UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

August 13, 2019 at 1:30 p.m.

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1. **16-25205-E-7** **TIMOTHY TAPURO**
18-2066
TAPURO V. COUNTY OF SACRAMENTO, DEPARTMENT OF

CONTINUED STATUS CONFERENCE RE: COMPLAINT
5-11-18 [1]

Plaintiff's Atty: Peter G. Macaluso
Defendant's Atty: Robert P. Parrish

Adv. Filed: 5/11/18
Answer: 6/29/18

Nature of Action:
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:
Continued from 7/16/19. Plaintiff-Debtor's counsel reported that the matter has been settled and are awaiting receipt of the check from the County. Once received, this Adversary Proceeding will be dismissed.

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.

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

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on July 22, 2019. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

The Motion to Extend the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Extend the Automatic Stay is granted.

The debtor, Lee Ann Newton ("Debtor"), seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor's second bankruptcy petition pending in the past year. Debtor's prior bankruptcy case (No. 18-23750) was dismissed on May 31, 2019 for failure to make payments and propose a Chapter 13 Plan. *See* Order, Bankr. E.D. Cal. No. 18-23750, Dckt. 57, May 31, 2019. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because of the timing of filing. Declaration, Dckt. 17. Debtor works at a school and has reduced income during the summer. *Id.* Because of the reduced income, Debtor fell behind in plan payments. *Id.* While Debtor attempted an amended plan, the post-petition mortgage payments made Debtor's amended plans infeasible. *Id.*

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). As this court has noted in other cases, Congress expressly provides in 11 U.S.C.

§ 362(c)(3)(A) that the automatic stay **terminates as to Debtor**, and nothing more. In 11 U.S.C. § 362(c)(4), Congress expressly provides that the automatic stay **never goes into effect in the bankruptcy case** when the conditions of that section are met. Congress clearly knows the difference between a debtor, the bankruptcy estate (for which there are separate express provisions under 11 U.S.C. § 362(a) to protect property of the bankruptcy estate) and the bankruptcy case. While terminated as to Debtor, the plain language of 11 U.S.C. § 362(c)(3) is limited to the automatic stay as to only Debtor. The subsequently filed case is presumed to be filed in bad faith if one or more of Debtor's cases was pending within the year preceding filing of the instant case. *Id.* § 362(c)(3)(C)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 362(c)(3)(C).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209–10 (2008). An important indicator of good faith is a realistic prospect of success in the second case, contrary to the failure of the first case. *See, e.g.*, *In re Jackola*, No. 11-01278, 2011 Bankr. LEXIS 2443, at *6 (Bankr. D. Haw. June 22, 2011) (citing *In re Elliott-Cook*, 357 B.R. 811, 815–16 (Bankr. N.D. Cal. 2006)). Courts consider many factors—including those used to determine good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine good faith under § 362(c)(3) are:

A. Why was the previous plan filed?

B. What has changed so that the present plan is likely to succeed?

In re Elliot-Cook, 357 B.R. at 814–15.

Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

The Motion is granted, and the automatic stay is extended for all purposes and parties, unless terminated by operation of law or further order of this 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 to Extend the Automatic Stay filed by Lee Ann Newton ("Debtor") 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 granted, and the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes and parties, unless terminated by operation of law or further order of this court.

3. 19-20026-E-13 NLG-3 — THOMAS IVERS, Lucas Garcia — CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY, 5-29-19 [66]

PROVIDENT FUNDING ASSOCIATES, L.P. VS.

This Matter is Continued to be heard on the court's 3:00 p.m. calendar on August 13, 2019, to be conducted in conjunction with other motions filed by Debtor in this case

The Motion for Relief From the Automatic Stay is xxxxxxxxx

Provident Funding Associates, L.P. ("Movant") seeks relief from the automatic stay with respect to Thomas James Ivers's ("Debtor") real property commonly known as 8610 Pershing Avenue, Fair Oaks, California ("Property"). Movant has provided the Declaration of Patricia Kha to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Patricia Kha Declaration states that there are four post-petition defaults in the payments on the obligation secured by the Property, with a total of $7,218.16 in post-petition payments past due. Declaration ¶ 8, Dckt. 68.

TRUSTEE'S RESPONSE

The chapter 13 Trustee, David Cusick ("Trustee") filed a Response on June 17, 2019 indicating nonopposition. Dckt. 77.

JULY 2, 2019 HEARING

At the July 2, 2019 hearing the parties announced that they had reached an agreement to allow the Debtor until the end of October 2019 to get the property sold. Civil Minutes, Dckt. 79. The court continued the hearing.

DISCUSSION

Current Status of Contested Matter

At the prior hearing, the parties indicated an agreement had been reached allowing Debtor time to get the Property sold. Since that hearing, the court has not been provided a status update and no

supplemental pleadings (including a stipulation) have been filed for this Matter.

On July 25, 2019, Debtor filed a Motion to Employ Kristy Hernandez, set for hearing August 13, 2019. Dckt. 82.

At the hearing, xxxxxxxxxxxxxx.

Relief From Stay

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 $422,217.67 (including $225,823.94 secured by Movant's first deed of trust), as reflected on Schedule D and the Proofs of Claim filed in this case. The value of the Property is determined to be $608,000.00, as stated in Schedules A and D.

Trustee filed a Response indicating non-opposition to the Motion. Debtor has not filed any opposition or response.

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 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.

Request for Attorneys' Fees

In the Motion, almost as if an afterthought, Movant requests that it be allowed attorneys' fees. The Motion does not allege any contractual or statutory grounds for such fees. No dollar amount is requested for such fees. No evidence is provided of Movant having incurred any attorneys' fees or having any obligation to pay attorneys' fees. Based on the pleadings, the court would either: (1) have to award attorneys' fees based on grounds made out of whole cloth, or (2) research all of the documents and California statutes and draft for Movant grounds for attorneys' fees, and then make up a number for the amount of such fees out of whole cloth. The court is not inclined to do either.

If grounds had been shown and evidence provided, the court could have easily made such determination and granted fees (assuming there is a contractual or statutory basis). If an amount of such fees had been included in the motion and prayer, the court and all parties in interest would fairly have been put on notice of the upper limit of such amounts, and the court could have taken the non-opposition and non-response as defaults.

While the court could consider the award of attorneys' fees as a post-judgment motion (Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054, 9014), the otherwise unnecessary cost and expense of Movant having to file a motion for an award of attorneys' fees for the unopposed Motion in which it made reference to wanting attorneys' fees would well exceed any attorneys' fees that the court would award for a motion such as this. Movant's strategic decision not to provide the court with grounds for and evidence of attorneys' fees has rendered it useless to proceed with a post-judgment motion that would cost more in unawarded (as in unnecessary and unreasonable fees) attorneys' fees.

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, for no particular reason, that the court grant relief from the Rule as adopted by the United States Supreme Court. With no grounds for such relief specified, the court will not grant additional relief merely stated in the prayer.

Movant has not 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 not granted.

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 conversion of the bankruptcy case 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.

No points and authorities is provided in support of the Motion. This is not unusual for a relatively simple (in a legal authorities sense) motion for relief from stay as the one before the court. 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. However, if a movant is seeking relief from a possible future stay, which may arise upon conversion, 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 Provident Funding Associates, L.P. and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted Provident Funding Associates, L.P. 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 Provident Funding Associates, L.P. ("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 Provident Funding Associates, L.P., 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 8610 Pershing Avenue, Fair Oaks, 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 fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is not waived for cause.

Attorney's fees and costs, if any, shall be requested as provided by Federal Rule of Civil Procedure 54 and Federal Rules of Bankruptcy Procedure 7054 and 9014. No other or additional relief is granted.

4. **19-23230-E-13 SMR-1** **JOSEPH BURCHETT** **Pro Se** **MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR RELIEF FROM CO-DEBTOR STAY 7-12-19 [31]**

SHERWOOD IRON POINT, LP VS.
DEBTOR DISMISSED: 07/30/19

Final Ruling: No appearance at the August 13, 2019 hearing is required.

The Motion for Relief is denied without prejudice.

The case having previously been dismissed and the stay having been terminated by operation of law, the Motion is denied as moot.

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 Automatic Stay and/or Motion for Relief from Co-Debtor Stay having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied as moot, the case having been dismissed.

5. **19-23735-E-13 KMR-1** **ROBIN/THOMAS HARLAND** **Stephen Reynolds** **CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY 7-2-19 [19]**

DEUTSCHE BANK NATIONAL TRUST COMPANY VS.

No 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, and the Chapter 13 Trustee on July 2, 2019. 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). 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 XXXXXXXX.

Deutsche Bank National Trust Company, as Trustee for Fremont Home Loan Trust 2006-3, Asset-Backed Certificates, Series 2006-3 ("Movant") seeks relief from the automatic stay with respect to the debtors, Robin Arlene Harland and Thomas Scott Harland's ("Debtor"), real property commonly known as 2263 Casa Dulce Way, Plumas Lake, California ("Property"). Movant has provided the Declaration of Tonya R. Caldwell to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues this bankruptcy case was filed to unfairly delay Movant's ability to foreclose on the Property, Movant is not adequately protected, and cause exists for termination of the stay pursuant to 11 U.S.C. § 362(d)(1) and (d)(4).

In support of this argument, Movant asserts that Debtor has filed four recent bankruptcy cases, including the present case, which has precluded Movant's attempts to foreclose on the Property and mitigate losses. As Exhibit 6, Movant filed docket headers for each of Debtor prior 3 cases. Dckt. 24.

Movant also asserts Debtor is due for 10 regular monthly mortgage payments from September 1, 2019 through June 1, 2019 as of June 21, 2019. This assertion is supported by the

testimony of Tonya R. Caldwell. Declaration ¶ 7, Dckt. 23.

As Exhibit 4, Movant also filed a payment history chart reflecting prepetition payments missed from September 1, 2019 through June 1, 2019. Dckt. 24.

CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on July 12, 2019. Dckt. 26. Trustee notes several case details, including that there is no confirmed plan, Debtor's first payment will come due July 25, 2019, and Movant filed Proof of Claim, No. 3 asserting a claim of $338,981.48 and prepetition arrearages of $23,773.67.

Trustee also notes that in Debtor's most recent prior case, No. 17-28427, $15,155.00 was disbursed in ongoing mortgage payments from September through March 2019, $32,475.00 disbursed overall to the ongoing mortgage, and $15,526.06 disbursed towards prepetition arrearages. Declaration, Dckt. 27.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on July 16, 2019. Dckt. 29. Debtor asserts multiple filings have been made her to pay creditors and maintain their family home.

Debtor argues the most recent prior case was dismissed for failure to make payments after debtor Robin Harland became disabled, resulting in loss of employment and income. Debtor represents the present case provide for payments Debtor can make under Debtor's changed circumstances.

Debtor also notes that Movant's declaration in support of the Motion conflicts with Trustee's declaration as to when payments were made.

PRIOR FILINGS

The court summarizes Debtor's recent case history as follows:

A. Case No. 16-22157
   1. Filed: April 5, 2016
   2. Chapter 13
   3. Plan Confirmed: December 1, 2016
   4. Dismissal Date: February 28, 2017
   5. Reason for Dismissal: delinquency in plan payments of $3,602.11

B. Case No. 17-22209
   1. Filed: April 3, 2017
   2. Chapter 13
   3. Dismissal Date: November 21, 2017
   4. Reason for Dismissal: failure to confirm a Chapter 13 Plan within 75 days of proposed plan being denied confirmation

C. Case No. 17-28427

1. Filed: December 31, 2017
2. Chapter 13
3. Plan Confirmed: July 30, 2018
3. Dismissal Date: June 7, 2019
4. Reason for Dismissal: delinquency in plan payments of $12,837.01

JULY 30, 2019 HEARING

At the July hearing the court continued the hearing, with the Movant's consent and in light of payments made in Debtor's prior case, to confirm that the Debtor is current in plan payments and is prosecuting the plan in this case to provide a 100% dividend to creditors. Civil Minutes, Dckt. 36.

The court further provided that the Debtor and Movant are to file a joint ex parte motion to continue the hearing on this Motion to August 27, 2019, the date for the hearing on Trustee's Objection To Confirmation.

APPLICABLE LAW

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).

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.).

DISCUSSION

Since the prior hearing, nothing has been filed in this case to indicate that Debtor is current in plan payments or is otherwise prosecuting the case. No joint ex parte motion to continue the hearing has been filed as was discussed at the prior hearing.

At the hearing, xxxxxxxxxxxxxx.

Movant argues relief is warranted here because Debtor's have used their bankruptcy filings to delay foreclosure proceedings.

However, 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.

No further explanation is given for why the cases here were part of a scheme to delay, hinder, or defraud creditors.

Movant points to 10 prepetition payments missed to bolster its arguments. However, the Trustee has presented contradictory evidence showing that in Debtor's most recent prior case, No. 17-28427, $15,155.00 was disbursed in ongoing mortgage payments from September through March 2019. Declaration, Dckt. 27.

The Trustee's testimony is more credible than Movant's testimony (Declaration ¶ 7, Dckt. 23) which asserted there were 10 payments missed "From 09/01/18 To 06/01/19." Furthermore, Trustee's evidence shows that in Debtor's prior case $32,475.00 was made on the ongoing mortgage payment and $15,526.06 disbursed towards prepetition arrearages. Declaration, Dckt. 27.

$48,001.06 in payments made over roughly 18 months does not on its face indicate a bad faith filing, or a scheme to delay creditors.

Reviewing the Proofs of Claims Filed in this and the prior cases and the Trustee's final accounting filed in the three prior cases:

Current Case

Proof of Claim No. 3

Amount of Claim.....($338,981.48)

Pre-Petition Arrearage...($ 23,773.87)

Case 17-28427

Proof of Claim No. 3	Trustee's Final Report, Payments to Movant (Dckt. 105)
Amount of Claim.....($354,998.02)	Current.....$32,475.00
Pre-Petition Arrearage...($ 32,286.95)	Arrearage.....$15,526.06

Case 17-22209 (No Plan Confirmed, Creditor was only creditor paid in case)

Proof of Claim No. 3	Trustee's Final Report, Payments to

	Movant (Dckt. 63)
Amount of Claim.....($353,485.01)	Current.....$12,872.16
Pre-Petition Arrearage...($ 27,708.65)	Arrearage.....$0

Case 17-28427

Proof of Claim No. 5	Trustee's Final Report, Payments to Movant (Dckt. 68)
Amount of Claim.....($355,760.48)	Current.....$24,299.00
Pre-Petition Arrearage...($ 22,574.58)	Arrearage.....$0

Since April 2016 Debtor has had the continuing protection of the Bankruptcy Code and afforded the opportunity to diligently and in good faith to prosecute a Chapter 13 plan, cure the arrearage to this Creditor, and move forward financially. There has spanned thirty-nine (39) months since the filing of the first case. If Debtor confirms a Chapter 13 plan in this case and took the maximum sixty (60) months allowed for a Chapter 13 plan, then with the prior starts and stops with these multiple cases, Debtor will effectively obtain a 100 month plan.

While the total claim stated by Movant is now $16,821.00 lower than when Debtor started this thirty-nine (39) months ago, the arrearage is ($23,773.87), which is $1,000 more than when this chain of bankruptcy cases commenced.

Debtor has provided additional evidence that the prior case was dismissed after her debtor Robin Harland became disabled, resulting in loss of employment and income. Declaration, Dckt. 30.

A review of the Schedules may offer the first clue to why these bankruptcy cases have been unsuccessful. On Schedule I Debtor lists having combined income (after taxes and withholding on co-debtor Thomas Harland's wages) of $6,278.93. Dckt. 1 at 34-35. Of this, there is $1,024 in gross pension or retirement income for debtor Robin Harlan. *Id.* There does not appear to be any payment for state and federal taxes for this $12,000 a year in retirement income which is placed on the $86,448 of gross wage income of co-debtor Thomas Harland.

On Schedule J the family unit is identified as four persons–the two debtors, a son and a brother. *Id.* at 36-37. It appears that the son has special needs which cause additional expenses. No income is shown on Schedule I for the dependent brother. On Schedule A/B debtor lists owning three cars (of which only two are operational). However, on Schedule J, the monthly expense for the registration, repairs, maintenance, and gas for the two vehicles is stated to be only ($350). If annual registration for each of the vehicles is ($300), that would average ($50) a month. Assuming routine maintenance bills of ($300) a year for each vehicle (though given the age of the vehicle two sets of new tires would drive up that average), that would be another ($50) a month.

That would leave ($125) per vehicle for gas each month. If gas costs ($3.50) a gallon, that

allows for the purchase of thirty-five (35) gallons of gas a month, which averages eight (8) gallons a week. If the vehicle gets twenty (20) miles to the gallon, each debtor would be restricted to driving only twenty-two miles a day. That does not seem realistic.

The food and housekeeping supplies budget of ($675) a month for four adults may also be unreasonably low. If one backs out ($125) a month for housekeeping supplies, that leaves ($550) for food, which is only ($1.48) per person, per day, per meal for food (in a 31 day month).

It may well be that the repeated failures in plan performance may be because Debtor is trying to maintain a life style, while not extravagant, is not affordable.

With respect to good cause for relief pursuant to 11 U.S.C. § 362(d)(1), Movant has only argued Debtor is delinquent in prepetition payments.

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 Deutsche Bank National Trust Company, as Trustee for Fremont Home Loan Trust 2006-3, Asset-Backed Certificates, Series 2006-3 ("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 **XXXXXXXXXXX**.
>
> No other or additional relief is granted.

6. **17-24939-E-13 APN-1** **GRETEL ELVING**
Mohammad Mokarram

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR RELIEF FROM CO-DEBTOR STAY
7-11-19 [21]

TOYOTA MOTOR CREDIT CORPORATION VS.

Final Ruling: No appearance at the August 13, 2019, 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, and Office of the United States Trustee on July 11, 2019. 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). 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.

Toyota Motor Credit Corporation, servicing agent for Toyota Lease Trust ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2016 Toyota Prius, VIN ending in 2149 ("Vehicle"). The moving party has provided the Declaration of Rahnae Spooner to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the debtor, Gretel Elving ("Debtor").

The Spooner Declaration presents testimony that the Vehicle is the subject of a lease agreement which has now fully matured. Declaration, Dckt. 25. The Spooner Declaration further testifies that Movant is in possession of the Vehicle. *Id.*

CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on July 24, 2019. Dckt. 27. Trustee notes that relief may not be necessary given the confirmed plan.

DISCUSSION

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, the Vehicle here being subject to a lease agreement that has matured and the Debtor having surrendered the Vehicle. 11 U.S.C. § 362(d)(1).

Movant has also provided sufficient grounds to grant relief from the co-debtor stay under 11 U.S.C. § 1301(a). Movant has established, pursuant to 11 U.S.C. § 1301(a), that it would be irreparably harmed if relief from the co-debtor stay were not granted.

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.

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 Toyota Motor Credit Corporation, servicing agent for Toyota Lease Trust ("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 Toyota Prius, VIN ending in 2149 ("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 request to terminate the co-debtor stay of Todd D. Elving of 11 U.S.C. § 1301(a) is granted to the same extent as provided in the forgoing paragraph granting relief from the automatic stay arising under 11 U.S.C. § 362(a).

No other or additional relief is granted.

7. 19-22078-E-13 PGM-2 — EDUARDO/MARIE ORTEGA — Peter Macaluso — MOTION TO CONFIRM PLAN — 7-7-19 [67]

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 Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 7, 2019. By the court's calculation, 37 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Motion to Confirm the Amended Plan is denied.

The debtor, Eduardo M Ortega and Marie E Ortega ("Debtor"), seek confirmation of the Amended Plan. The Amended Plan provides for monthly plan payments of $8,000.00 for sixty months and a 0 percent dividend to unsecured claims totaling $200,355.64. Amended Plan, Dckt. 71. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CREDITOR'S OPPOSITION

Robert Guerra holding a secured, nondischargeable claim ("Creditor") filed an Opposition on July 19, 2019. Dckt. 76. Creditor argues that the Plan and case were filed in bad faith, as has already been discussed by this court in a tentative ruling on a dismissal motion. Creditor argues the facts indicating bad faith include th following:

1. Debtor knowingly filed false schedules because they knew Creditor's claim was greater than $10.00.

2. Debtor in the first proposed plan listed Creditor's claim as $1.00 and failed to provide for the claim.

3. Debtor has had four prior bankruptcy cases dismissed, all based on plan defaults.

4. Since the prior cases, Debtor has only incurred more priority tax and secured debt, demonstrating that Debtor is syphoning money away from creditors.

5. Debtor has continued to delay payment to Creditor's claim.

CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on July 22, 2019. Dckt. 83. Trustee notes several of the plan provisions, pending motions to dismiss and for relief from automatic stay, that no evidence has been presented as to prior filed cases, and that Debtor is current in plan payments with the next payment coming due July 25, 2019.

However, Trustee does not take a position on the confirmability of the plan.

DEBTOR'S REPLY

Debtor filed a Reply on August 5, 2019. Dckt. 92. Debtor's counsel asserts that the present plan is feasible, three payments of $8,045.00 having been made.

As to Creditor's claim, Debtor's counsel proposes paying the claim off with two more payments made in August and September 2019.

In reply to Trustee's Response, Debtor provides the following explanations for prior case history:

1. Debtor has paid $229,133.48 through the Trustee and $118,072.24 to Creditor (during an unspecified time period). Declaration ¶ 1, Dckt. 93.

2. Debtor's daughter experienced mental health issues that caused expenses for treatment. When combined with Creditor's claim, paying creditors inside or outside the bankruptcy became difficult. *Id.*, ¶ 2.

3. Debtor's grandfather died in 2016, and Debtor's father died in May 2019. *Id.*, ¶ 3.

4. Debtor Marie Ortega has an education but could only get hired at temporary agencies. *Id.*, ¶ 4.

5. Debtor Eduardo Ortega "took two changes in positions as the corporations were changing, so after a year and a half in the startup [Debtor Eduardo Ortega] was promoted into the present position." *Id.*, ¶ 5.

DISCUSSION

This is Debtor's fourth Chapter 13 case. Debtor's prior cases, including on filed under Chapter 7, are summarized as follows:

A. Case No. 17-22226
   1. Filed: April 3, 2017
   2. Chapter 13
   3. Dismissal Date: January 16, 2019
   4. Reason for Dismissal: Delinquency in plan payments.

B. Case No. 16-21304
   1. Filed: March 2, 2016
   2. Chapter 13
   3. Dismissal Date: January 22, 2017
   4. Reason for Dismissal: Delinquency in plan payments.

C. Case No. 14-27476
   1. Filed: July 22, 2014
   2. Chapter 13
   3. Dismissal Date: September 24, 2015
   4. Reason for Dismissal: Delinquency in plan payments.

D. Case No. 12-38100
   1. Filed: October 10, 2012
   2. Chapter 7
   3. Result: Discharge received June 25, 2013

As discussed by the parties to this Matter, there is a pending Motion to Dismiss (Dckt. 23) and Motion For Relief (Dckt. 37) in this case. In a prior hearing on the Motion To Dismiss, this court made the following finding:

> This case is Debtor's fifth since 2012. While Debtor's Chapter 7 was concluded with entry of a discharge in 2013, the subsequent three Chapter 13

cases have been dismissed for defaults in plan payments.

Debtor's filing, failing to perform, and dismissal of the three prior Chapter 13 cases did not occur because Debtor was not represented by knowledgeable, experienced counsel. In the two immediately prior cases Debtor was represented by the same counsel as in this case, and in the third prior case by another bankruptcy attorney. If Debtor was filing and attempting to prosecute the Chapter 13 cases in good faith they were represented by more than sufficient legal horsepower.

A review of the record in the prior Chapter 13 cases indicate monetary defaults in plan payments that were included in the grounds for the dismissal of those cases:

A. Case 17-22226, dismissed January 16, 2019.....$30,389.42 default

B. Case 16-21304, dismissed January 22, 2017.....$15,625.00 default

The file indicates that Debtor failed to make an additional five months of payments of $5,650.00 while the court continued the hearing to allow the Debtor in good faith to cure the default and prosecute a plan in that case before dismissing the case. This indicates that there is $43,875.00 in net monthly income that was not paid into the Plan in Case 16-21304.

C. Case 14-27476, dismissed September 24, 2015.....$23,948.00 default

Just for the periods during the Chapter 13 cases in which the Debtor defaulted and did not modify the plans, there is at least $70,467.00 of monthly net income that has disappeared. This does not take into account all of the additional income for the months Debtor was not in the non-productive, multiple plan default prior Chapter 13 cases.

On Schedule A/B Debtor states under penalty of perjury that there is only nominal money in bank accounts, $400, and there are no other assets in which what is more than $120,000 of annual take-home income, after taxes and withholding, has been transferred or converted. Dckt. 1 at 13-72

Even after the Debtor's stated reasonable monthly expenses for the two debtors and their two adult children they list as dependents, Debtor has $7,900 a month in monthly net income. Annually this would be $94,800 of "extra" money rolling around - which is unaccounted for.

Notwithstanding this significant income, Debtor has "struggled" to make payments under four Chapter 13 cases filed in the last few years.

> Debtor's significant income and failure to prosecute a successful Chapter 13 suggest that Debtor is merely filing cases to delay payment, hinder creditors' ability to collect on their claims. At best, this is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).
>
> Notably, Debtor has not filed an opposition to this Motion brought on 28 days' notice.

Civil Minutes, Dckt. 82.

Debtor did not respond to that dismissal motion until the hearing despite the Motion being brought on 28 days' notice. Now, Debtor asserts several explanations for the defaults in prior cases. Those explanations are as follows:

> 1. In total, we have paid the Trustee(s) a total of $229,133.48, and has paid down the Guerra claim from $126,000.00 to $7,927.76, or a total of $118,072.24.. Declaration ¶ 1, Dckt. 93.

Debtor seems to argue that since they have paid upwards of $300,000.00 since their first Chapter 13 filed in 2012, that they must be filing in good faith. This is not well-taken considering claims have only increased and Debtor has a very large gross income.

> 2. During this time period our daughter was experiencing mental health issues that caused expenses for treatment, but giving the garnishments and collection efforts by Guerra, catching up outside of bankruptcy was very hard, and staying in the bankruptcy became harder. *Id.*, ¶ 2.
>
> 3. During this time we also suffered two deaths in the family, the grandfather and father. In 2016, my grandfather died, and we were asked by my grandmother to help care for him. Our father was experiencing dementia over the last several years until dying this May of 2019. *Id.*, ¶ 3.
>
> 4. During this period, while my wife has her education she could not find a job, and could only get hired in temporary agencies. *Id.*, ¶ 4.

In 2014 Debtor Marie Ortega was working at ASC Profiles, where she had worked for 1 year. 14-27476, Dckt. 141. In 2016, Marie worked at ASC Profiles still, at this point for 3 years and 6 months. 16-21304, Dckt. 1. In 2017, Marie worked at ASC Profiles, "now" for 15 years. 17-22226, Dckt. 8. And, in the present case, Marie works at ASC Profiles, now for only 6 years. Dckt. 1.

> 5. I then took two changes in positions as the corporations were changing, so after a year and a half in the startup debtor was promoted into the present position. *Id.*, ¶ 5.

In the remaining four paragraphs of the Declaration, Debtor asserts increased expenses and appears to indicate a struggle to increase income. This testimony provided under penalty of perjury is not credible.

In fact, income and expenses have remained somewhat constant for Debtor over the years, with income increasing at a respectable rate:

Case	Gross Income	Expenses	Disposable Income
14-27476 (Dckt. 141)	$12,186.59	$3,561.00	$5,987.22
16-21304 (Dckts. 1, 66)	$11,790.82	$3,350.71	$5,650.00
17-22226 (Dckt. 8)	$13,382.89	$4,343.08	$7,300.00
19-22078 (Dckt. 1, 73)	$17,306.11	$3,691.23	$8,000.00

The above does not show any sudden expenses or hardships, and a review of all the pleadings filed in all of Debtor's prior cases reveals this is the first time these expenses have been asserted.

Creditor points to the growing secured and tax claims as an indicator of bad faith. In this case, the Franchise Tax Board filed Proof of Claim, No. 1 asserting a claim of $57,887.09. The Internal Revenue filed Proof of Claim, No. 2 asserting a claim of $63,381.07. Since the prior case, the FTB's claim has increased by 786 percent, and the IRS' claim has increased by 86.5 percent.

It is unclear how those claims could have increased so dramatically if the prior case were being prosecuted in good faith. Debtor's first proposed plan provided for a dividend of 82 percent ($166,979.98). Dckt. 2. Now, presumably in light of the tax claims having been filed, Debtor is proposing a 0 percent plan.

In coming back to Debtor's explanations, another issue with their credibility exists. Debtor does not actually provide any dollar amounts to any of the expenses. The court is told there were expenses for the care of various family members, including mental health and posthumous expenses. However, it is doubtful those expenses reached $80,000.00, which is roughly the amount by which tax claims increased between the prior and current case.

Debtor's most recent case, no. 17-22226, was dismissed January 16, 2019 after a $30,389.42 delinquency in plan payments. Roughly four months, where Debtor had a disposable monthly income of either $7,300.00 or $8,000.00, passed between dismissal and filing of this case. Therefore, Debtor should be sitting on a very modest $60,000+ surplus.

No explanation was offered for where these monies went.

At the hearing, xxxxxxxxxxxxxx.

Based on the pleadings filed in this and Debtor's prior cases, the present case and Amended Plan have not been filed in good faith. The Motion is denied, and the Amended Plan is not confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by the debtor, Eduardo M Ortega and Marie E Ortega ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Confirm the Amended Plan is denied, and the Amended Plan is not confirmed.

8. **19-22078-E-13 EAT-1** | **EDUARDO/MARIE ORTEGA** **Peter Macaluso** | **CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY 6-10-19 [37]**

WILMINGTON TRUST, N.A. VS.

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, creditors, and Office of the United States Trustee on June 10, 2019. 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). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Relief from the Automatic Stay is granted.

Wilmington Trust, National Association as Trustee for MFRA Trust 2016-1 ("Movant") seeks relief from the automatic stay with respect to the debtors, Eduardo Ortego and Marie Ortega's ("Debtor") real property commonly known as 2481 Bent Tree Dr., Roseville, California ("Property").

Movant has provided the Declaration of James M. Stefani to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The James M. Stefani Declaration provides the following testimony:

1. Notices of Trustee's Sale were filed on March 1, 2012; September 16, 2013; June 27, 2014; February 11, 2016; and April 7, 2017. All sales were cancelled due to bankruptcy filings. Declaration ¶ 8, Dckt. 39.

2. A new Notice of Default was recorded April 1, 2019 but rescinded due to this bankruptcy filing. *Id.,* ¶ 9.

3. The Property was involved in several bankruptcy cases. *Id.,* ¶ 10.

4. As of May 2019, no payments have been received by Debtor since November 2018. *Id.,* ¶ 12.

CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("the Chapter 13 Trustee") filed a Response on July 1, 2019. Dckt. 55. The Chapter 13 Trustee notes Debtor is $8,062.38 delinquent under the plan, and that Movant is included as a Class 1 claim with a monthly payment of $2,277.55.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on July 2, 2019. Dckt. 62. Debtor asserts an amended plan will be filed to cure Movant's arrearage claim by the 26th month of the plan term. Debtor requests the court deny the Motion on the basis that the amended plan will provide adequate protection.

JULY 16, 2019 HEARING

At the July 16, 2019 hearing, the court continued hearing and ordered the Chapter 13 Trustee to make a distribution of $6,500.00 to Movant as an adequate protection payment. Civil Minutes, Dckt. 80.

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 $668,011.63 (including $532,858.08 in consensual liens, and $121,268.16 in tax liens). *See* Schedule D, Dckt. 1 *and* Proof of Claim, Nos. 1-3, 5, 10. The value of the Property is determined to be $575,000.00, as stated in Schedules A and D. Dckt. 1.

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 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.

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, Debtor has filed now three cases and as of May 10, 2019 the total indebtedness owed to Movant is $471,943.21.

A. Case No. 17-22226
   1. Filed: April 3, 2017
   2. Chapter 13
   3. Dismissal Date: January 16, 2019
   4. Reason for Dismissal: Delinquency in plan payments.

B. Case No. 16-21304
   1. Filed: March 2, 2016
   2. Chapter 13
   3. Dismissal Date: January 22, 2017
   4. Reason for Dismissal: Delinquency in plan payments.

C. Case No. 14-27476
   1. Filed: July 22, 2014
   2. Chapter 13
   3. Dismissal Date: September 24, 2015
   4. Reason for Dismissal: Delinquency in plan payments.

D. Case No. 12-38100
1. Filed: October 10, 2012
2. Chapter 7
3. Result: Discharge received June 25, 2013

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 filing multiple bankruptcy cases.

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 cannot have been for any bona fide, good faith reason in light of Movant not receiving regular monthly payments and suffering from undue delay from the foreclosure proceeding on the subject Property. In effect, this is a series of bankruptcy attempts by Debtor. Movant argues that Debtor's repeated bankruptcy filing is being used as part of a scheme to delay or hinder or otherwise interfere with Movant's ability to enforce its state law remedies. The scheme includes multiple bankruptcy filings affecting the Property, which further hurts Movant.

The court finds that proper grounds exist for issuing an order pursuant to 11 U.S.C. § 362(d)(4). Debtor has been in and out of bankruptcy for nearly a decade. In 2013, Debtor received a discharge in Debtor's Chapter 7 case. Notwithstanding being afforded that relief, Debtor proceeded to file 4 Chapter 13 bankruptcy cases. Omitting the present case, all of Debtor's Chapter 13 cases have been dismissed for delinquency in plan payments.

Debtor does not appear to be capable (or willing) of prosecuting a Chapter 13 case in good faith. Rather, it appears Debtor is merely using bankruptcy protections to stop foreclosure on the Property, and live in the Property while paying only what Debtor wants to pay.

Debtor has engaged in a scheme to hinder, defraud, and delay creditors through the multiple filing of bankruptcy cases, and relief is granted pursuant to 11 U.S.C. § 362(d)(4).

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.

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 Wilmington Trust, National Association as Trustee for MFRA Trust 2016-1 ("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 2481 Bent Tree Dr., Roseville, 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.

9. **19-22078-E-13 MAS-2** | **EDUARDO/MARIE ORTEGA** **Peter Macaluso** | **CONTINUED MOTION TO DISMISS CASE** **5-9-19 [23]**

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.

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

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on May 9, 2019. By the court's calculation, 33 days' notice was provided. 14 days' notice is required.

The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Motion to Dismiss is granted, and the bankruptcy case is dismissed with prejudice as to each of the two Debtors.

The request for injunction (Fed. R. Bankr. P. 7001) barring the filing of a future bankruptcy case in this Motion is denied without prejudice.

Creditor, Robert Guerra ("Creditor"), filed this Motion seeking dismissal of this case filed by debtors, Eduardo M Ortega and Marie E Ortega ("Debtor"), pursuant to 11 U.S.C. §1307.

The Motion states the following with particularity (Fed. R. Bankr. P. 9013) :

1. Debtor is incapable of keeping their promises, whether paying creditors or complying with the terms of their own Chapter 13 plans. This case was filed in bad faith.

2. Debtor has filed the following prior cases:

Filing Date	Case No.	Result
10/10/2012	12-38100	Discharge entered June 25, 2013
07/22/14	14-27476	Dismissed September 25, 2015
03/02/16	16-21304	Dismissed January 23, 2017
04/03/17	17-22226	Dismissed January 16, 2019

3. The Debtors have been in and out of Chapter 13 for the last 6 years. Where a plan has been confirmed, the cases were dismissed for defaults in payments.

4. Debtor currently owes Creditor slightly less than $8,000 under the 1999 non-discharge and forbearance agreement.

5. Debtor defaulted on the balloon payment on April 1, 2019 under the recent forbearance agreement.

6. This is the fifth filing by Debtor in the past five or six years. Debtor is a high wage earner but has failed to complete a Chapter 13 file in recent years.

7. Debtor lists $100,000.00 in arrearages in this case, indicating their financial situation has gotten worse since prior filings.

8. The instant case was filed not listing Creditor's secured claim, and appears to have been filed for the sole purpose of thwarting Creditor's enforcement of judgment.

9. Debtor's serial filings and inaccurate schedules demonstrate bad faith and warrant dismissal with prejudice to refiling for at least one year.

Motion, Dckt. 23.

JUNE 11, 2019 HEARING

At the June 11, 2019 hearing Debtor's counsel asserted a defect in service - the Motion not having been served by personal service or U.S. Mail. counsel not having consented to service by email, the specter of a deficiency in service exists.

Additionally, Debtor's counsel stated that Debtor believed that Creditor had been paid in full through the prior four Chapter 13 cases. The balance of Creditor's claim (not including any additional attorney's fees) has been reduced to less than $8,000.

The court continued the hearing and ordered an opposition be filed by June 24, 2019, and Reply by July 9, 2019. Order, Dckt. 46.

DEBTOR'S OPPOSITION

Debtor's counsel filed an Opposition on June 24, 2019. Dckt. 51. Debtor's counsel argues the current case was not filed in bad faith and should not be dismissed. Debtor's counsel argues further:

1. Debtors have paid the Creditor a total of $134,528.00 at the demise of the mortgage payments.

2. There has been no misrepresentation; while Debtor was unable to complete payments due, the balance was $795.84 according to the Trustee's accounting and down from a initial balance of $122,952.47.

3. The Debtor's first case lasted 14 months, the second case lasted 10 months, and the third case 9 months.

4. Debtor filed this case to pay the creditors and Creditor has been front loaded with the intention to complete that debt first.

5. Debtor appears to have paid Creditor's claim given the lack of a new proof of claim accounting for payments via the Trustee to a remaining balance of $795.84, and is a little bewildered that the claim is asserted to be in excess of $7,000.00.

While a throng of factual allegation are made in the Opposition, no evidence such as a declaration of Debtor was filed. Despite the allegations of bad faith in this case and in the face of the court's comments at the prior hearing, there is no testimony of the Debtor's explaining how this case can be filed in good faith.

At a very basic level, every law student is taught that the court relies on properly authenticated, admissible evidence to establish facts in any proceeding–the court cannot and does not merely take counsel at their word. Furthermore, the Local Rules affirmatively require that evidence be filed along with every motion and request for relief (including a request that this Motion be denied). LOCAL BANKR. R. 9014-1(d)(3)(D). Failure to comply with the Local Rules is grounds for an appropriate sanction. LOCAL BANKR. R. 1001-1(g).

CREDITOR'S REPLY TO DEBTOR'S OPPOSITION

Creditor filed a Response on July 1, 2019. Dckt. 58. Creditor argues that Debtor's Opposition only explains some payments on Creditor's claim have been made, and does not actually refute the allegations of bad faith stated in the Motion. Creditor further notes that no admissible evidence was filed in support of the Opposition.

Creditor filed the Declaration of Mark Serlin, Creditor's counsel, in support of its Opposition. Dckt. 59. Therein, Serlin explains Creditor's claim has continued to grow due to attorney's fees and costs necessarily incurred through collection.

DISCUSSION

Creditor's arguments are well-taken. At the prior hearing, the court noted Debtor's intentions and affirmative conduct in these series of bankruptcy cases has not been to propose, confirm, and perform a Chapter 13 Plan in good faith. Despite those observations, Debtor has chosen not file any evidence to support its Opposition. No testimony of Debtor was provided explaining how this case was filed in good faith. Debtor has elected to mutely sit on the sidelines rather than actively support Debtor's contentions with evidence.

This case is Debtor's fifth since 2012. While Debtor's Chapter 7 was concluded with entry of a discharge in 2013, the subsequent three Chapter 13 cases have been dismissed for defaults in plan payments.

Debtor's filing, failing to perform, and dismissal of the three prior Chapter 13 cases did not occur because Debtor was not represented by knowledgeable, experienced counsel. In the two immediately prior cases Debtor was represented by the same counsel as in this case, and in the third prior case by another bankruptcy attorney. If Debtor was filing and attempting to prosecute the Chapter 13 cases in good faith they were represented by more than sufficient legal horsepower.

A review of the record in the prior Chapter 13 cases indicate monetary defaults in plan payments that were included in the grounds for the dismissal of those cases:

A. Case 17-22226, dismissed January 16, 2019.....$30,389.42 default

B. Case 16-21304, dismissed January 22, 2017.....$15,625.00 default

The file indicates that Debtor failed to make an additional five months of payments of $5,650.00 while the court continued the hearing to allow the Debtor in good faith to cure the default and prosecute a plan in that case before dismissing the case. This indicates that there is $43,875.00 in net monthly income that was not paid into the Plan in Case 16-21304.

C. Case 14-27476, dismissed September 24, 2015.....$23,948.00 default

Just for the periods during the Chapter 13 cases in which the Debtor defaulted and did not modify the plans, there is at least $70,467.00 of monthly net income that has disappeared. This does not take into account all of the additional income for the months Debtor was not in the non-productive, multiple plan default prior Chapter 13 cases.

On Schedule A/B Debtor states under penalty of perjury that there is only nominal money in bank accounts, $400, and there are no other assets in which what is more than $120,000 of annual take-home income, after taxes and withholding, has been transferred or converted. Dckt. 1 at 13-72

Even after the Debtor's stated reasonable monthly expenses for the two debtors and their two adult children they list as dependents, Debtor has $7,900 a month in monthly net income. Annually this would be $94,800 of "extra" money rolling around - which is unaccounted for.

Notwithstanding this significant income, Debtor has "struggled" to make payments under four Chapter 13 cases filed in the last few years.

Debtor's significant income and failure to prosecute a successful Chapter 13 suggest that Debtor is merely filing cases to delay payment, hinder creditors' ability to collect on their claims. At best, this is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Notably, Debtor has not filed an opposition to this Motion brought on 28 days' notice.

DEBTOR'S DECLARATION FILED IN SUPPORT OF AMENDED PLAN CONFIRMATION

Since the prior hearing, nothing has been filed by Debtor except for a Reply and Declaration in support of Debtor's Motion To Confirm Amended Plan. In Debtor's Declaration, Debtor asserts several explanations for the defaults in prior cases. Those explanations are as follows:

> 1. In total, we have paid the Trustee(s) a total of $229,133.48, and has paid down the Guerra claim from $126,000.00 to $7,927.76, or a total of $118,072.24.. Declaration ¶ 1, Dckt. 93.

Debtor seems to argue that since they have paid upwards of $300,000.00 since their first Chapter 13 filed in 2012, that they must be filing in good faith. This is not well-taken considering claims have only increased and Debtor has a very large gross income.

> 2. During this time period our daughter was experiencing mental health issues that caused expenses for treatment, but giving the garnishments and collection efforts by Guerra, catching up outside of bankruptcy was very hard, and staying in the bankruptcy became harder. *Id.*, ¶ 2.
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> 3. During this time we also suffered two deaths in the family, the grandfather and father. In 2016, my grandfather died, and we were asked by my grandmother to help care for him. Our father was experiencing dementia over the last several years until dying this May of 2019. *Id.*, ¶ 3.
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> 4. During this period, while my wife has her education she could not find a job, and could only get hired in temporary agencies. *Id.*, ¶ 4.

In 2014 Debtor Marie Ortega was working at ASC Profiles, where she had worked for 1 year. 14-27476, Dckt. 141. In 2016, Marie worked at ASC Profiles still, at this point for 3 years and 6 months. 16-21304, Dckt. 1. In 2017, Marie worked at ASC Profiles, "now" for 15 years. 17-22226, Dckt. 8. And, in the present case, Marie works at ASC Profiles, now for only 6 years. Dckt. 1.

> 5. I then took two changes in positions as the corporations were changing, so after a year and a half in the startup debtor was promoted into the present position. *Id.*, ¶ 5.

In the remaining four paragraphs of the Declaration, Debtor asserts increased expenses and

appears to indicate a struggle to increase income. This testimony provided under penalty of perjury is not credible.

In fact, income and expenses have remained somewhat constant for Debtor over the years, with income increasing at a very respectable rate:

Case	Gross Income	Expenses	Disposable Income
14-27476 (Dckt. 141)	$12,186.59	$3,561.00	$5,987.22
16-21304 (Dckts. 1, 66)	$11,790.82	$3,350.71	$5,650.00
17-22226 (Dckt. 8)	$13,382.89	$4,343.08	$7,300.00
19-22078 (Dckt. 1, 73)	$17,306.11	$3,691.23	$8,000.00

The above does not show any sudden expenses or hardships, and a review of the pleadings filed in all of Debtor's prior cases reveals this is the first time these hardships have been asserted.

Creditor points to the growing secure and tax claims as an indicator of bad faith. In this case, the Franchise Tax Board filed Proof of Claim, No. 1 asserting a claim of $57,887.09. The Internal Revenue filed Proof of Claim, No. 2 asserting a claim of $63,381.07. Since the prior case, the FTB's claim has increased by 786 percent, and the IRS' claim has increased by 86.5 percent.

It is unclear how those claims could have increased so dramatically if the prior case were being prosecuted in good faith. Debtor's first proposed plan provided for a dividend of 82 percent ($166,979.98). Dckt. 2. Now, presumably in light of the tax claims having been filed, Debtor is proposing a 0 percent plan.

In coming back to Debtor's explanations, another issue with their credibility exists. Debtor does not actually provide any dollar amounts to any of the expenses. The court is told there were expenses for the care of various family members, including mental health and posthumous expenses. However, it is doubtful those expenses reached $80,000.00, which is roughly the amount by which tax claims increased between the prior and current case.

Debtor's most recent case, no. 17-22226, was dismissed January 16, 2019 after a $30,389.42 delinquency in plan payments. Roughly four months, where Debtor had a disposable monthly income of either $7,300.00 or $8,000.00, passed between dismissal and filing of this case. Therefore, Debtor should be sitting on a very modest $60,000+ surplus.

Debtor has not attempted to explain where those funds went.

DISMISSAL WITH PREJUDICE

The Motion requests that this, the fourth recent bankruptcy case filed by Debtor, be dismissed with prejudice. Generally, a dismissal is without "prejudice" unless otherwise ordered by the court "for cause." 11 U.S.C. § 349(a). The "prejudice" is that normally the dismissal of a bankruptcy case does not result in the Debtor not being able to obtain a discharge of the debts in the dismissed case in a subsequent case. *Id.*

The Seventh Circuit Court of Appeals addressed the concept of dismissal with prejudice in In re Hall, 304 F.3d 743, 746 (7th Cir. 2002), stating:

> Normally, a dismissal of a bankruptcy petition has no long-term consequences for the debtor's ability to re-file. *Umbenhauer v. Woog*, 969 F.2d 25, 30 (3d Cir. 1992). There is an exception, however, if the court "for cause" orders that the dismissal of the case is with prejudice. See 11 U.S.C. § 349(a). In that instance, the order may either bar the later dischargeability of debts that would have been dischargeable in the dismissed proceeding, or it may preclude the debtor from filing a subsequent petition related to those debts. *Id.* **Dismissals with prejudice are therefore generally reserved for extreme situations, such as when a debtor conceals information from the court, violates injunctions, files unauthorized petitions, or acts in bad faith**. *Id.*; *In re Tomlin*, 105 F.3d 933, 937 (4th Cir. 1997) (filing six bankruptcy petitions in seven years); *In re Martin-Trigona*, 35 B.R. 596, 601 (Bankr. S.D.N.Y. 1983).

The Ninth Circuit Court of Appeals addressed dismissal with prejudice in *Leavitt v. Soto* (*In re Leavitt*), 171 F.3d 1219, 1223-1224 (9th Cir. 1999), stating:

> Generally, dismissals are ordered without prejudice to carry out the remedial purpose of the Bankruptcy Code and to restore property rights, insofar as is practicable, to the same positions as when the case was first filed, but without affecting the disposition of debts. *In re Tomlin*, 105 F.3d 933, 936-37 (4th Cir. 1997); *In re Lawson*, 156 B.R. 43, 45 (9th Cir. BAP 1993). **The phrase "unless the court, for cause, orders otherwise" in Section 349(a) authorizes the bankruptcy court to dismiss the case with prejudice.** *See also In re Tomlin*, 105 F.3d at 937; 3 Collier on Bankruptcy § 369.01, at 349-2-3 (15th ed. 1997). A dismissal with prejudice bars further bankruptcy proceedings between the parties and is a complete adjudication of the issues. *Tomlin*, 105 F.3d at 936-37.
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> "Cause" for dismissal under § 349 has not been specifically defined by the Bankruptcy Code. For Chapter 13 cases, §§ 1307(c)(1) through (10) provide that the bankruptcy court may convert or dismiss, depending on the best interests of the creditors and the estate, for any of ten enumerated circumstances. Although not specifically listed, bad faith is a "cause" for dismissal under § 1307(c). *Eisen*, 14 F.3d at 470 ("A Chapter 13 petition filed in bad faith may be dismissed 'for cause' pursuant to 11 U.S.C. § 1307(c)."); *In re Hopkins*, 201 B.R. at 995 (holding that the debtors' filing of frivolous tax returns with no intention to pay taxes warranted dismissal of a Chapter 13 petition for bad faith). Therefore, it follows that **a finding of bad faith based on egregious behavior can justify dismissal with prejudice**. *Tomlin*, 105 F.3d at 937; *In re Morimoto*, 171 B.R. at 86; *In re*

> *Huerta*, 137 B.R. 356, 374 (Bankr. C.D.Cal. 1992). We hold that bad faith is "cause" for a dismissal of a Chapter 13 case with prejudice under § 349(a) and § 1307(c).

In *Leavitt v. Soto* (*In re Leavitt*), 171 F.3d at 1224-1225 (*See also, In re Khan*, 846 F.3d 1058, 1065 (9th Cir. 2017)), the Ninth Circuit stated that this analysis is a consideration of bad faith in the dismissal of a Chapter 13 case with prejudice as follows:

> Bad faith, as cause for the dismissal of a Chapter 13 petition with prejudice, involves the application of the "totality of the circumstances" test. *Eisen*, 14 F.3d at 470. The bankruptcy court should consider the following factors:
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> > (1) whether the debtor "misrepresented facts in his [petition or] plan, unfairly manipulated the Bankruptcy Code, or otherwise [filed] his Chapter 13 [petition or] plan in an inequitable manner," id. (citing *In re Goeb*, 675 F.2d 1386, 1391 (9th Cir. 1982));
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> > (2) "the debtor's history of filings and dismissals," id. (citing *In re Nash*, 765 F.2d 1410, 1415 (9th Cir. 1985));
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> > (3) whether "the debtor only intended to defeat state court litigation," id. (citing *In re Chinichian*, 784 F.2d 1440, 1445-46 (9th Cir. 1986)); and
> >
> > (4) whether egregious behavior is present, *Tomlin*, 105 F.3d at 937; *In re Bradley*, 38 B.R. 425, 432 (Bankr. C.D. Cal. 1984).
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> A finding of bad faith does not require fraudulent intent by the debtor.
>
> > Neither malice nor actual fraud is required to find a lack of good faith. The bankruptcy judge is not required to have evidence of debtor illwill directed at creditors, or that debtor was affirmatively attempting to violate the law - malfeasance is not a prerequisite to bad faith.
>
> *In re Powers*, 135 B.R. 980, 994 (Bankr. C.D. Cal. 1991) (relying on *In re Waldron*, 785 F.2d 936, 941 (8th Cir. 1986)).

The evidence presented in support of the Motion, the files in this and the prior bankruptcy cases filed and not prosecuted by Debtor, clearly support a finding that Debtor, and each of them, have not filed or attempted to prosecute this bankruptcy case in good faith.

It is significant that these two debtors have elected to not provide any counter testimony in this Contested Matter. They have chosen not to educate the court as to facts and events which counter the structure of bad faith that has been assembled by Movant from the current and prior bankruptcy cases.

Debtor, and each of them, have used this case as one in a series of bankruptcy case filings in a bad faith scheme to hinder and delay creditors, and effectively defraud them out of the monthly net income that Debtor had committed to pay under the various plans, in the various Chapter 13 cases, which Debtor filed and then failed to perform.

Debtor, and each of them, have actively worked with knowledgeable bankruptcy counsel to manipulate, improperly use, and abuse the Bankruptcy Code to divert monies from the bankruptcy estate and plan, not pay creditors, and "live in bankruptcy protection" to the prejudice of creditors (as well as the bankruptcy estates from which property of the estates, the monthly net income, was diverted by Debtor).

Debtor, and each of them, have misrepresented the plans that they purport to present in good faith and "promise" to perform. As discussed above, Debtor has "used" the Bankruptcy Code to divert more than $100,000 in monthly net income instead of funding their Chapter 13 plans as "promised."

In the prior bankruptcy cases, though the court continued hearings on Motions to Dismiss filed by the Chapter 13 Trustee, the Debtor failed to fulfill the promises Debtor made to prosecute those cases, which in addition to the substantial defaults in plan payments, include the following.

A. Case 17-22226

Though promising diligently to prosecute a loan modification and being granted a one hundred and one (101) day continuance, Debtor failed to seek approval of a loan modification or demonstrate that Debtor was in good faith pursuing the represented loan modification. 17- 22226; Civil Minutes, Dckts. 90, 91.

B. Case 16-21304

Though promising to diligently file evidence of how Debtor could generate an extra $10,000+ to cure the defaults in the case and having been given an eighty four (84) day continuance to diligently prosecute the case and present he promised evidence, Debtor failed to so do. 16-21304; Civil Minutes, Dckts. 80, 92, 95.

Over five years Debtor has filed five bankruptcy cases, with four dismissed for failure to prosecute, failure to make plan payments, and failure to present evidence to support what they have promised to do. Debtor has grossly defaulted in plan payments, though by Debtor's own admissions/evidence Debtor has substantial monthly net income to easily make the required payments.

Debtor has used these series of bankruptcy cases as part of Debtor's scheme to delay creditors, prevent foreclosures, not pay debts, and divert significant monies, amounts in excess of $100,000 from creditors and the bankruptcy estates or plan estates (if there was a confirmed plan) in the prior bankruptcy cases.

Debtor, and each of them, intentionally and willfully, with the assistance of multiple experienced bankruptcy counsel, have abused and misused the bankruptcy laws to improperly hinder and delay creditors.

Debtor's intentions and affirmative conduct in these series of bankruptcy cases has not been

to propose, confirm, and perform a Chapter 13 Plan in good faith.

Though the Motion clearly seeks dismissal with prejudice; with the Motion being filed using the notice procedure specified under Local Bankruptcy Rule 9014-1(f)(1) for which written opposition is required; Debtor, and each of them, have chosen to merely have their attorney file an opposition argument, but Debtor, and each of them, have stayed away from providing any evidence or testimony in opposition.

The court has carefully considered the Motion, supporting and opposing pleadings, this case and the history of Debtor's repeated failed filing of bankruptcy cases. The requested relief of dismissal with prejudice is proper under these facts and the law.

Based on the foregoing, cause exists to dismiss this bankruptcy case with prejudice. The Motion is granted, and the case is dismissed with prejudice. [FN. 1.]

FN. 1. As stated by the Ninth Circuit Court of appeals in *Colonial Auto Ctr. v. Tomlin* (*In re Tomlin*), 105 F.3d 933, 937 (9th Cir. 1977), the effect of a dismissal with prejudice is stated to be as follows:

> Indeed, although the Bankruptcy Code establishes a general rule that dismissal of a case is without prejudice, it also expressly grants a bankruptcy court the authority to "bar the discharge, in a later case . . . of debts that were dischargeable in the case dismissed . . . ." 11 U.S.C. § 349(a) (1994); 3 Collier on Bankruptcy § 349.02[2] (15th ed. rev. 1994).

Request for Injunction

Creditor also requests in the Motion that the court bar Debtor from filing a bankruptcy case for at least a year. In substance, this is a request for an injunctive relief.

Federal Rule of Bankruptcy Procedure 7001 provides that a proceeding to obtain an injunction or other equitable relief is an adversary proceeding. Creditor has not provided authority for the court to grant such relief pursuant to this Contested Matter.

The Bankruptcy Code does in some instances allow injunctive relief without bringing an adversary proceeding. For example, 11 U.S.C. § 362(d)(4) allows relief preventing automatic stay from going into effect as to certain property in any future case. However, Creditor has not sought such relief.

Therefore, the request for injunctive relief barring Debtor from filing a bankruptcy case for at least year is denied.

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

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

The Motion to Dismiss the Chapter 13 case filed by Creditor, Robert Guerra ("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 Motion to Dismiss is granted, and the case is dismissed with prejudice, by which Debtor Eduardo Mendez Ortega, Jr. and Debtor Marie Esquivel Ortega, and each of them, are barred from obtaining a discharge of any and all debts that would have been dischargeable in the current bankruptcy case, No. 19-22078.

IT IS FURTHER ORDERED that the request for injunctive relief barring Debtor from filing a bankruptcy case for at least year is denied.

10. **18-20885-E-13 JHW-1** | **ANTHONY/WENDY GIANOLA** Peter Macaluso | **MOTION FOR RELIEF FROM AUTOMATIC STAY** **7-5-19 [111]**

MERCEDES-BENZ FINANCIAL SERVICES USA LLC VS.

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, parties requesting special notice, and Office of the United States Trustee on July 5, 2019. By the court's calculation, 39 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.

Mercedes-Benz Financial Services USA LLC ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2013 Mercedes-Benz C250W, VIN ending in 9745 ("Vehicle"). The moving party has provided the Declaration of Amy Wetch to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Anthony Paul Gianola and Wendy Elaine Gianola ("Debtor").

Movant argues cause for relief exists because Debtor has missed plan payments in this case.

On April 30, 2019, the court issued an Order granting a motion to value Movant's secured claim at $8,000.00. Order, Dckt. 31. The Confirmed Plan provides for monthly payments of $3,650.00 beginning November 2018, and payments of $150.00 towards Movant's claim. Amended Plan, Dckt. 60.

Exhibit E filed by Movant is a payment history created by the Chapter 13 Trustee. Dckt. 116. The payments history reflects $3,286.46 having been paid to Movant's claim. This is roughly 22

payments of $150.00.

CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on July 24, 2019. Dckt. 124. Trustee confirms Debtor is delinquent under the confirmed Plan by $13,585.12, and notes a motion to dismiss the case is set for August 21, 2019. Trustee also notes $3,286.46 has been paid to Movant thus far.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on July 29, 2019. Dckt. 129. Debtor asserts that Debtor is current in payments to the Movant. Debtor argues the following:

1. Debtor is actually ahead in payments to Movant's claim.

2. The Vehicle is necessary for Debtor's transportation.

3. Debtor intend to file a modified plan.

4. The Information Sheet filed by Movant is misleading because it lists missed plan payments, not missed post-petition payments on Movant's claim.

5. Debtor's modified plan will propose selling Debtor's real property.

DISCUSSION

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).

Here, there is no dispute that Debtor is actually ahead of schedule in payments made on Movant's claim. $3,286.46 has been paid on a $8,000.00 claim.

What Movant argues is that cause for relief exists based on a delinquency in plan payments. This argument is not really explained. It is unclear why Movant is not adequately protected where there is no post-petition delinquency on its claim.

Furthermore, Movant's argument is misleading. At a glance, it reads like there is a delinquency on Movant's claim because that claim is being paid through the plan. However, Movant's claim is already paid through September 2019.

The Motion is denied without prejudice.

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 Mercedes-Benz Financial Services USA 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** the Motion for Relief from the Automatic Stay is denied without prejudice.