UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

June 23, 2020 at 1:30 p.m.

1.	**20-22540-E-13** **ETW-1**	**RAKESHNI SHARMA** **Richard Jare**	**MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY** **5-21-20 [13]**
	USRE TRUST VS		

The Telephonic Appearances of the Following Persons are Required for the June 23, 2020 Hearing

Edward Weber, Esq., Atty for Movant Trust
Kristi Wells, Esq., Atty for Movant Trust
Richard Jare, Esq., Atty for Debtor
Rakeshni Sharma, Debtor

Tentative Ruling: 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.

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

Sufficient 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 May 21, 2020. 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

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

A Motion for Relief From the Automatic Stay has been filed, for which the "person" purportedly seeking relief is USRE Trust ("Trust Movant"). Trust Movant seeks relief from the automatic stay with respect to Rakeshni Devi Sharma's ("Debtor") real property commonly known as 7101 Lyndale Circle, Elk Grove, California ("Property"). Trust Movant has provided the Declaration of Charmaine Mark to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

In a Declaration, Dckt. 15, Charmaine Mark indicates ("Mark") states "I am authorized representative of the [Trust] Movant herein." However, Mark does not state the basis for being such an "authorized representative." Mark continues, stating:

> I am personally familiar with the books, records, and files that pertain to the loans and extensions of credit given to Debtors concerning the property described herein.

Declaration, p. 1:24-26; Dckt. 15. No testimony is provided as to why or how Mark has such books and records, or why Mark has such knowledge of the private financial information of the Trust Movant. Mark then continues further, qualifying any "personal knowledge," stating:

> As to the following facts, I know them to be true of my own knowledge or I have gained knowledge of them from my business records which I keep and which Superior Loan Servicing, my loan servicer also maintains on my behalf, all of which were made at or about the time of the events recorded, and which are maintained in the ordinary course of business at or near the time of the acts, conditions, or events to which they relate. Any such document was prepared in the ordinary course of business by a person who had personal knowledge of the event being recorded and had or has a business duty to record accurately such event. The business records are available for inspection and copies can be submitted to the Count if required. I offer the testimony in this declaration based on my review of the relevant business records und my own personal knowledge of the same.

Declaration, p. 1:26, 2:1-10; *Id.*

While stating under penalty of perjury of having personal knowledge, slipped into this testimony is that the Mark Declarant does not have the information, but is relying on information and documents provided by others, including a loan servicer. Without stating any basis for having such knowledge, Mark purports to testify under penalty of perjury how and what records the loan servicer maintains.

On its face, the Mark Declaration shows no basis for Mark having any personal knowledge (Fed. R. Evid. 601, 602) for this "testimony" under penalty of perjury. Rather, this "testimony" appears to be in the nature of "rental testimony" in which Mark is merely the Trojan Horse into which the

necessary "testimony" is packaged.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on June 10, 2020. Dckt. 31. The Opposition makes passing reference to whether the Movant Trust is the person who should be the movant or if it should be the trustee of the trust. Opposition, P. 1:22-24; Dckt. 31. Other than a glancing reference to this fundamental point, the Debtor then drops to counsel's technology problems.

The Opposition continues, written in the first person, questioning whether the Chapter 13 Trustee has filed a response, theorizes that the Trustee would state that no payments had yet come due, and that "Beyond that he [the Chapter 13 Trustee" might just rewrite the plan provisions in pleading paper." Opposition, p. 2:1-6; Dckt. 31. A curious statement.

Debtor's counsel then bemoans the status of his computer and its inability to process and pass the digested data from its electronic bowels.

The Opposition then states:

1. The loan upon which Movant Trust's claim is based is a "flagrant violation of Dodd-Frank" Title XIV - Mortgage Reform and Anti-Predatory Act. . . ." *Id.* p. 2:15-16.

2. Debtor's counsel admits to having limited knowledge, stating, "[e]ven I [appearing to be a reference to Debtor's counsel] who profess to have very limited knowledge in this area can tell that it is a violation." *Id.*, p. 2:17-18.

3. That the terms of the loan are:

   a. Interest rate of 16.99% after including an additional 6% "[a]s soon as the very first payment was late."

   b. The balloon payment is due in August 2021, 24 months after the loan was entered into.

   Id., p. 2:18-21.

4. The property that secures the claim asserted by Movant Trust is the Debtor's residence, and it is asserted that this one residence "is essential for her [Debtor's] rehabilitation." *Id.*, p. 2:23-24.

The Opposition then includes a copy and past of various statements that appear to come from the Declaration of Debtor, which include:

5. The proposed Chapter 13 Plan provides for making adequate protection payments of $1,800 for the first month and then $2,700 a month thereafter. The purpose and duration of the adequate protection payments are not

stated. *Id.*, p. 3:4-9.

6. Debtor intends to sue Movant Trust and "various parties" associated with the loan.

7. Only having received the Motion does Debtor now see that Movant Trust asserts the right to enforce the Note upon which Movant Trust asserts its secured claim. The Motion then states:

    a. The Note does not identify the payee in the Note itself, but in an attachment to the Note which is asserted to have been attached later to the Note.

    b. Debtor does not recall any such attachment when she signed the Note.

    c. That while the Deed of Trust states that there is an Exhibit D attached to it that identifies a "lender," there is no Exhibit D attached to the Note that Movant Trust has filed as an Exhibit in support of the present Motion. The beneficiary is not identified in the Deed of Trust.

    Id., p. 3:14-25.

8. Debtor bought the house in 2011 and since then has lived there, using it as her personal residence. *Id.*, p. 3:26-27.

9. Debtor asserts that only two weeks earlier did Debtor learn of the alleged violation of the Dodd Frank Act as it relates to this Loan. *Id.*, p. 4:1-2. The Opposition then alleges:

    a. Debtor was misrepresented to "by the lender" (with the lender not identified).

    b. Debtor asserts that someone (unidentified) told her that to qualify for the loan that she needed a different address (for an unstated reason) and to state that she was seeking a business loan.

    c. Debtor "basically got $0 zero cash out of the loan." That this loan "merely" refinanced the existing first mortgage on the residence.

    d. Only two weeks before filing the Opposition did Debtor obtain legal advice that the loan for the Note at issue was not for a business purpose (at least for the Debtor) and not exempt from the Dodd Frank Act.

    Id., p. 4:2-10.

10. The "indication" of her address on the mortgage documents is false, with the lender (unidentified) and notary having been given her driver's license showing her address as the residence that is the Property which secures the Movant Trust's claim. *Id.*, p. 4:11-16.

11. Someone's cousin (not identified whether Debtor's or Debtor's counsel) who handles "my affairs" is digging around to find documents. *Id.*, p. 4:20-22.

12. The Plan provides adequate protection payments. *Id.*, p. 4:26-28.

13. Debtor is in the process of determining whether the Dodd Frank Act violations eviscerate the Note and render it unenforceable. *Id.*, p. 5:1-3.

Debtor then provides her Declaration to provide her personal knowledge testimony (Fed. R. Evid. 601, 602) as to various facts and events asserted in opposition to the present Motion. Debtor's testimony under penalty of perjury includes:

A. The proposed Plan provides for adequate protection payments. Declaration ¶ A, Dckt. 29.

B. Debtor repeats what is stated in the Motion about the Note and Deed of Trust not having the "lender" identified in those documents, but there being an attached Exhibit E to just the Note. *Id.*, ¶ C.

C. Debtor has lived in the residence that secures Movant Trust's claim since 2011. *Id.*, ¶ D.

D. Debtor believes that the lender (unidentified) misrepresented to her that she needed to state a different address and the lender needed to say this was a business loan. Further, that this was "merely" a refinance of the existing obligation then secured by the first mortgage on the residence. *Id.*, ¶ E.

E. Debtor provided her driver's license showing the residence that secures Movant Trust's claim as her address to the "lender" and the notary. *Id.*, ¶ F.

F. Debtor's cousin handles some of her affairs and is digging around to try and find the loan documents. *Id.*, ¶ J.

G. Debtor's legal conclusion that the "respondent's loans" ("respondent" not identified) were predatory. *Id.*, ¶ 10 (Debtor's Declaration changing from alphabetical to numeric paragraph numbering).

H. Debtor is assessing whether Movant Trust's Note is unenforceable. *Id.*, ¶ 11.

Debtor's counsel then provides a Points and Authorities to address the legal issues raised and asserted in Opposition to the Motion. The legal points and authorities consists only of a cut and paste from the Cornell website of a portion of commentary on the Dodd Frank Act (approximately one page,

single spaced, of indented text). Dckt. 32.

MOVANT'S REPLY

Movant filed a Reply on June 15, 2020. The Reply first asserts that since this is the Debtor's second bankruptcy case that was filed in the past year, then the automatic stay will automatically terminate since it has not been extended. Reply, ¶ 2. No legal authority or analysis has been provided for this assertion, and runs contrary to the plain language of 11 U.S.C. § 362(c)(3) which states that the stay terminates only as to the "Debtor." As this court has previously written, it is clear from the plain language of the statute that the stay terminates only as to the Debtor and not in the case. In 11 U.S.C. § 362(c)(4) Congress expressly provides for the stay not going into effect in the "case" upon certain events having occurred, as well as in 11 U.S.C. § 362(a) creating express stays for the debtor and express stays for the bankruptcy estate and property of the bankruptcy estate. A recent Fifth Circuit decision which held that the plain language provides for only termination of the stay as to the debtor, which is the majority holding of courts addressing this issue, may provide a vehicle for the Supreme Court to resolve the majority - minority (not applying the plain language "debtor" termination) split.

It is asserted that Debtor cannot confirm a plan.

With respect to the proper person to be the party seeking relief, it is "clear" in the various exhibits that Movant Trust is named on the Note and Deed of Trust, as well as having been named in the foreclosure documents. Further, that the loan servicer is Superior Loan Servicing as shown on the exhibits. It is asserted that Debtor has never made any payments on the Note.

Movant Trust further replies that it is Debtor who has made misrepresentations, including that she did not live in the residence that secures the claim and that the money was to be used for business or reinvestment purposes.

CHAPTER 13 TRUSTEE'S RESPONSE

David P. Cusick ("the Chapter 13 Trustee") filed an Opposition on June 15, 2020. Dckt. 34. Trustee notes that the Meeting of Creditors is scheduled for June 25, 2020 and that no payments have come due under the proposed Plan. Additionally, Debtor included Movant in Section 7 of the proposed Plan.

DISCUSSION

On the first point, Debtor raises but does not address and Movant Trust brushes aside the fundamental issue of whether Movant Trust is a proper person who has standing to seek relief in this court. Though the Parties do not deem it worth a modicum of research time or to properly address in seeking relief from the court, this court cannot cavalierly brush aside such fundamental standing issues.

The United States Supreme Court in adopting Federal Rule of Civil Procedure 17, which is incorporated into Federal Rules of Bankruptcy Procedure 7017, 9014, that the following persons are the "real party in interest' who may seek relief in federal court:

(a) Real Party in Interest.

(1) Designation in General. An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

Fed. R. Civ. P. 17(a)(1) [emphasis added].

It is the trustee of the trust who must seek relief from the federal court, not the amorphous trust. This requirement which is taught in first year law school civil procedure courses as discussed in Moore's Federal Practice, which includes the following:

[1] Rule Applies to Any Claimant

Rule 17 sets forth criteria defining who may bring an action in federal court.1Link to the text of the note The Rule requires every action to be asserted in the name of the real party in interest.2Link to the text of the note Real parties in interest are the persons or entities possessing the right or interest to be enforced through the litigation.

. . .

[f] General Principles Apply to All Statutorily Designated Real Party Representatives

The principles discussed in the preceding sections generally apply to all statutorily designated real parties in interest (see [a], above). The following case examples demonstrate the point:

. . .

•A trustee of an express trust is entitled to sue as real party in interest on behalf of trust beneficiaries.[45] . . . .

[45] Real party trustees. Fed. R. Civ. P. 17(a)(1)(E); see *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 465, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980) (real party

trustees who were authorized to take legal title to and invest trust assets were more than "mere conduits" for remedy flowing to trust beneficiaries, who could interfere in trust affairs only in extraordinary situations).

2d Circuit *United Const. Workers. v. Electro Chem. Engrav. Co.*, 175 F. Supp. 54, 57 (S.D.N.Y. 1959) (labor union, as real party trustee, entitled to sue to enforce payments to trust funds established for members (citing Moore's); *United States Bank Nat'l Ass'n v. Nesbitt Bellevue Prop. LLC*, 859 F. Supp. 2d 602, 606 (S.D.N.Y. 2012) (trustee who possesses customary powers to hold, manage, and dispose of assets, as determined under terms of underlying trust document, is real party in interest); *cf. Hong Kong Deposit & Guar. Co. v. Hibdon*, 602 F. Supp. 1378, 1382 (S.D.N.Y. 1985), app. dis., 755 F.2d 1 (2d Cir. 1985) (in action against debtors for recovery of loans made to them by now insolvent corporation, liquidators holding customary powers of trustees were real parties in interest (citing *Navarro*)).

5th Circuit *Thomas v. N.A. Chase Manhattan Bank*, 994 F.2d 236, 242–243 (5th Cir. 1993) (unless otherwise limited by trust instrument, trustee of express trust has power to prosecute or defend actions). *Cf. Piambino v. Bailey*, 610 F.2d 1306, 1322–1324 (5th Cir. 1980) (in action involving pyramid sale scheme, compliance officer of brokerage was deemed real party trustee of express trust within meaning of Fed. R. Civ. P. 17(a)(1)).

8th Circuit *Green v. Lake of the Woods County*, 815 F. Supp. 305, 307 (D. Minn. 1993) (finding that trustee of express trust is real party in interest).

9th Circuit *Board of Natural Resources v. Brown*, 992 F.2d 937, 942 (9th Cir. 1993) (in dispute over funds received under federal land grant trusts, the state Boards of Natural Resources and Education which acted as trustees for federal lands were named real parties entitled to sue on behalf of school district); *First Fidelity Bank, N.A. v. First Interstate Bank of Ore., N.A.*, 716 F. Supp. 1359, 1360–1361 (D. Ore. 1989) ("[T]rustee has right to assert claims on behalf of trust, and beneficiaries to trust need not be joined.").

4 Moore's Federal Practice - Civil § 17.10.

Turning to California law on the point, the person who is empowered to seek to assert and defend actions for a trust is the trustee, as discussed in Witkin Summary of California Law:

[§ 130] Actions and Proceedings.

(1) In General. "The trustee has the power to prosecute or defend actions, claims, or proceedings for the protection of trust property and of the trustee in the performance of the trustee's duties." (Prob.C. 16249.) The trustee may sue without joining the beneficiaries. (C.C.P. 369; see 9 A.L.R.2d 10 [beneficiaries as necessary parties to action relating to trust or trust property]; 4 Cal. Proc. (5th), Pleading, § 137.) (On actions by and against trustee generally, see C.E.B., 2 Trust and Probate Litigation § 22.1 et seq.; on propriety of reimbursement for attorneys'

fees and other expenses of action or proceeding, see Prob.C. 15684, supra, § 69.)

(2) Nonattorney Trustee May Not Represent Trust. A trustee who is not an attorney may not represent the trust in an action involving trust property. (*Ziegler v. Nickel* (1998) 64 C.A.4th 545, 75 C.R.2d 312, 1 Cal. Proc. (5th), Attorneys, § 379.) (*See Finkbeiner v. Gavid* (2006) 136 C.A.4th 1417, 1420, 39 C.R.3d 871, 1 Cal. Proc. (5th), Attorneys, § 379 [distinguishing Ziegler; trustee who was not suing third party and who appeared in *pro per* to petition for modification and termination of trust of low value was not engaged in unauthorized practice].)

13 Witkin Sum. Cal. Law Trust § 130. As is further explained in Witkin California Procedure:

[§ 137] In General

(1) Trustee as Real Party in Interest. The real party in interest statute provides that the "trustee of an express trust" may sue "without joining as parties the persons for whose benefit the action is prosecuted." (C.C.P. 369(a); *see Saks v. Damon Raike & Co.* (1992) 7 C.A.4th 419, 427, 428, 8 C.R.2d 869, 13 Summary (10th), Trusts, § 222, citing the text [trustee, not beneficiary, is real party in interest] ; *Pillsbury v. Karmgard* (1994) 22 C.A.4th 743, 753, 27 C.R.2d 491 [quoting Saks] .)

Insofar as the trustee and the beneficiary of a strict trust are concerned, the statutory language has little significance. Under the general test of real party in interest, the trustee of a strict trust, with the legal title to the trust property, ordinarily has the right of action under substantive law, and may sue or be sued without joinder of the beneficiaries. (*Thorpe v. Story* (1937) 10 C.2d 104, 114, 73 P.2d 1194 [trustees under bondholders' protective agreement] ; *Johnson v. Curley* (1927) 83 C.A. 627, 630, 257 P. 163 [trustee was sole defendant] ; *Alexander v. Title Ins. & Trust Co.* (1941) 48 C.A.2d 488, 494, 119 P.2d 992; *McKoin v. Rosefelt* (1944) 66 C.A.2d 757, 768, 153 P.2d 55 [need not allege capacity as trustee] ; *see Dietzel v. Anger* (1937) 8 C.2d 373, 375, 65 P.2d 803 [trust indenture securing bond issue, providing for action by trustee exclusively] ; *Powers v. Ashton* (1975) 45 C.A.3d 783, 787, 119 C.R. 729, citing the text; Rest.2d, Trusts § 280.)

Witkin Cal. Proc. § 137.

As discussed by the California Court of Appeal, for a “trust” to hold title to assets, such title is placed in the name of the trustee in his/her/its fiduciary capacity as trustee.

In contrast to a corporation, which the law often deems a person, a trust is not a person but rather “ ‘ “a fiduciary relationship with respect to property.” [Citations.]’ ” (*Ziegler v. Nickel* (1998) 64 Cal.App.4th 545, 548, italics omitted.) “Legal title to property owned by a trust is held by the trustee … . ‘A … trust … is simply a collection of assets and liabilities.’ ” (*Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1343–1344 [7 Cal. Rptr. 3d 178].) “[A]n ordinary express trust is not an entity separate from its trustees.” (*Powers v. Ashton* (1975) 45

Cal.App.3d 783, 787 [119 Cal. Rptr. 729].)

> **A trust itself cannot sue or be sued**. (*Presta v. Tepper* (2009) 179 Cal.App.4th 909, 914 [102 Cal. Rptr. 3d 12].) **"As a general rule, the trustee is the real party in interest with standing to sue and defend on the trust's behalf.** [Citations.]" (*Estate of Bowles* (2008) 169 Cal.App.4th 684, 691.) "A claim based on a contract entered into by a trustee in the trustee's representative capacity, … may be asserted against the trust by proceeding against the trustee in the trustee's representative capacity … ." (Prob. Code, § 18004, italics added.)

Portico Management Group, LLC v. Harrison, 202 Cal. App. 4th 464, 473 (2011).

For the present Motion, the purported owner of the Note, represented by counsel, has sought to commence this Contested Matter inserting USRE Trust as the "movant." Such a "trust" is not, and cannot, be the real party in interest and does not have standing to seek relief from this court.

The trustee, who is the fiduciary of such purported trust, is absent from these federal court proceedings. It is unclear whether this is intentional, the trustee hiding from the court, or manifests an incapacity of such trustee.

Further, the documents provided by counsel for Movant Trust raise further issues. The beneficiary under the deed of trust is not identified in the Deed of Trust. Exhibit B, Dckt. 16. For the Note, Exhibit A, the "beneficiary" to whom payment is promised by Debtor is not identified in the Note itself, but reference is made to an Exhibit D. Exhibit A, p.1; *Id.* There is attached to Exhibit A a page identified as "Exhibit D." *Id.* at 5. This Exhibit D does not identify a "beneficiary," but lists USRE Trust as a "lender" with 100% ownership. There is no trustee, fiduciary of any trust, who is identified as the payee on the Note.

An internet search of "USRE Trust" turns up several items with information relating thereto. These items include:

A. "USA Real Estate Investment Trust USA Real Estate Investment Trust is a California business trust that acquires, owns, and finances real property investments. The Trust currently owns several income producing properties in California." https://www.bloomberg.com/profile/company/USRE:US.

B. "USA REAL ESTATE INVESTMENT TRUST /CA (USRE) - Description of business GENERAL The Trust is a California business trust that was formed on October 7, 1986, for the primary purpose of engaging in the business of acquiring, owning, operating and financing real estate investments. The Trust commenced operations on October 19, 1987, upon the sale of the minimum offering amount of shares of beneficial interest ("shares"). . . ." http://www.hotstocked.com/companies/u/usa-real-estate-investment-trust-ca-USRE-description-69620.html

The court cannot proceed on this Motion, not having a legally competent real party in interest. It is not clear whether the trustee, whomever he/she/it is for the trust is being hidden from the court, is unaware of his/her/its legal obligations not only as a party in interest but to acquire title to

property for which it is the trustee (at least under California law). Given the documentation provided by Movant Trust, it may be that any proceedings may well require a judicial determination of who is the trustee, who actually owns the Note, and whether there is an existing deed of trust to be enforced or "merely" a reformation action to correct a clerical error.

It may be that the trustee of this Movant Trust has a sufficient incapacity that the court will have to appoint a personal representative.

The Debtor has presented the court with some arguments and assertions, but little law to go with it. More significantly, Debtor is manifesting that she may be legally incompetent to proceed in this case and a second personal representative may be required. Debtor has demonstrated an inability to state accurate information in documents and disclosures, that she is susceptible to knowingly making false statements when told to by others (here it is asserted to be the unidentified lender or loan broker), and appears unable to handle her finances (as shown by failing to make even one payment on the obligation that is the subject of the Motion.

Thus, it may be that the Debtor has a sufficient incapacity that the court will have to appoint a personal representative for her.

Current and Prior Bankruptcy Cases

Debtor's proposed Chapter 13 Plan in this case requires a monthly plan payment of $2,500 for the first month and then $3,500 for an additional 49 months. For Movant Trust, Debtor will make "adequate payments" of $1,800 a month for the first month and then $2,700 a month thereafter while Debtor pursues a loan modification or litigation against Movant Trust. Dckt. 24.

This court has allowed such "adequate protection" provisions for use by a debtor who is diligently pursuing litigation concerning the underlying obligation, using the automatic stay in place of a preliminary injunction in the litigation and the adequate protection payments in lieu of a preliminary injunction bond. The court does not now determine whether the adequate protection payments are "adequate" to protect the interests of Movant Trust (or whomever the creditor is) in the place of an undertaking to support a preliminary injunction.

Looking at Schedule I (Dckt. 21 at 25-27), Debtor reports having $7,526 in monthly income after taxes and other withholding. Debtor suggests that she could increase her income by decreasing her tax withholding and 403B contribution by $900 a month.

On Schedule J (Dckt. 21 at 27-28) Debtor states that she has a family unit of four persons, and her three dependants are her two adult daughters and her mother. No contribution is made on Schedule I by the two adult daughters and Debtor's mother, each who are listed as dependants.

On Schedule J, Debtor lists some questionable expenses for a household of four persons - Debtor and her three adult dependants - which include:

A. Home Maintenance.....$0.00

B. Food and Housekeeping Supplies.....($500)

(Assuming $75 a month for housekeeping supplies for four persons, then that leaves $425 for food, which equals ($106) per person, which is only ($1.18) per meal in a thirty-day month)

C. Medical and Dental Expenses.....($100)

D. Transportation Expenses.....($500)

(Fuel, maintenance, repairs, and registration for three vehicles)

It is unclear how Debtor, burdened with three adults as dependants, will be able to perform a bankruptcy plan. Debtor may just need to pursue her litigation in the state or district court, obtaining a preliminary injunction based on the apparent merits of her case therein with a bond or undertaking required by that court which she can afford.

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 USRE Trust, stated to be the Real Party in Interest 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.

FINAL RULINGS

2. **19-24911-E-13 JHK-1** **LAWRENCE MCNAMEE** **Joseph Canning** **MOTION FOR RELIEF FROM AUTOMATIC STAY** **5-18-20 [49]**

FORD MOTOR CREDIT COMPANY LLC VS.

Final Ruling: No appearance at the June 23, 2020 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient 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 May 18, 2020. By the court's calculation, 36 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 the Automatic Stay is granted.

Ford Motor Credit Company, LLC ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2016 Ford Mustang, VIN ending in #6887 ("Vehicle"). The moving party has provided the Declarations of Jacklyn Larson and John Eng to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Lawrence Michael McNamee ("Debtor").

Movant argues Debtor has not made five (5) post-petition payments, with a total of $46,440.00 in post-petition payments past due to the Chapter 13 Trustee per Debtor's Chapter 13 Plan. Declaration, Dckt. 53.

TRUSTEE'S RESPONSE

Trustee filed a Response on June 9, 2020. Dckt. 61. Trustee asserts that Debtor is delinquent in the amount of $55,728.00 under the plan and a motion to dismiss is set for July 1, 2020 at 10:00am. Debtor has paid $27,864.00 to date under the plan.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $25,587.96 (Declaration, Dckt. 49), while the value of the Vehicle is determined to be $16,420.00, as stated in Schedules B and D filed by Debtor.

11 U.S.C. § 362(d)(1): Grant Relief for Cause

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Vehicle, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is granted.

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 Ford Motor Credit Company ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Vehicle, under its security agreement, loan documents granting it a lien in the asset identified as a 2016 Ford Mustang ("Vehicle"), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.
>
> **IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause.
>
> No other or additional relief is granted.

3. **19-21025-E-13 AP-1** **TASSANNA MILES**
Jeffery Meisner

MOTION FOR RELIEF FROM AUTOMATIC STAY
5-20-20 [33]

MTGLQ INVESTORS, LP VS.

Final Ruling: No appearance at the June 23, 2020 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Chapter 13 Trustee on May 20, 2020. By the court's calculation, 34 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 the Automatic Stay is granted.

MTGLQ Investors, LP ("Movant") seeks relief from the automatic stay with respect to Tassanna Miles' ("Debtor") real property commonly known as 5735 Portola Road, Atascadero, California ("Property"). Movant has provided the Declaration of Mario Selva to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property. Dckt. 36.

Movant argues fifteen (15) post-petition payments have not been made, with a total of $33,818.49 in post-petition payments past due. Declaration, Dckt. 36.

Additionally, Movant argues that the filing of Debtor's petition is constructively part of a scheme to delay, hinder, or defraud Movant. Movant holds the note for a $584,000.00 loan ("Note") executed by Richard L. Davis and Jacqueline J. Davis ("Borrowers") on December 11, 2007. *Id*. p. 2, ¶6; *see also* Exhibit 1, Dckt 38. The Note is secured by a Deed of Trust. Exhibit 2, Dckt. 38. Under the terms of the Deed of Trust, Creditor may require the loan be paid in its entirety if Borrowers transfer interest in the Property without prior written consent of the Creditor. *Id.*, p. 10 of the Deed, ¶18; *see also* Fixed /Adjustable Rate Rider, p. 3, ¶B.1.

Movant further argues that on February 17, 2019 Borrowers executed an unauthorized Grant Deed transferring interest in the Property from Borrowers to Ricahrd (sic) J. Davis and Debtor as tenants in common. Exhibit 3, Dckt. 38. On February 21, 2019, Debtor commenced the instant case by voluntarily filing for bankruptcy. According to Movant, a Trustee Sale was scheduled for February 22, 2019. Notice of Trustee Sale, Exhibit 6, Dckt. 38.

CHAPTER 13 TRUSTEE'S RESPONSE

David P. Cusick ("the Chapter 13 Trustee") filed an Response on June 9, 2020. Dckt. 44. Trustee requests the court take into consideration that neither the Movant nor the Property are listed in Debtor's Plan or Schedules.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $638,282.97 (Declaration, Dckt. 36).

11 U.S.C. § 362(d)(1)
Grant Relief for Cause

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

Debtor has failed to make fifteen post-petition payments, with a total of $33,818.49. Furthermore, Debtor failed to disclose the Property in her Schedules and Debtor failed to include Movant as a creditor to be paid in the Plan. *See* Dckts. 1 and 2.

The court shall issue an order terminating and vacating the automatic 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.

11 U.S.C. § 362(d)(4)
Prospective Relief from Future Stays

11 U.S.C. § 362(d)(4) allows the court to grant relief from the stay when the court finds that the petition was filed as a part of a scheme to delay, hinder, or defraud creditors that involved either (i) transfer of all or part ownership or interest in the property without consent of the secured creditors or court approval or (ii) multiple bankruptcy cases affecting particular property. 3 COLLIER ON BANKRUPTCY ¶ 362.07 (Alan n. Resnick & Henry H. Sommer eds. 16th ed.).

Certain patterns and conduct that have been characterized as bad faith include recent transfers of assets, a debtor's inability to reorganize, and unnecessary delays by serial filings. *Id.*

Here, the court finds that there is conduct that presumes bad faith for purposes of 11 U.S.C. § 362(d)(4). The conduct is the recent transfer of the interest in the Property from Borrowers to Debtor four days before Debtor filed for bankruptcy, and thus five (5) days before the scheduled Trustee Sale. It seems that Borrowers, instead of filing for bankruptcy themselves, used Debtor to invoke an automatic stay that would prevent a trustee's sale of Property scheduled for February 22, 2019. Additionally, Movant did not authorize the transfer of Property to Debtor through the Grant Deed.

Moreover, though there being a deed purporting to transfer the Property to her, Debtor under penalty of perjury did not disclose the Property or interest therein in her Schedules. *See* Dckt. 1. Debtor also failed to include Movant as a creditor to be paid through the Plan. *See* Dckt. 2. As it relates to Debtor's omission of this interest, Movant points out that it was Debtor's bankruptcy counsel who faxed the Grant Deed to Movant's foreclosure counsel in order to stop the Trustee's Sale of Property.

A review of the Grant Deed filed in support of the Motion as Exhibit 3, the top part of the page reads as follows:

From: Law Offices of Meisne Fax: To: Les Zieves Fax: [number] Page 2of 2 02/22/2019 10:53 AM

Dckt. 38, p. 30. Page 1 of 2 does not appear to be attached.

A review of the California State Bar website discloses no reported licensed attorney with the name "Meisne." However, the State Bar reports the following attorneys with "Meisne" in their names:

Meisner, Geoffrey Laurence	Active	304986	San Francisco	October 2015
Meisner, Jeffrey Michael	Active	263718	Sacramento	June 2009
Meisner, Jennifer Suzzane	Deceased	141143	South Pasadena	June 1989
Meisner, Joyce Penney	Active	120656	Santa Ana	December 1985
Meisner, Lee Eric	Active	269697	Brea	June 2010

http://members.calbar.ca.gov/fal/LicenseeSearch/QuickSearch?FreeText=meisne&SoundsLike=false

Included in the above "Meisne" attorney is Debtor's counsel in this bankruptcy case.

This is additional evidence of bad faith as to Debtor's purpose in filing of this case since it appears that her attorney clearly had actual knowledge of such interest and was propounding such interest to stay Movant from foreclosing.

This raises serious concerns relating to the conduct of Debtor and Debtor's counsel. Debtor's Counsel and Debtor have both signed the Chapter 13 Plan and failed to include this claim in the Plan. To the extent that such information raises concerns for the Chapter 13 Trustee or the U.S. Trustee, they may take such action as they deed appropriate.

Relief pursuant to 11 U.S.C. § 362(d)(4) may be granted if the court finds that two elements have been met. The filing of the present case must be part of a scheme, and it must contain improper transfers or multiple cases affecting the same property. With respect to the elements, the court concludes that the filing of the current Chapter 13 case in the Eastern District of California was part of a scheme by Debtor to hinder and delay Movant from conducting a nonjudicial foreclosure sale by transferring interest in the Property.

The fact that a debtor commences a bankruptcy case to stop a foreclosure sale is neither shocking nor *per se* bad faith. The automatic stay was created to stabilize the financial crisis and allow all parties, debtor and creditors, to take stock of the situation. The filing of the current Chapter 13 case was not filed for *bona fide*, good faith reason for this Debtor seeking relief under the Bankruptcy Code with respect to Movant and this secured debt. Debtor filing for bankruptcy four days after the transfer of Property, and thus five days before the scheduled Trustee Sale; and Debtor's omission of Movant as creditor and the Property in her Schedules and Plan.

The court finds that proper grounds exist for issuing an order pursuant to 11 U.S.C. § 362(d)(4). Movant has provided sufficient evidence concerning bankruptcy case being filed to prevent actions against the Property. Movant has provided the court with evidence that Debtor has engaged in a scheme to hinder, defraud, and delay creditors through the transfer of Property.

In granting the 11 U.S.C. § 362(d)(4) relief, the court notes that such is not the end of the game for Debtor. While granting relief through this case, if Debtor has a good faith, bona fide reason to commence another case while that order is in effect for the Property, the judge in the subsequent case can impose the stay in that case. 11 U.S.C. § 362(c)(4). That would ensure that Debtor, to the extent that some bona fide reason existed, would effectively assert such rights rather than filing several bankruptcy cases that are then dismissed.

Request for Prospective Injunctive Relief

Movant makes an additional request stated in the prayer, for which no grounds are clearly stated in the Motion. Movant's further relief requested in the prayer is that this court make this order, as opposed to every other order issued by the court, binding and effective despite any conversion of this case to another chapter of the Code. Though stated in the prayer, no grounds are stated in the Motion for grounds for such relief from the stay. The Motion presumes that the stay will be reimposed if this case were converted to one under another Chapter.

As stated above, Movant's Motion does not state any grounds for such relief. Movant does

not allege that notwithstanding an order granting relief from the automatic stay, a stealth stay continues in existence, waiting to spring to life and render prior orders of this court granting relief from the stay invalid and rendering all acts taken by parties in reliance on that order void.

Although the points and authorities is provided in support of the Motion, it does not reference the legal basis for granting prospective injunctive relief. Other than referencing the court to the legal basis (11 U.S.C. § 362(d)(3) or (4)) and then pleading adequate grounds thereunder, it is not necessary for a movant to provide a copy of the statute quotations from well known cases. A movant seeking relief from a possible future stay, which may arise upon conversion, must provide the legal points and authorities for such heretofore unknown nascent stay is necessary.

As noted by another bankruptcy judge, such request (unsupported by any grounds or legal authority) for relief of a future stay in the same bankruptcy case:

> [A] request for an order stating that the court's termination of the automatic stay will be binding despite conversion of the case to another chapter unless a specific exception is provided by the Bankruptcy Code is a common, albeit silly, request in a stay relief motion and does not require an adversary proceeding. Settled bankruptcy law recognizes that the order remains effective in such circumstances. Hence, the proposed provision is merely declarative of existing law and is not appropriate to include in a stay relief order.
>
> Indeed, requests for including in orders provisions that are declarative of existing law are not innocuous. First, the mere fact that counsel finds it necessary to ask for such a ruling fosters the misimpression that the law is other than it is. Moreover, one who routinely makes such unnecessary requests may eventually have to deal with an opponent who uses the fact of one's pattern of making such requests as that lawyer's concession that the law is not as it is.

In re Van Ness, 399 B.R. 897, 907 (Bankr. E.D. Cal. 2009) (citing *Aloyan v. Campos (In re Campos)*, 128 B.R. 790, 791–92 (Bankr. C.D. Cal. 1991); *In re Greetis*, 98 B.R. 509, 513 (Bankr. S.D. Cal. 1989)).

As noted in the 2009 ruling quoted above, the "silly" request for unnecessary relief may well be ultimately deemed an admission by Movant and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted Movant and other creditors represented by counsel, and upon conversion, any action taken by such creditor is a *per se* violation of the automatic stay.

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 MTGLQ Investors, LP ("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 vacated to allow Movant, 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 that is recorded against the real property commonly known as 5735 Portola Road, Atascadero, California, ("Property") to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale to obtain possession of the Property.

IT IS FURTHER ORDERED that the above relief is also granted pursuant to 11 U.S.C. § 362(d)(4), which further provides:

> "If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording."

No other or additional relief is granted.