UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

November 18, 2014 at 1:30 p.m.

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1. 14-29845-E-13 IVAN KOSOVSKIY
JFL-1 Pro Se

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ORDER RETAINING JURISDICTION
10-16-14 [14]

SETERUS, INC. VS.
CASE DISMISSED 10/20/14

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Final Ruling: No appearance at the November 16, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee, and Office of the United States Trustee on October 16, 2014. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

Seterus, Inc., the subservicer for Federal National Mortgage Association ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 3811 Northhaven Drive, Rocklin, California (the "Property"). Movant has provided the Declaration of Philip Leavenworth to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Leavenworth Declaration states that there are no post-petition

defaults in the payments on the obligation secured by the Property. The Declaration also provides evidence that the loan has been in default, with monthly payments owing since December 2011. The Leavenworth Declaration also asserts that Movant held a Trustee's Sale of the Property on October 1, 2014, wherein title reverted to Movant. Unbeknownst to Movant, Ivan Kosovskiy ("Debtor") filed the instant case on October 1, 2014. Movant did not receive notice of the case filing until October 8, 2014.

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 $431,767.80 (including $431,767.80 secured by Movant's first deed of trust), as stated in the Leavenworth Declaration. The value of the Property is determined to be $150,000.00, as stated in Schedules A and D filed by Debtor.

Movant seeks retroactive relief of the automatic stay for its trustee's sale in this case pursuant to *In re National Environmental Waste Corp.*, 129 F.3d 1052 (9th Cir. 1997) and *In re Fjeldsted*, 293 B.R. 12 (B.A.P. 9th Cir. 2003). Movant alleges that Debtor engaged in inequitable conduct because Debtor and the co-owners of the Property have filed eight (8) bankruptcy cases since February 2011. Nearly every case was dismissed shortly after it was filed for failure to comply with procedures, causing significant delays in Movant's efforts to foreclose on the Property.

Although the instant case was dismissed on October 20, 2014, the court maintains the right to annul the automatic stay after dismissal. *See In re Aheong*, 276 B.R. 233, 248 (B.A.P. 9th Cir. 2002). This is especially appropriate in this situation, where Debtors have acted repeatedly in a fashion that prevented Movant from exercising its ability to foreclose on the Property. Debtor has filed three prior bankruptcy cases a Chapter 7 in which he received a discharge and two Chapter 13 cases which have been dismissed. No Chapter 13 Plan was filed in this case and Debtor has not attempted to prosecute this case in good faith. Also, Movant held its Trustee's sale on the day Debtor filed the instant case, without knowledge of that filing. The situation surrounding the instant Motion allows the court to exercise its ability to retroactively grant Movant relief from the automatic stay, even after the case has been dismissed.

The court shall issue an order retroactively 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.

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 Seterus, Inc., the subservicer for Federal National Mortgage Association ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and

good cause appearing,

IT IS ORDERED that the automatic stay provisions of 11 U.S.C. § 362(a) are annulled effective October 1, 2014, the filing date of this case, authorize the nonjudicial foreclosure sale of Seterus Inc., its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law on October 1, 2014 and for the purchaser at the sale to obtain possession of the real property commonly known as 3811 Northhaven Drive, Rocklin, California.

No other or additional relief is granted.

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2. 11-36470-E-13 WASIF/IRUM ASGHAR
WW-3

CONTINUED OBJECTION TO CLAIM OF STATE BOARD OF EQUALIZATION, CLAIM NUMBER 29 AND/OR MOTION TO CONDITIONALLY DETERMINE THE VALUE OF THE CLAIM PENDING RESOLUTION OF THE APPEAL
7-15-13 [73]

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

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

Below is the court's tentative ruling.

Local Rule 3007-1 Objection to Claim - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 15, 2013. By the court's calculation, 57 days' notice was provided. 44 days' notice is required.

The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here the moving party reused a Docket Control Number. This is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). The respondent Creditor having filed an opposition, the court will address the merits of the motion. 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 decision of the court is to continue the Evidentiary Hearing Scheduling Conference to 3:00 p.m. on xxxxxxxxxxxxxxxxxx.

PROCEDURAL HISTORY

At the September 10, 2013 hearing on the Objection to Claim, the court continued the hearing so that the Objection could be heard after the State Board of Equalization's review of Debtor's appeal. Dckt. No. 85. The court further stated that if the review had not been completed in a timely manner, this court would have to determine the issue as a necessary proceeding for the administration of federal law.

At the March 4, 2014 hearing, the parties reported that an offer for settlement in being reviewed by the State Board of Equalization and requested an additional 60 day continuance. The court continued the hearing.

A review of the case docket at the May 6, 2014 hearing showed that nothing was filed by either the Debtors or the Board of Equalization, to show whether the determination on the appeal has been made. The court continued the Objection to Proof of Claim No. 29 of the State Board of Equalization to this hearing date to bring the objection to conclusion pursuant to 11 U.S.C. § 505.

REVIEW OF OBJECTION

The Proof of Claim at issue, listed as claim number 29 on the court's official claims registry, asserts a $37,470.60 claim alleging a priority tax debt for the tax period of July 1, 2007 through June 30, 2008 and indicates the debt is contingent upon dual determination from account no. SR KH 100-713773.

The Debtor objects to the Proof of Claim on the basis that he was not the responsible party during the time period for which the tax claim is asserted. Debtor Wasif Asghar asserts that he was involved in an accident and due to the illness relating thereto was not involved in the operation of the business during that period.

Debtor asserts that the former business partner Qamaruddin Shaikh was in fact operating the business during the relevant time period. Debtor states that the State Board of Equalization has not yet completed its review and investigation with respect to the dual determination but that their claim should be disallowed in its entirety as Debtor was not the responsible party and should not be held liable for the claim.

CREDITOR'S OPPOSITION

Creditor California State Board of Equalization ("SBE") states that Debtors scheduled a disputed SBE 2008 tax claim in Schedule "E," in the amount of $1.00 allegedly incurred by QS Ventures, Inc., for which Debtor, Wasif Asghar, disclosed an ownership interest in Paragraph 18 of his

Statement of Financial Affairs. SBE timely filed its Proof of Claim No. 29-1 in the amount of $37,470.60 (the "Claim"), which is asserted as a priority, but contingent, tax claim.

Although SBE does not oppose Debtors' request in Paragraph 11 of the Claim Objection for a six-month temporary suspension in Chapter 13 plan distributions on SBE's Claim pending administrative review, SBE questions and opposes Debtors' concurrent request in Paragraph 11 of the Claim Objection for a bankruptcy court adjudication of SBE's tax-based Claim on its merits under Federal Rule of Bankruptcy Procedure 9014.

DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

Debtor seeks the this court to disallow the claim of SBE through a determination that he was not the "responsible party" and his therefore not personally liable for the tax obligation. Both parties agree that the tax appeal is currently pending, which addresses the same issues.

AUGUST 8, 2014 STATUS REPORT BY THE STATE BOARD OF EQUALIZATION

Tax creditor, the California State Board of Equalization (identified as the "SBE") submits a Status Report on the Debtors' Objection to Claim of State Board of Equalization, or in the Alternative, to Conditionally Determine the Value of the Claim Pending Resolution of the Appeal.

On July 15, 2013, the Debtors filed their Claim Objection against the SBE. This was because Chapter 13 Trustee, in compiling a list of timely filed claims, indicated that the plan may not be feasible, and that case dismissal may be warranted. Dckt. No. 51. The Court continued the original September 10, 2013 hearing on the Claim Objection to March 4, 2014. Dckt. No. 87, then to May 6, 2014, Dckt No. 90, then to August 19, 2014, Dckt. No. 93, so that the Debtors may engage in out of court settlement discussions with the SBE, and pursue their administrative appeals rights with the SBE's Appeals Division for a re-determination of tax.

On April 13, 2012, the contested tax was billed to Debtor, Wasif Asghar, in his capacity as a "responsible person" for the now-ceased QS Ventures, Inc., because its tax debts to the SBE remain outstanding. Cal. Rev. & Tax. Code § 6829; Cal. Code Regs., tit. 18 § 1702. The federal counterpart "responsible person" tax statute is at 26 U.S.C. § 6672, and is frequently litigated in bankruptcy courts. 11 COLLIER ON BANKRUPTCY TAXATION §TX15.02 (2014).

SBE states that on or about April 2, 2014, the SBE informed the Debtors' counsel that the SBE rejected the Debtors' written tax settlement proposal under the guidelines of Cal. Rev. & Tax. Code § 7093.5(c).

The Debtors currently have a scheduled conference with a hearing officer with the SBE's Appeals Division on September 4, 2014, designated as Case Id. 611390. See Cal. Code Regs., tit. 18 § 5264. Because this multi-level appeals process has not yet concluded, this contested "responsible person" tax remains contingent for bankruptcy purposes. Notwithstanding this upcoming conference, the SBE states that it concurs with the Court's discussion in its previous minute orders that the Court has permissive jurisdiction under 11 U.S.C. § 505(a) for a determination of a contingent state tax liability, as a necessary proceeding for the administration of federal law.

Creditor again asserts that the Debtors have not met their burden of proof in objecting to the state tax claim. As briefed in the SBE's August 22, 2013 Opposition to the Debtors' Objection to the Claim of the California State Board of Equalization, or in the Alternative, to Conditionally Determine the Value of the Claim Pending Resolution of the Appeal ("Opposition"), Dckt. No. 82, in the context of a claim objection to a state tax, the burden of proof is determined by state tax law. *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 20 (2000).

Under California law, a tax assessment billing by a revenue agency is presumed to be correct, and the burden of proof to show otherwise stays with the taxpayer. Flying Tiger Line v. State Bd. of Equalization, 157 Cal. App. 2d 85, 99 (1958); 67B AM. JUR. 2D Sales and Use Taxes § 214 (2013). A taxpayer who objects to his or her "responsible person" tax liability bears the burden of proof. *Latin v. State Bd. of Equalization* (*In re Latin*), 2009 Bankr. LEXIS 4523 *23-24 (B.A.P. 9th Cir. 2009) (explaining that Sales and Use Tax Regulation 1702.5 requires that a taxpayer provide evidence that he or she lacked responsibility or willfulness).

SBE argues that Debtor Wasif Asghar has was not sufficiently controverted the contention that he was the responsible person for taxes of the QS Ventures, Inc, during the relevant time period. As explained in SBE's Opposition to the Objection, Debtors' proof consisted only of a single Kaiser Permanente doctor's visit on or about July 31, 2007. SBE asserts that his in and of itself does not demonstrate that Debtor, Wasif Asghar, at all relevant times, was not a person responsible for payment of California sales taxes on behalf of QS Ventures, Inc. The Debtors have not met their burden of proof. Thus, SBE requests that the Objection be overruled.

SCHEDULING OF AN EVIDENTIARY HEARING

This bankruptcy case was filed on July 1, 2011 (three years ago). Creditor filed its proof of claim on November 30, 2011 (two years and eight months ago). Proof of Claim No. 29. This Objection to Creditor's Claim was filed on July 15 2013 (now more than one year ago).

The parties, now more than three years into this case, have been unable to resolve this dispute. The court has continued and re-continued the hearing to afford good faith, bona fide settlement discussions to be conducted. After such good faith efforts, there is no resolution. Therefore, the court determines that it is necessary for the claims objection process to proceed and this court determine what claim, if any, is allowed in this case.

The Evidentiary Hearing Scheduling Conference was conducted on November 18, 2014.

NOVEMBER 18, 2014 SCHEDULING CONFERENCE

The California State Board of Equalization filed a Status Report on November 12, 2014. Dckt. 99. The Board reports that written discovery has been exchanged with the Debtors' tax counsel. Further, that the discovery and ongoing communications have narrowed the issues and the parties believe that discovery should be completed by November 24, 2014.

The Board requests that the court set a further status conference, rather than setting the matter for an evidentiary hearing, to allow the parties to continue their good faith negotiations and focus on settling this matter.

The Parties are represented by their respective knowledgeable counsel. Affording these Parties and their counsel the opportunity to attempt and achieve an agreed resolution of this dispute is warranted as part of the diligent prosecution of this objection.

The Evidentiary Hearing Scheduling Conference is continued to 3:00 p.m. on xxxxxxxxxxxx.

3. 14-25376-E-13 KEVIN/BREE SEARS — MOTION FOR RELIEF FROM AUTOMATIC STAY
AJP-3 Douglas Jacobs — 10-28-14 [86]

CORY ADAMS VS.

THIS CONTESTED MATTER IS CONTINUED TO 3:00 P.M. ON NOVEMBER 18, 2014 TO BE HEARD IN CONJUNCTION WITH THE MOTIONS TO DISMISS THIS BANKRUPTCY CASE

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 24, 2014. By the court's calculation, 25 days' notice was provided. 14 days' notice is required.

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

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

Cory Adams ("Movant") seeks relief from the automatic stay with respect to an enforcement of a fee award by the State Bar of California against Kevin Sears ("Debtor") (the "Action"). The moving party has provided the Declaration of Arthur Pollock to introduce evidence. Movant asserts he was awarded a fee refund of $30,000.00 by an arbitration panel on August 15, 2012. The award was based on Debtor's substandard performance as Movant's defense attorney in a felony case. Movant commenced a State Bar of California Case to pursue this award in April 2013. Exhibit B, Dckt. 88.

Movant has provided a properly authenticated copy of the arbitration award and the State Bar letter regarding enforcement to substantiate its claim.

Movant has presented a colorable claim for his ability To enforce the arbitration award. As stated by the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings which address issues arising only under 11 U.S.C. Section 362(d). *Hamilton*, 2005 Bankr. LEXIS 3427 at *8-*9 (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief as part of a motion for relief from the automatic stay Contested Matter (Fed. R. Bankr. P. 9014).

The Chapter 13 Trustee has filed an Opposition to the Motion. Dckt. 94. The Opposition focuses on several key flaws in the present Motion. Though asking for relief, Movant does not state the statutory basis (grounds_ for the relief). Further, Movant does not state for what purposes the relief is to be granted. Finally, the Trustee reads the Motion as Movant seeking relief from a third-party, the California State Bar, an entity for which Movant has not shown it has standing to assert such rights.

Movant filed a response, stating that the grounds are "for cause" arising under 11 U.S.C. § 362(d)(1). Dckt. 105. Movant asserts the conduct in the present bankruptcy case and the Debtors' prior bankruptcy case demonstrate that the bankruptcy case is not being prosecuted in good faith. Further, that the relief sought is to proceed with administrative proceedings before the State Bar, not obtain relief for the California State Bar.

REVIEW OF MOTION

The court's analysis begins with the Motion itself, which must state

with particularity (Fed. R. Bankr. P. 9013) the grounds upon which the relief is based and the relief itself. The court's review of the Motion identifies the following grounds and relief requested.

a. Movant has obtained a final, binding arbitration award of $30,000.00 against Kevin Sears, Movant's former attorney.

b. Movant seeks relief from the automatic stay "so that the State Bar of California, at [Movant's] request, may commence enforcing the award pursuant to the administrative rules of procedure governing such enforcement."

c. The Motion does not state the scope of the relief, such as (1) suspension of Mr. Sears' license to practice law, (2) garnishment of Mr. Sears' post-petition wages (property of the bankruptcy estate), or (3) levy and execution against property of Mr. Sears (property of the bankruptcy estate).

d. The relief requested is to modify the automatic stay "so that enforcement proceedings currently pending with the State Bar of California may go further against the [Mr. Sears]."

Motion, Dckt. 86.

The Declaration of Movant's counsel is provided in support of the Motion. Dckt. 88. The Declaration does not describe the specific enforcement activities which Movant seeks to pursue.

DISCUSSION

Though the court can fairly read the Motion as the Movant seeking relief from the automatic stay so that he can proceed before the California State Bar, the court cannot identify what actual relief is requested. It may be limited to administrative proceedings which condition or suspend Mr. Sears' license to practice law. It may include the enforcement of that award by the Superior Court, and that court taking control over property of the estate. Since property of the estate is subject to the exclusive jurisdiction of the federal court, 28 U.S.C. § 1334(e), granting of relief so that other courts and administrative bodies can exercise control over property of the estate must be carefully structured.

Based on the sweeping, "give me relief to enforce the arbitration award however it can be enforced" nature of the relief requested, the court denies the motion without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by Cory Adams ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Relief From the Automatic Stay to allow Cory Adams and his agents, representatives and

successors, to exercise and enforce all nonbankruptcy rights and remedies to pursue the fee arbitration award is denied without prejudice.

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4. 13-21878-E-7 THOMAS EATON
14-2106
RICE V. EATON

STATUS CONFERENCE RE: AMENDED COMPLAINT
9-9-14 [15]

Plaintiff filed a First Amended Complaint on September 9, 2014 (Dckt. 15) and Defendant-Debtor filed his Answer on October 8, 2014 (Dckt. 28). On October 28, 2014 Plaintiff filed a Motion to Strike the Affirmative Defenses in the Answer (Dckt. 30, DCN LR-2).

The Complaint alleges and the Answer admits (1) jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 157 and 1334, and 11 U.S.C. § 523. Further, that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). First Amended Complaint ¶¶ 1 and 2; Answer to First Amended Complaint ¶¶ 1 and 2.

The First Amended Complaint seeks a determination that the debt owed to Plaintiff is nondischargeable pursuant to 11 U.S.C. § 523(a)(4). The Second Cause of Action seeks to have the Defendant-Debtor's Chapter 7 Discharge revoked based on: (1) Defendant-Debtor concealing $4,800.00 in a bank account from the Trustee; (2) Defendant-Debtor failing to disclose the existence of bank accounts held in his name and his daughter's name; (3) $131,000 of monies held for Defendant-Debtor in his family law attorney's trust account; (4) failure to disclose to the Chapter 7 Trustee 12 other accounts of the Defendant-Debtor; (5) Defendant-Debtor materially understating his annual income to be $233,772 when it is $727,162; (6) Defendant-Debtor understating his taxes; (7) Defendant-Debtor not accurately stating the value of a whole life insurance policy which he has paid into $2,500 a month; (8) Defendant-Debtor materially overstating his monthly health insurance expense to be $1,288.00, when he has previously stated it is $350 in other financial statements; and (9) Defendant-Debtor has provided an incorrect copy of a tax return to the Trustee and has failed to provide the correct amended return. Further, the discharge should be revoked because of Defendant-Debtor's failure to disclose the support obligation to Plaintiff, failed to truthfully and accurately state his income and expenses, and failed to explain the loss of assets.

5. 13-21878-E-7 THOMAS EATON — MOTION TO STRIKE
14-2106 LR-2 — 10-28-14 [30]
RICE V. EATON

Tentative Ruling: The Motion to Strike has not been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1).

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

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Insufficient Notice Provided.

Correct Notice Not Provided. No Proof of Service for this Motion and supporting pleadings appears on the Docket. Even if it was served on the day the Motion was filed, October 28, 2014, only 21 days notice was provided. 28 days' notice is required.

The Motion to Strike is set for a final hearing at 1:30 p.m. on xxxxx. Opposition to the Motion shall be filed and served on or before xxxxx, 2014.

Lorain Rice, the pro se Plaintiff, has filed this Motion to Strike the affirmative defenses stated in the answer filed by Thomas Eaton, the Defendant-Debtor. Dckt. 30. The Notice of Hearing merely states that on November 6, 2014 (a typographic error in the body of the Notice) Plaintiff will move for the court to strike the affirmative defenses. Actually, the Plaintiff has already so moved in the Motion itself.

The first challenge to the Motion is that it was not set on the required 28 days notice, but only 20 days. Second, the Notice does not state that written opposition is required fourteen days before the hearing. Local Bankruptcy Rule 9014-1(a), (f)(1), (f)(2)(A). Additionally, the motion is to be filed as a separate pleading from the points and authorities. Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents.

This Adversary Proceeding is one in which Plaintiff seeks to have a determination that the child support obligations upon which her claim is based is nondischargeable and that the Defendant-Debtor's discharge should be revoked. This Adversary Proceeding appears to have all of the earmarks of contentious, lay waste to the opposition, family law state court litigation. Such proceeds require the court to be ever vigilant over the Adversary Proceeding. FN.1.

FN.1. War of the Roses is a 1998 Moving directed by Danny DeVito which stars Michael Douglas, Kathleen Turner, and Danny DeVito. The storyline for the movie relates to the unrelenting campaign spouses wage against the other in a divorce battle over who will be victorious in retaining their home, and successfully punishing the other. One description of the plot line is,

> “In an effort to win the house, Oliver offers his wife a considerable sum of cash in exchange for the house, but Barbara still refuses to settle. Realizing that his client is in a no-win situation, Gavin advises Oliver to leave Barbara and start a new life for himself. In return, Oliver fires Gavin and takes matters into his own hands. At this point, Oliver and Barbara begin spiting and humiliating each other in every way possible, even in front of friends and potential business clients. Both begin destroying the house furnishings; the stove, furniture, Staffordshire ornaments, and plates. Another fight results in a battle where Barbara nearly kills Oliver by using her monster truck to ram Oliver's antique automobile. In addition, Oliver accidentally runs over Barbara's cat in the driveway with his car. When Barbara finds out, she retaliates by trapping him inside his in-house sauna, where he nearly succumbs to heatstroke and dehydration.”

Www.Wikipedia.org and www.imbd.com.

Such battles are not permitted to be transported to federal court.

Defendant-Debtor’s Answer to the First Amended Complaint states twenty affirmative defenses. Dckt. 28. For the body of the Answer, for most of his responses Defendant Debtor merely states “Defendant can neither admit nor deny the allegation set forth in paragraph ‘x’ of the complaint.” Defendant-Debtor makes this “I cannot (or will not) admit or deny” statement for 26 of the 30 paragraphs of the First Amended Complaint.

Federal Rule of Civil Procedure 8(b)(1)-(6) and Federal Rule of Bankruptcy Procedure 7008 require that a defendant either admit or deny the allegations in the Complaint. “A denial must fairly respond to the substance of the allegation.” Fed. R. Civ. P. 8(b)(2). While a defendant may deny an allegation based on a lack of information and belief, must so expressly state that the defendant lacks knowledge or information to form a belief about the truthfulness of the allegation and thereon denies the allegation. Fed. R. Civ. P. 8(b)(5).

The Defendant-Debtor has failed to deny or admit at least 26 of the allegations in the First Amended Complaint, stating that he can “neither admit or deny the allegation” of the specified paragraphs. Failure to deny an allegation is deemed to be an admission of the allegation. Fed. R. Civ. P. 8(b)(6); See 8 Moore’s Federal Practice Civil § 8.07.

AFFIRMATIVE DEFENSES STATED

The Defendant-Debtor asserts 20 affirmative defenses in his Answer. Each affirmative defense states only the legal principal upon which the affirmative defense is based (such as “fails to state a claim sufficient to constitute a cause of action” and “Plaintiff failed to mitigate damages.” There are no affirmative allegations in the general allegations for the

Answer.

Federal Rule of Civil Procedure 8(c) requires a defendant to state any affirmative defenses in the answer. The lower courts differ on whether affirmative defenses must be comply with the "plausibility" standard required for the Complaint enunciated in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007). In *Barnes v. AT&T Pension Benefit Plan*, 718 F.Supp. 2d 1167 (N.D. Cal. 2010), the court concluded that the general pleading requirements of Federal Rule of Civil Procedure 8(a) apply to affirmative defenses and a plausible defense must be stated, not merely a legal conclusion or principal. Other courts have held that stating a plausible affirmative defense is not required, but only require only that it give fair notice of the defense. *Baroness Small Estates, Inc. V. BJ's Restaurants, Inc.*, 2011 U.S. Dist. LEXIS 86917 (C.D. Cal. 2011).

MOTION TO STRIKE

Federal Rule of Civil Procedure 12(f), as incorporated by Federal Rule of Bankruptcy Procedure 7012, provides that the court may strike from any pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act on its own or on a motion made by a party. *Id.* The purposes of a Rule 12(f) motion is to avoid spending time and money litigating spurious issues. *Barnes v. AT & T Pension Ben. Plan Nonbargained Program*, 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010)(citing *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir.1993)). A matter is immaterial if it has no essential or important relationship to the claim for relief pleaded. *See Fogerty*, 984 F.2d at 1527. A matter is impertinent if it does not pertain and is not necessary to the issues in question in the case. *See id.*

Rule 12(f) motion provides the means to excise improper materials from pleadings, such motions are generally disfavored because the motions may be used as delaying tactics and because of the strong policy favoring resolution on the merits. *See Stanbury Law Firm v. I.R.S.*, 221 F.3d 1059, 1063 (8th Cir.2000). Accordingly, once an affirmative defense has been properly pled, a motion to strike which alleges the legal insufficiency of an affirmative defense will not be granted "unless it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense." *See William Z. Salcer, Panfeld, Edelman v. Envicon Equities Corp.*, 744 F.2d 935, 939 (2d Cir.1984) (internal citations omitted).

DISCUSSION

Plaintiff asserts in the Motion to Strike the 20 affirmative defenses are stated to increase the discovery burden and force Plaintiff to unearth (or draft out of) the grounds upon which such legal conclusions are asserted by Defendant-Debtor. This burden is asserted to have been imposed to increase the cost and expense for the Plaintiff and not based on any bona fide, good faith belief in the affirmative defenses.

The asserted affirmative defenses may well be moot in light of Defendant-Debtor's failure to admit or deny the allegations in the First Amended Complaint, other than the First Affirmative Defense that the First Amended Complaint fails to state a claim for which judgment may be granted. The court considers each of the Affirmative Defenses in order and in light of Defendant-Debtor's conduct in this case and pleading strategy in the

Answer to neither admit or deny the specific allegations in the First Amended Complaint.

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 Strike Affirmative Defenses filed by Lorain Rice, Plaintiff, 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 hearing on the Motion shall be conducted at 1:30 p.m. on ----------. Opposition to the Motion shall be filed and served on or before xxxxx.

6. 14-29493-E-13 RODNEY/CHANDRA LAMBERT
KO-1 Richard Jare

CONTINUED MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY AND/OR MOTION THAT THE CURRENT FILING WAS PART OF A SCHEME TO DELAY, HINDER, OR DEFRAUD CREDITORS
10-2-14 [24]

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

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

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

Local Rule 9014-1(f)(2) Motion – Final Hearing.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on October 2, 2014. By the court's calculation, 19 days' notice was provided. 14 days' notice is required.

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

The Motion to Confirm Termination or Absence of Stay is granted.

Landmark Bank, N.A. ("Creditor") filed the instant Motion to Confirm Termination or Absence of Stay on October 2, 2014. Dckt. 24. It is supported by a Memorandum of Points and Authorities. Dckt 27. Creditor holds a lien on the property commonly known as 1071 Little River Drive, Miami, Florida ("Property"), owned by Rodney Lambert ("Debtor").

MOTION

Creditor's Motion alleges the following:

1. On or about October 23, 2012, Valley Bank, the predecessor in

interest to Creditor, filed a complaint against Rodney and Chandra Lambert ("Debtors") in Miami-Dade County, Florida seeking foreclosure of the mortgage deed encumbering the Property (case number 12-41705CA21). Debtors then filed multiple bankruptcy cases, preventing Creditor from obtaining judgment against Debtors in that case. Debtors, in their Motion to Impose the Automatic Stay state that Creditor is the "primary creditor targeted by this filing."

2. Debtors filed the current bankruptcy case on September 23, 2013. Debtors previously filed a Chapter 13 petition on August 2, 2013 (Case No. 13-30287), but this case was dismissed on January 8, 2014 for Debtors' failure to timely file and serve an amended plan. Debtors also filed a Chapter 13 petition on February 1, 2014 (Case No. 14-20995). This case was dismissed on September 17, 2014 for Debtors' delinquency in plan payments.

3. Debtors' three most recent bankruptcy cases involve the Property and each filing has been timed to prevent Creditor and its predecessor in interest from pursing collection against Debtors. All of the cases have been pending and two have been dismissed in the past year. This indicates that the automatic stay is not in effect. 11 U.S.C. § 362(c)(4).

4. In both of the two cases immediately preceding the current case, Debtors have been unable to confirm a plan, causing the cases to be dismissed. Debtors' financial affairs have not significantly changed since the second bankruptcy case. Creditor alleges that Debtors have filed the current bankruptcy case as part of a scheme to delay, hinder, or defraud Creditor. 11 U.S.C. § 362(d)(4).

The Creditor seeks:

1. The court to enter an order confirming that the automatic stay did not go into effect upon the filing of the instant bankruptcy case pursuant to 11 U.S.C. § 362(c)(4)(A) such that the Creditor may pursue any and all remedies available to it under the terms of the loan documents which are the subject of is claim in this matter, including, but not limited to, foreclosure of its mortgage deed and security agreement and the prosecution of any remedies available to it under state law in order to obtain possession of and sell the Property.

2. The court find that Debtors' three most recent bankruptcy cases each involve the Property, that Debtors have filed the instant bankruptcy case to delay, hinder, or defraud creditors, and issue an order including language consistent with that finding and consistent with 11 U.S.C. § 362(d)(4).

3. The court waive the 14-day stay period of Fed. R. Bankr. P. 4001(a)(3).

OCTOBER 21, 2014 HEARING

The court continued the hearing to afford Debtors the opportunity to

file opposition to the Motion. Debtors' opposition was to be filed on or before October 31, 2013. Any replies by Movant were to be filed on or before November 7, 2014.

DEBTORS' OPPOSITION

On October 31, 2014, Debtors filed an Opposition to the Motion. Dckt. 77. Debtors allege that the motion is improper because declaratory relief can only be sought through an adversary proceeding, not through a motion.

Debtors state that Mr. Lambert spoke directly with Landmark Bank in August 2014 after they called him regarding a loan modification. Debtor was later instructed by one of Landmark Bank's attorneys that Debtor was not to contact the Bank directly. Debtors allege that this is inequitable, since Debtors were not allowed access to the lender's loan modification programs.

Debtors reiterate the grounds stated in their prior Motion to Impose the Automatic Stay, including that Landmark Bank's predecessor in interest used predatory lending practices and that the bank waived Debtor's default by accepting payments from the Chapter 13 Trustee in Debtors' prior case. Debtors also alleged that Movant's predecessor in interest violated the Dodd-Frank Act by accelerating the due date of the loan and that the act protects Debtor as it applies to personal residences.

MOVANT'S REPLY TO DEBTORS' OPPOSITION

Movant filed its Reply to Debtors' Opposition on November 6, 2014. Dckt. 80. Movant states that the two grounds of relief sought in its Motion were orders from the court under 11 U.S.C. § 362(c)(4) (confirming that no stay is in effect due to Debtors' filing of two or more cases in the previous year) and 11 U.S.C. § 362(d)(4) (finding that the filing of this case was part of a scheme to delay, hinder, or defraud creditors that involved multiple bankruptcy filings affecting the Property). Movant is not seeking a declaratory judgment, but relief from the stay. This is a contested matter under Federal Rule of Bankruptcy Procedure 9014. Movant asserts that it is proper for it to seek relief from stay through a motion.

Movant states that Debtor's assertion that Movant's failure to allow Debtors to enter into a loan modification is inequitable does not have a basis in fact. Movant offers that the reason Debtors have not been able to secure a loan modification is because this is Debtors' third bankruptcy case in less than a year. Creditors, like Movant, are currently unwilling to enter into a modification agreement with Debtors. Additionally, when Movant discovered Debtors were represented by counsel, Movant's counsel requested that all future communication between Debtor and Movant be done through the parties' respective counsel.

Movant then asserts that Debtor's reiteration of their prior grounds for their Motion to Impose the Automatic Stay did not add any further explanation for why the allegations apply to the Motion. Additionally, Debtors do not cite any particular section of the Dodd-Frank Act when they allege that Movant violated it. If there were a claim against Movant for violating the Act, Movant asserts that it would not be within the scope of this Motion to determine.

APPLICABLE LAW

Under 11 U.S.C. § 362(c)(4)(A)(I), the automatic stay does not go into effect of a later filed case if a debtor has had 2 or more single or joint cases pending within the previous year but were dismissed. A party in interest may request the court to "promptly enter an order confirming that no stay is in effect. 11 U.S.C. § 362(c)(4)(A)(ii).

11 U.S.C. § 362(d)(4) allows the court to grant relief from stay where the court finds that the petition was filed as 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 secured creditors or court approval or (ii) multiple bankruptcy cases affecting the property.

DISCUSSION

Here, the Creditor has established that the Debtors have filed 2 cases that were pending within the previous year but were dismissed. The Debtors filed the first Chapter 13 case on August 2, 2013 (Case No. 13-30287) which was dismissed on January 8, 2014 for Debtors' failure to timely file and serve and amended Chapter 13 plan and motion to confirm. Case No. 13-30287, Dckt. 76. The Debtors filed the second Chapter 13 case on February 1, 2014 (Case No. 14-20995) which was dismissed on September 17, 2014 for Debtors' delinquency in plan payments to the Chapter 13 Trustee and for unreasonable delay that was prejudicial to creditors. Case No. 14-20995, Dckt. 167. While the Debtors have filed a Motion to Impose the Automatic Stay (Dckt. 13) which was heard in conjunction with the instant motion, the court denied the Debtors' motion because they failed to provide clear and convincing evidence to rebut the presumption of the instant filing not being in good faith.

Debtors' Opposition goes to the underlying dispute they believe they have with this Creditor – whether a loan modification should be granted. Since August 2013 the Debtors had the opportunity to either negotiate or litigate the dispute, using the automatic stay in the prior cases in lieu of obtaining a preliminary injunction in the litigation. The Debtors failed to so do. Because of the prior two dismissals, there is no automatic stay in this bankruptcy case.

Furthermore, the court finds that proper grounds exist for issuing an order pursuant to 11 U.S.C. § 364(d)(4). Creditor has provided sufficient evidence concerning a series of bankruptcy cases being filed with respect to the subject Property.

The "scheme" envisioned by 11 U.S.C. § 362(d)(4) is intentional conduct, not mere inadvertence or misadventure. *In re Duncan & Forbes Development, Inc.*, 368 B.R. 27 (Bankr. C.D. Cal. 2007). It is something other than the "ordinary" hindrance or delay which is inherent in any one or two bankruptcy filings in a good faith attempt to prosecute them. The multiple filing of bankruptcy cases, which are not prosecuted, which work to repeatedly delay a creditor from enforcing its rights can be a "scheme" to delay creditors sufficient to warrant relief pursuant to 11 U.S.C. § 362(d)(4). *In re Wilke*, 429 B.R. 916 (Bankr. N.D. Ill. 2010).

The court finds that the filing of the present bankruptcy petition works as part of a scheme to improperly delay or hinder Creditor with respect to the Property. Debtors have filed multiple bankruptcy cases, none of which have been effectively prosecuted. This is particularly evident given the fact that the instant bankruptcy was filed merely five days after

the dismissal of the Debtors second bankruptcy case.

Debtors have sought relief under the Bankruptcy Code with the assistance of counsel in all three cases. (A different attorney in the first case and the same attorney in the second case and the Current Case.)_ Debtors have daisy chained bankruptcy filings to provide continuous protection within bankruptcy as follows:

Case 13-30287		**Case 14-20995**	**Case 14-29493 (Current Case)**
Filed	August 2, 2013		
Dismissed	January 1, 2014		
Filed		February 1, 2014	
Dismissed		September 17, 2014	
Filed			September 23, 2014

These Debtors have been in bankruptcy protection for fifteen months without being able to not only confirm a plan, but unable to even make the monthly payments on the plan they proposed. Civil Minutes, 14-20995, Dckt. 164; case dismissed because Debtors were $6,000.00 delinquent in plan payments, for proposed plan which required $2,000.00 a month payments.

This court is not shocked by, and finds it to be in the proudest bankruptcy tradition, that a bankruptcy case be filed on the eve of (or just minutes prior to) a foreclosure sale. Such is expected once, and possibly twice when a pro se debtor files bankruptcy, crashes on the shoals of federal court practice, and then hires an experienced consumer attorney to represent him or her in the good faith prosecution of a case.

However, bankruptcy cases are not to be repeatedly filed and no productive action taken to reorganize or rehabilitate the debtor's finances (which may well include prosecuting litigation with a creditor over an asserted loan modification). In the series of bankruptcy cases, the Debtors have not so properly prosecuted their cases. The real purpose of the multiple bankruptcy filings is clearly stated in their opposition – using the bankruptcy case to force a *de facto* modification.

The court does not find persuasive Debtors' argument that granting relief pursuant to 11 U.S.C. § 364(d)(4) is not proper if because of the multiple filings the automatic stay did not go into effect by virtue of the prior dismissals pursuant to 11 U.S.C. § 362(c)(4). The opposition states that the multiple filings of bankruptcy cases have been targeted at Movant. The purposes of the filing is to derail Movant from enforcing its lien rights. Debtors do not need to have whether the automatic stay exists "clarified" since they assert that Movant has waived its right to foreclose. Clearly, Debtors have and continue to assert that the filings of the bankruptcy case (and automatic stay which may arise thereto) preclude the

Movant from enforcing its lien rights.

In reality, Debtors argue that they should be allowed to continue to file bankruptcy cases and create the "fog of war" confusion with title companies and third parties as to whether there is, or is not, an automatic stay arising in the latest bankruptcy filing by the Debtors. Creditors should not be put to the task of proving, or obtaining an order determining, that no automatic stay exists in the latest bankruptcy filing by the Debtors. Such "illusory automatic stay" improperly impedes the good faith, bona fide exercise of Movant's lien rights under the circumstances of the Debtors' multiple bankruptcy cases.

Creditor request for the waiver of the 14-day stay of enforcement under Fed. R. Bankr. P. 4001(a), the court having found that the automatic stay was never in place at the time of filing the instant case, the 14-day stay is waived.

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 to Confirm Termination or Absence of Stay filed by Landmark Bank, N.A. ("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 no automatic stay went into effect upon the commencement of Case No. 14-29493 under the provisions of 11 U.S.C. § 362(c)(4)(A)(I) and Landmark Bank, N.A., their agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 1071 Little River Drive, Miami, Florida
>
> **IT IS FURTHER ORDERED** that relief is granted pursuant to 11 U.S.C. § 362(d)(4) with this order granting relief from the stay, if recorded in compliance with applicable State laws governing notices of interests or liens in real property, 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 as ordered by the court in any subsequent case filed during that period.
>
> **IT IS FURTHER ORDERED** that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived.
>
> No other or additional relief is granted.

7. 09-43197-E-13 DARRELL/ELIZABETH BROWN **MOTION TO CONFIRM TERMINATION**
DVW-1 **OR ABSENCE OF STAY**
11-3-14 [31]

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

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

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

Local Rule 9014-1(f)(2) Motion – Final Hearing.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on November 3, 2014. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The Motion to Confirm Termination or Absence of Stay is granted.

U.S. Bank, N.A. as legal title trustee for Truman 2013 SC4 Title Trust ("Creditor") filed the instant Motion to Confirm Termination or Absence of Stay on November 3, 2014. Dckt. 31. Creditor holds a lien on the property commonly known as 218 Mammoth Court, Vacaville, California ("Property"), owned by Darrell and Elizabeth Brown ("Debtors").

MOTION

Creditor's Motion alleges the following:

1. Debtors executed a note in the sum of $584,544.00 naming Wells Fargo Bank, N.A. as Payee. The Note is secured by a Deed of Trust in the sum of $584,544.00 naming Wells Fargo Bank, N.A. as Beneficiary recorded in the Office of the

County Recorder of Solano County on August 31, 2007 as Document No. 200700095117, encumbering the Property. Dckt. 34, Exhibit 1 and 2

2. All beneficial interest in the Note and Deed of Trust were assigned to Creditor. Creditor is in possession, custody, and control of the original endorsed Note assigning all right, title, and interest therein to Movant.

3. An Assignment of the Deed of Trust was recorded on March 4, 2014 as Document No. 201400015289 in the Office of the Solano County Recorder. Dckt. 34, Exhibit 3.

4. Debtors filed the instant bankruptcy case on October 26, 2009.

5. On October 26, 2009, Debtors filed a Chapter 13 Plan listing Creditor as a Class 4 claimant, which class allows the holder of a Class 4 secured claim, upon confirmation of the Plan, to exercise its rights against its collateral in the event of a default under terms of its loan or security documentation provided the case is then pending under Chapter 13. An order confirming the Plan was entered on December 17, 2009.

6. A notice of Default was recorded on October 9, 2013 by Creditor's predecessor in interest pursuant to the stay modifications as set forth in the confirmed Plan.

7. Debtors have failed to reinstate their loan, the Notice of Default is outstanding, Creditor has recorded a Notice of Sale and intends to proceed with its foreclosure.

8. Creditor is informed and believes that an Order of the court confirming no stay is in effect may be required by the title company in order to provide insurable and marketable title.

The Creditor is seeking an Order confirming that there is no stay in effect in this case as to the Property and that the automatic stay was terminated as to the Property upon confirmation of Debtor's Chapter 13 Plan on December 17, 2009.

CHAPTER 13 TRUSTEE NONOPPOSITION

On November 6, 2014, David Cusick, the Chapter 13 Trustee, filed a notice of nonopposition to the instant Motion.

APPLICABLE LAW

11 U.S.C. § 1327(a) states:

> (a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected to plan.

Under the confirmed Plan, Class 4 claims:

> mature after the completion of this plan, are not in default, and are not modified by this plan. These claims shall be paid by Debtor or a third person whether or not the plan is confirmed. Entry of the confirmation order shall constitute an order modifying the automatic stay to allow the holder of a class 4 secured claim to exercise its rights against its collateral in the event of a default under the terms of its loan or security documentation provided this case is then pending under chapter 13.

Dckt. 5.

DISCUSSION

Here, the Creditor have shown that under the terms of the Plan, the automatic stay was not in effect at the time of confirmation as to the Property. The Creditor has established that they hold a Class 4 claim under the Plan. The Creditors have further established that the assignment of the Deed of Trust and Note took place on March 4, 2014. Dckt. 34, Exhibit 3. Under such, the Creditor has shown that a Notice of Default was recorded on October 9, 2013 by Wells Fargo Bank, N.A., the predecessor in interest to the Creditor. Since the Plan was confirmed on December 17, 2009, the terms of the Plan became binding on the Debtors and the creditors. 11 U.S.C. § 1327(a). Under the terms of the Plan, the confirmation of the plan acted as an order modifying the automatic stay to allow the Creditor to exercise its rights against the collateral in the event of a default under the terms of the loan. Here, the Creditor has filed a Notice of Default. The Default has not been cured. At the time of default, the Creditor was allowed to exercise its rights against the Property.

Therefore, under the terms of the Plan, the automatic stay was not in effect at the time of confirmation.

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 to Confirm Termination or Absence of Stay filed by U.S. Bank, N.A. as legal title trustee for Truman 2013 SC4 Title Trust (“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 no automatic stay went into effect upon the confirmation of the Plan on December 17, 2009 (Dckt. 5) of Case No. 09-43197 under the provisions of Plan and U.S. Bank, N.A. as legal title trustee for Truman 2013 SC4 Title Trust, their agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 218

Mammoth Court, Vacaville, California

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

No other or additional relief is granted.