has provided the Declaration of Michael Holmes to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Holmes Declaration states that there are 3 post-petition defaults in the payments on the obligation secured by the Property, with a total of \$1,789.41 in post-petition payments past due. The Declaration also provides evidence that there are 7 pre-petition payments in default, with a pre-petition arrearage of \$4,175.29. The Declaration states further that Debtor has fallen behind on his taxes, and therefore has subject the property to foreclosure.

#### **DEBTOR'S OPPOSITION**

Debtor filed an opposition on April 12, 2016, asserting that all post-petition defaults have been accounted for. Dckt. 30. Debtor explains that the payment for January 23, 2016, had become lost in the mail, and was returned to Debtor around April 7, 2016. Debtor attaches as Exhibit "A" a copy of the receipt showing that payment was mailed on April 8, 2016. Dckt. 31. Debtor states further that the other missed payments have already been mailed and received by the Trustee.

**TRUSTEE'S RESPONSE**

Trustee filed a response on April 12, 2016. Dckt. 27. Trustee provides a history of Debtor's payments. The Trustee states that the Debtor is delinquent \$789.00 in plan payments.

**APRIL 26, 2016 HEARING**

Prior to the hearing, the parties stipulated to continue the hearing to 1:30 p.m. on May 24, 2106. Dckt. 33. The court authorized the stipulation and continued the hearing to 1:30 p.m. on May 24, 2016. Dckt. 34.

**TRUSTEE'S RESPONSE**

Trustee filed an updated response on May 10, 2016. Dckt. 38. Trustee provides a history of Debtor's payments. The Trustee states that the Debtor is current under the confirmed plan.

**STIPULATION**

On May 23, 2016, the parties filed a stipulation to continue the instant hearing to 1:30 p.m. on June 28, 2016. Dckt. 41.

On May 23, 2016, the court entered an order continuing the Motion to 1:30 p.m. on June 28, 2016.

3. [12-36884-E-7](#) JENNY PETTENGILL  
HLC-5 Richard A. Hall

CONTINUED MOTION TO EMPLOY NINA  
SALARNO AS SPECIAL COUNSEL  
4-7-16 [[245](#)]

**No Tentative Ruling:** The Motion to Employ 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 - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on April 7, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Employ 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). The defaults of the non-responding parties and other parties in interest are entered.

**The Motion to Employ is xxxxx.**

Chapter 7 Trustee, John Roberts, seeks to employ Special Litigation Counsel Nina Salarno, pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of Counsel to assist the Trustee in the representation of the estate's interest in the divorce action pending in state court.

The Trustee argues that Counsel's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate regarding present divorce action. The Trustee states that Ms. Salarno has represented the Debtor in the divorce action only.

Ms. Salarno testifies that she has only represented the Debtor in the divorce proceeding and has not represented any other party in connection with the Debtor. Ms. Salarno declares that she holds no claims against Debtor or

Captain Enterprises, LLC at this time. Ms. Salarno states that Captain Enterprises, LLC advanced the fees and costs incurred in the divorce action, although Ms. Salarno only represented the Debtor. Ms. Salarno testifies she and the firm do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys, outside of the representation of the Debtor in the divorce action.

The Trustee's Motion requesting the following relief:

WHEREFORE, Trustee prays that his employment of Salarno as set forth herein be approved as follows:

- i. As counsel for the Trustee pursuant to 11 U.S.C. § 330 and 503(b)(2) in the Pettengill case, and
- ii. As an administrative expense claimant in the Lazoutkine case on account of professional services rendered by an attorney for valuable services rendered in that estate pursuant to 11 U.S.C. § 503(B)(4) [sic];
- iii. At the rate of \$400 per hour, to be offset against a \$25,000 retainer (the "Retainer") which will be advanced and supplemented by Jenny Pettengill from her personal, exempt funds which are not property of her bankruptcy estate;
- iv. With the caveats that:
  1. Salarno may not take any instruction from Ms. Pettengill as that instruction may relate to the contemplated litigation, and
  2. Ms. Pettengill shall be subrogated to Salarno's position as an administrative priority expense creditor to the extent Salarno's fees and costs have already been allowed by this Court and advanced by Pettengill from personal, exempt funds which are not property of her bankruptcy estate.

Dckt. 245.

#### **APPLICABLE LAW**

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 327 also provides for special provisions if the attorney whose employment being sought previously represented the Debtor:

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including-- . . .

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by--

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian; or

(F) a member of a committee appointed under

section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

## **DISCUSSION**

The Trustee does not attach the employment agreement for the court and other parties in interest to review, but provides a summary of terms in the Motion. The Motion gives substantial background as to the factually and legally intensive nature of the case. However, most of what is discussed goes to the protracted "civil" dissolution fight between Debtor and ex-spouse, but not on the issue of whether the property was community property or owned by Corrigan Finance.

The Trustee first instructs that Salarno will be approved as counsel pursuant to 11 U.S.C. § 330 and § 503(b)(2). First, 11 U.S.C. § 330 is not a provision for authorizing to employ a professional, but only provides the basis for allowing compensation to a professional previously authorized to be employed. It appears that the Trustee references this section to indicate that whatever fees Salarno will ultimately be paid must first be approved by the court. The Motion then directs the court to 11 U.S.C. § 503(b)(2) and (4), which state that fees allowed pursuant to 11 U.S.C. § 330 are an administrative expense.

Next, Debtor will provide a \$25,000.00 retainer for Salarno, and that Salarno be authorized to draw on the retainer without any approval of fees pursuant to 11 U.S.C. § 331 for interim fees.

Third, that any administrative expense of Debtor will be subordinated to Salarno's administrative expense.

Fourth, the court must lift the automatic stay and the Trustee prosecute the determination of what is property of the estate in the family law court. (Where the court notes that Debtor and Salarno have labored since 2011.)

Fifth, the court pre-approves an hourly rate of \$400.00 for Salarno.

Sixth, Salarno be granted an administrative expense in priority over all other administrative expenses from the proceeds of any property which is determined to be property of the bankruptcy estate through litigation in which Salarno represents the Trustee. However, the Trustee offers no legal basis for the court rewriting the administrative priority expenses for Salarno.

In "selling" the court on authorizing the employment, the Trustee argues that because of the "complexity" of the litigation (to determine whether

the property is property of the bankruptcy estate and the bankruptcy estate is administratively insolvent, the Trustee has not been successful in engaging any other attorney to represent the Trustee on a contingent fee basis.

The Trustee and proposed counsel for Trustee shall address at the hearing the great complexity of this litigation to determine the estate's interest in this property. In some respects, this litigation can be as "simple" as a post-judgment enforcement action by a debt collector who has obtained a judgment against only one spouse. The collector seeks to enforce the judgment against property for which title is held only in the name of the non-debtor spouse and the post-judgment proceedings are limited to determine whether the property is actually community property. There are none of the other dissolution, support, contempt, protective order, income disparity, sanction disputes which pervade State Court family law dissolution actions.

While many of the above mandatory employment terms stated to the court are within employment pursuant to 11 U.S.C. § 327, the Trustee has not provided the court with a basis for entering an order mandating that the ownership rights and interests of the estate will be litigated in the family law court, in conflict with the prior order of this court.

The Motion also does not address why litigation of the estate's rights and interests in the property are more efficiently and cost effectively litigated in the family law proceedings with all of the other dissolution issues rather than in this court - as previously stipulated by the Trustee.

Additionally, while making the statement that the Trustee could not engage another attorney, the court has not been provided with a summary of the efforts of the Trustee, and whether the Trustee dictated that any such representation must be in the State Court Family Law division rather than this court.

**MAY 5, 2016 HEARING**

At the hearing, Trustee's counsel and the proposed special counsel requested a continuance so that the final terms, in light of the issues raised, could be addressed and the employment consummated. The court continued the hearing to 1:30 p.m. on May 10, 2016. Dckt. 264.

**MAY 10, 2016 HEARING**

To date, no supplemental papers have been filed in connection with the instant Motion.

At the hearing, the parties agreed to have the matter continued to 1:30 p.m. on May 24, 2016.

**MAY 24, 2016 HEARING**

To date, no supplemental papers have been filed in connection with the instant Motion.

At the hearing, xxxxx.

4. [16-21885-E-13](#) SUSAN REICHARD  
Julius M. Engel

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
5-5-16 [[22](#)]

WANG YANG ENTERPRISES, LLC  
VS.

**Tentative Ruling:** The Motion for Relief From the Automatic Stay 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 - Hearing Required.

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 April 21, 2016. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay 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). The defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

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

Wang Yang Enterprises, LLC ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 10803 Coloma Rd., #2, Rancho Cordova, California (the "Property"). The moving party has provided the Declaration of Edward Palmer to introduce evidence as a basis for Movant's contention that Susan Reichard ("Debtor") does not have an ownership interest in or a right to maintain possession of the Property.

Movant presents evidence that it is the owner of the Property. Movant

asserts it purchased the Property at a pre-petition Trustee's Sale on May 9, 2016. Based on the evidence presented, Debtor would be at best tenant at sufferance. Movant commenced an unlawful detainer action in California Superior Court, County of Sacramento. Exhibit 3, Dckt. 25.

The Movant is seeking an order of annulment of the automatic stay so that it can continue to prosecute the state court action that was filed on April 8, 2016 without any knowledge of the Debtor's filing on March 25, 2016. The Movant also seeks termination of the co-debtor stay under 11 U.S.C. § 1301.

#### **TRUSTEE'S OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on May 10, 2016. Dckt. 31.

First, the Trustee asserts that the Debtor failed to provide sufficient notice of the Motion.

Second, the Trustee states that the Debtor failed to list her prior case, Case No. 15-27051, on the Petition. The prior case was filed September 5, 2015. There was no plan confirmed. On February 24, 2016, an order dismissing the case was entered for failure to confirm the plan.

The prior case has not been closed, so a stay may still exist as to the property of that prior case, and the Debtor may still have an ownership interest in the real property.

Lastly, the Trustee reports that there is no confirmed plan in the instant case. However, the Debtor is current under the proposed plan. Also, the Debtor's Motion to Value Collateral of Movant was granted on May 3, 2016 but did not make any determination of the ownership interest of the parties.

#### **DISCUSSION**

Movant has provided a properly authenticated copy of the recorded Trustee's Deed Upon Sale to substantiate its claim of ownership. Based upon the evidence submitted, the court determines that there is no equity in the property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. See *In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

First, to address the concerns of the Trustee as to notice, while the Proof of Service was uploaded on May 5, 2016, reviewing the Proof of Service shows that it was served on April 21, 2016, which is 33 days notice. Therefore, the Trustee's objection is overruled.

#### **Pending Prior Bankruptcy Case**

As noted by the Trustee, the Debtor has a previous case that remains open. Even though the case was dismissed on February 24, 2016, the case remains open. Movant asserts that it purchased the Property at a March 9, 2016 nonjudicial foreclosure sale. That is more than two weeks before the commencement of this bankruptcy case, and the creation of any automatic stay in this case.

When this bankruptcy case was filed on March 25, 2016, the automatic stay for this case went into effect. It was in effect when on April 8, 2016, Movant commenced a state court unlawful detainer action.

Debtor has not filed an opposition to this Motion. The Notice of Hearing clearly states that the Motion is filed pursuant to Local Bankruptcy Rule 9014-1(f)(1) and a written opposition must be filed at least fourteen days prior to the hearing date.

**Instant Motion**

Moving onto the instant Motion as to the Property, based upon the evidence submitted, the court determines that there is no equity in the property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2).

Movant has presented a colorable claim for title to and possession of this real property. 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 as part of a motion for relief from the automatic stay Contested Matter (Fed. R. Bankr. P. 9014).

As with Debtor, cause exists to terminate the co-debtor stay. This is a Chapter 13 case with no good faith plan providing for payment of any creditor claims presented to the court. Further, continuing the co-debtor stay, while terminating the stay as to the Debtor would work an unreasonable and irreparable harm to Movant.

Additionally, the Movant seeks retroactive relief of the automatic stay for the state court action to July 3, 2014 pursuant to *In re National Environmental Waste Corp.*, 129 F.3d 1052 (9th Cir. 1997) and *In re Fjeldsted*, 293 B.R. 12 (B.A.P. 9th Cir. 2003). Movant alleges it was unaware of the bankruptcy prior to the state court action being prepared and filed. The Movant argues that the balancing test of *In re National Environmental Waste Corp.* supports retroactive relief since the Movant was not aware of the filing and because the Debtor will not suffer any harm. The court agrees and finds that retroactive relief is justified in the instant case.

The court shall issue an order retroactively terminating and vacating the automatic stay and co-debtor stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property. FN.1.

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FN.1. Given the fact that the prior case, while dismissed, still remains open, the court clarifies that the instant Order is only for the automatic stay in the instant case.  
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The Movant has alleged adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3).

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 Wang Yang Enterprises, LLC ("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 annulled effective March 25, 2016, the filing date of this case, authorize the filing the unlawful detainer action in California Superior Court, County of Sacramento, Case No. 160002097.

**IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. §§ 362(a) and 1301(a) are vacated to allow Wang Yang Enterprises, LLC, and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 10803 Coloma Rd., #2, Rancho Cordova, California.

**IT IS FURTHER ORDERED** that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause shown by Movant.

No other or additional relief is granted.

5. [11-45395-E-13](#) NADER SHAHCHERAGHI  
APN-1 Peter G. Macaluso

MOTION FOR RELIEF FROM  
AUTOMATIC STAY AND/OR MOTION  
FOR RELIEF FROM CO-DEBTOR STAY  
4-21-16 [[84](#)]

LAKESIDE GREENS HOMEOWNERS  
ASSOCIATION VS.

**Tentative Ruling:** The Motion for Relief From the Automatic Stay 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.**

-----  
Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on April 21, 2016. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay 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). The defaults of the non-responding parties are entered.

**The Motion for Relief From the Automatic Stay is denied  
without prejudice.**

Lakeside Greens Homeowners Association ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 3401 Bermuda Ave, Apt. 26, Davis, California (the "Property"). Movant has provided the Declaration of Peg Hart to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Hart Declaration states that there are 54 post-petition defaults in

the payments on the obligation secured by the Property, with a total of \$23,649.08 in post-petition payments past due.

According to the Declaration of Peg heart, the manager of Lakeside Green Homeowners Association, the defaults date back to November 1, 2011. Declaration, Dckt. 86. She testifies that the Homeowners' Association suffered,

- A. The first post-petition default in November 2011, and Movant did nothing;
- B. Then the second post-petition default in December 2011, and Movant did nothing;
- C. Then the third post-petition default in January 2012, and Movant did nothing;
- D. Then the fourth post-petition default in February 2012, and Movant did nothing;
- E. Then the fifth post-petition default in March 2012, and Movant did nothing;

these monthly now, in April 2016, defaults continued, with;

- F. The twelfth post-petition default in October 2012, and Movant did nothing;
- G. Then the thirteenth post-petition default in November 2012, and Movant did nothing;

these monthly now, in December 2012, continued, with;

- H. The twenty-fourth post-petition default occurring in October 2013, and Movant did nothing;
- I. Then continuing monthly, with the thirty-sixth post-petition default occurring in October 2014, and Movant did nothing;
- J. Then continuing monthly, with the forty-eight post-petition default occurring in October 2015, and Movant did nothing; until
- K. The fifty-fourth continuing monthly default which occurred in April 2016, when Movant "sprung" to action.

The Hart Declaration fails, or is careful to not provide, any explanation as to why and how, if there is a bona fide obligation owing, the Homeowner's Association failed to act.

The court notes that after slumbering for fifty-four months, for which there are alleged to be association dues owing, Movant demands that the court waive the normal fourteen-day stay of enforcement, because now, years later, Movant claims that it is not adequately protected.

The Movant is seeking relief from the automatic stay as well as relief from the co-debtor stay pursuant to 11 U.S.C. § 1301.

#### **TRUSTEE'S RESPONSE**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on May 10, 2016. Dckt. 90. The Trustee states that the Debtor is \$1,700.00 delinquent under the plan. The Creditor is included in Class 2A to be paid a monthly dividend of \$264.47 with an interest rate of 4.75%. The Creditor has filed Proof of Claim No. 7 in the amount of \$14,135.31 for pre-petition HOA Assessments. The Trustee has disbursed \$12,784.46 principal and \$1,775.66 interest on the claim. The Debtor's confirmed plan does not contain any provisions regarding post-petition HOA assessments.

#### **DEBTOR'S OPPOSITION**

The Debtor filed an opposition to the Motion on May 17, 2016. Dckt. 93. The Debtor states that the plan provides for the pre-petition arrears. The Debtor incorrectly made the assumption that the ongoing, post-petition payments to Creditor were covered in the plan.

While Debtor is delinquent in payments to Creditor, Debtor argues that he should not be penalized with the loss of his property for the way the Plan was proposed and confirmed. The Debtor seeks a provision that will allow him to cure the post-petition delinquency.

The Debtor asserts that he will be current on or before the hearing.

#### **DISCUSSION**

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be \$241,984.08 (including \$23,649.08 secured by Movant's assessment lien), as stated in the Hart Declaration and Schedule D filed by Nadar Shahcheraghi ("Debtor"). The value of the Property is determined to be \$385,295.00, as stated in Schedules A and D filed by Debtor.

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay. In this case, the equity cushion in the Property for Movant's claim provides adequate protection such claim at this time. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004). Movant has not sufficiently established an evidentiary basis for granting relief from the automatic stay for "cause" pursuant to 11 U.S.C. § 362(d)(1).

With respect to the present Motion, Movant has shown that it is adequately protected. First, it has a lien in property with more than enough value to pay any debt - so long as such debt is actually owing and enforceable. Second, Movant has shown that it is adequately protected by choosing not to act for almost five years.

Movant's conduct is inconsistent with that of a homeowner's association which is actually providing services for which dues are owing. It is inconsistent with a creditor who is actually owed a debt. Movant, while having the opportunity to explain to the court some reasonable basis for the financial

somnolence, if there is actually a debt owing, has chosen not to do so.

### **Debtor's Opposition**

Debtor's opposition is equally lacking. First, Debtor fails (or refuses) to provide any evidence to support the arguments advanced by his current attorney in opposing the Motion. All that is argued is that Debtor "assumed" that the future, post-petition dues would (somehow) be paid as part of a pre-petition claim. Debtor does not (or will not) so testify, but merely this is argued by his counsel.

Next, Debtor's counsel assures that court that Debtor will find almost \$24,000.00 between the May 17, 2016 filing of the Opposition and the May 24, 2016 hearing. Opposition, p. 2:7-8; Dckt. 93. If the Debtor has access to such a large sum of money, then the financial information provided to the court under penalty of perjury to support a less than 100% plan appear suspect.

As between Debtor and Movant, Debtor's argument is less non-credible than Movant's arguments and evidence.

The court denies the Motion without prejudice. With just months left in the current Chapter 13 Plan, it appears doubtful that Debtor can cure the arrearage, if one actually exists. If Debtor can produce the money to cure the almost \$24,000.00 arrearage in one fell swoop, then the Chapter 13 Trustee and creditors have some time to investigate further and determine whether the current plan is in good faith and consistent with the Bankruptcy Code.

Therefore, the Motion is denied without prejudice.

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 Lakeside Greens Homeowners Association ("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 Motion is denied without prejudice.

No other or additional relief is granted.