UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

January 10, 2023 at 1:30 p.m.

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1. **22-21314-E-13** **NADIA ZHIRY**
KSR-1 **Peter Macaluso**

CONTINUED STATUS CONFERENCE RE: MOTION TO EXCUSE TURNOVER AND/OR MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY
5-31-22 [12]

Debtor's Atty: Peter Macaluso

Notes:
Continued from 10/13/22. On or before 1/24/23 the Debtor shall have deposited an additional $25,000.00 into the blocked account at the Bank of Marin for monies to fund the remedial repair costs and expenses (including permit fees) to be incurred by the Contractor employed.

The Status Conference is xxxxxxx

JANUARY 10, 2023 HEARING

At the Status Conference, **xxxxxxx**

REVIEW OF MOTION AND PRIOR HEARINGS

Movant-Receiver's Adversary Proceeding

On September 5, 2022, Movant-Receiver filed a complaint against Debtor to determine debts to be non-dischargeable pursuant to 11 U.S.C. § 523(a)(7) for fees owed to Movant-Receiver. It appears to the court that the complaint was improperly filed on the bankruptcy docket. However, there has been an adversary proceeding filed on September 5, 2022. Adversary Proceeding No. 22-02089.

OCTOBER 13, 2022 HEARING

Supplement Pleadings Filed By Debtor

On September 29, 2022 Debtor filed several supplemental pleadings. In the Supplemental Pleading, Dckt. 113, Debtor's counsel states:

A. He reviews the prior status of permits relating to the Properties.

B. For the current status of the permits, counsel states:

1. For the 1039 Claire Avenue Property

a. Permit for new foundation - Expired on July 17, 2022.

(1) Bruce Monighan is allowing this to go to the Building Department within a new entitlement.

2. For the 1049 Claire Avenue Property

a. Electrical Permit - Issued

b. Demolition of accessory dwelling with attached carport.

(1) Demolition previously completed

(2) Permit Pending

c. Enclose bike shed and carport to make a bedroom, bathroom, bar area.

(1) Permit submission Incomplete

(a) The proposed contractor is working to correct the incomplete permit submission.

C. Cost Analysis Update

1. Proposed contractor has retained a sub-contractor to complete the design and drawings to complete the permit process.

a. No increase in bid amount for the hiring of this sub-contractor.

2. Possible Additional Costs

a. Fire Suppression System.....Est. $18,000

b. Water and sewer Fee.....Est. $14,000

3. For these additional costs, the supplemental pleading states:

a. For the estate additional expenses "[t]otaling $32,000.00, which Mr. Sanders is prepared to all said funds of $32,000.00 be set aside from the funds presently on had, to insure payment."

b. At the hearing, Debtor's counsel explained the above statement and the source and funding of an additional $25,000, for the additional expenses.

D. Counsel projects the following Time Table for the work to be done:

1. Application

a. Ca. Licensed Structural Engineer - prepare design.....9/29/22

b. 4 permits in application process.....9/29/22

2. Cap-off water and waste lines.....11/1/22

3. County Fees, upon issuance of final permits.....11/1/22

4. Final Building Permit for 1039 Claire Ave.....2/24/23

5. Certificate of Occupancy for 1039 Claire Ave.....3/31/23

6. Final Permit for "ADU".....2/24/23

7. Certificate of Occupancy for 1039 Claire Ave.....3/31/23

Debtor filed supplemental Exhibits Exhibits, Dckt. 114, consisting of the following documents:

A. Exhibit A. Email dated September 29, 2022, from the City of Sacramento's Building Inspector to Debtor's Counsel, providing information on the status of the permits.

B. Emails B and C are screen shots from the City of Sacramento showing the status of the various permits.

On October 6, 2022, Debtor filed a Second Supplemental Pleading, Dckt. 116, Debtor's counsel reports that with the assistance o f Dan Collins, the Receiver's Representative, the Electrical Permit was passed on September 29, 2022. Debtor is now prepared to employ: (1) Flax & Stone, for designs and plans; (2) Chad Qi, an engineer; and (3) Mooni Sanwal, Fire and Safety Contractor. *Id*. at 2:10-13.

Debtor requests that the court authorize the disbursement of $4,988.28 for Professional Fees. These fees are for the initial advances made by the contractor, who by separate Order the court is authorizing the employment and payment of the initial disbursement.

Additionally, on October 6, 2022, Debtor filed a set of Additional Exhibits, Dckt. 117. Exhibit D is a Deposit Receipt for $35,000 with the Bank of Marin, and cashier's checks made payable to Richard Sanders which total $35,000.

Exhibit E consists of the following documents:

1. Claire Ave Price Breakdown

    a. Fees for permits and drafting basic set of plans, which total $6,488.28, and $1,500.00 cashier's check which is show as being a payment on the forgoing amount.

2. City of Sacramento Building Permit for 1049 Claire Ave, for the electrical work, showing that the $234.90 fees have been paid.

3. Housing and Dangerous Buildings Permit that expired October 3, 2022.

4. Qi Structural Engineering Services Contract with the contractor, with fees stated to be $2,000.00.

5. City of Sacramento statement showing the 1039 Clair Ave building permit in "Applied" status.

6. Flex + Stone plan drafting (not including engineering) fee contract, with the fees totaling $1,700.

7. Mooni Sanwal contact information for "Annual Fire and Safety."

Supplemental Pleading by Receiver

Gerard F. Keenan II, the State Court Receiver for the Properties, filed on October 10, 2022, a Conditional Agreement to the Motion to Employ Contractor filed by Debtor. Dckt. 119. Based on the assumption that the time lines, costs, scope of work, and completion schedules presented by Debtor are accurate, the Receiver does not oppose the Motion to Employ Contractor.

At the hearing, the Parties agreed to the continuance of the hearing to 1:30 p.m. on January 10, 2023, for a status conference.

Additionally, in light of the additional costs and expenses (including the hiring of subcontractors) by the Contractor being employed by Debtor, Debtor agreed that the monies in the blocked account for the funding of the work to be done by Contractor will be increased by an additional $25,000.00, with that additional amount deposited by January 24, 2023.

August 18, 2022 Hearing

At the hearing, the court addressed these issues in conjunction with the related Motion to Employ Contractor. The Parties and their counsel constructively addressed issues relating to the information necessary and documentation of the work to be done within the contract. This includes all of the permit and other fees which will be required.

JULY 28, 2022 HEARING

The Receiver has recounted his view of a four year history of the State Court Action and the shortcoming of Debtor and her Family. Debtor has provider her view of the past four years, the inadequacy of her prior counsel, and her perceived unfairness of the State Court process.

As this court addressed with counsel for the Debtor, this bankruptcy case is not merely a way to derail the proper exercise of the Receiver's powers and fulfilling his obligations in the State Court Action. It could properly be a good faith, bona fide Chapter 13 reorganization with the Debtor, as the fiduciary of the bankruptcy estate and then the fiduciary plan administrator under a confirmed plan, to have the repairs and remediation completed, and then either sell the Properties if necessary.

The court presented the situation to Debtor and Debtor's counsel in a very base way - "It's Time to Put Up or Shut Up" in moving forward to reorganize in bankruptcy after the State Court Action having been around for four plus years and the Receiver ready to proceed. The "Put Up" is not only setting a prompt deadline to have the work done, but the "money in the bank" to pay for getting it promptly done.

The Debtor and Receiver have filed their respective Status Reports for the continued hearing on July 28, 2022. While the Receiver remains skeptical as to Debtor and her family's ability to prosecute the remediation, Debtor has now assemble $30,000.00 of the projected $46,000.00 in necessary funds to correct the violations. The cost is reported as being "only" $46,000.00 because Richard Sanders, the General Contractor, ("General Contractor") is providing these services at a discounted rate. Additionally, Debtor's counsel reports that the additional $16,000.00 can be assembled and deposited in the next two weeks.

As discussed at the hearing, the costs will likely be higher as it appears that a subcontractor who is licensed to install fire suppression systems (which General Contractor is not) for the structure.

Counsel for the Debtor reported having $5,000.00 in his trust account and five $5,000.00 cashier's checks issued by Wells Fargo Bank, N.A., with the checks made payable to the General Contractor. As the court noted at the hearing, the licensed professional General Contractor's employment will need to be authorized by the court and his fees authorized to be paid pursuant to 11 U.S.C. §§ 330, 331.

Additionally, the now $30,000.00, plus the additional amounts to fund the repairs, shall not be in the form of cashier's checks sitting in Debtor's counsel's drawer (subject to possible aging out or cancellation), but will be deposited in a blocked account established by the Debtor, as the fiduciary of the bankruptcy estate, at Wells Fargo Bank, N.A.

The Contract is given a senior lien on the monies in the blocked account for the fees and expenses he is authorized to be paid by this court. The Receiver is given a second lien on the monies for costs and expenses in connection with this Bankruptcy Case in the event that Debtor and her family, or the General Contractor, default in performance of the repairs and other remediation to the Properties and the stay is modified to allow the Receiver to proceed in the State Court Action to address and remediate the violations.

The Parties are to conduct a joint inspection of the Properties, with at least the respective counsel and contractors, to identify any questions as to what repairs and remediation needs to be done.

Debtor will file a Motion for Authorization to Employ Richard Sanders as the licensed General Contractor to do the repairs and remediation, as well as obtain any necessary subcontractors. The Motion will be supported by the contract for the services to be rendered, which will include the benchmark dates

for the various phases of the repairs, construction, and remediation which will be used by the court and Parties to track Debtor's performance of her obligations.

From what has been presented, the remaining repairs and remediation are necessary for City Ordinance Compliance confined to the property itself, and not a public harm (such as an oil spill, impairment of transit, or the like). These repairs and remediations are more in the nature of economic damages to be addressed and corrected for the private use of property – And Compliance With the Law.

The court having a $30,000.00 cash fund to be shortly established and it soon being funded to $46,000+, the remedy through a bankruptcy plan appears more proper and consistent with the Bankruptcy Code. Additionally, it provides the Receiver the forum and ability to fulfill his obligations having been supported by the Superior Court, see that the remediation and repairs occur, and prevent the Debtor and her family viewing the bankruptcy reorganization as merely a license to do nothing.

The hearing on the Motion to Excuse Turnover and Confirm Exemption from Automatic Stay is continued to 10:30 a.m. on August 18, 2022 (specially set day and time). This will afford the Parties to further inspect the Property, the Debtor fund the blocked account for the monies needed to make the repairs, and a Motion to Employ a Professional, the General Contractor, to be filed and set for hearing on August 18, 2022.

JULY 12, 2022 HEARING

At the hearing, the Debtor and Debtor's counsel expressed confusion on moving forward. Believing that counsel for the Receiver had instructed Debtor's counsel and contractor not to contact the Building Department about the status of any permits and what would be required, no contractor is in place, has not inspected the property, and the scope of work to be done is not estimated. Debtor's counsel stated that $5,000 is being held in his trust account for having the contractor provide some initial work, but that would only begin after the court ordered that Debtor was in control of the Property.

As the court has previously stated, and re-stated at the July 12, 2022 hearing, this Debtor and her family must be moving forward to show that there is an ability to promptly addressed the deficiencies in the Property, has the monies in place to do the work, and is prepared to move forward if the court exercises the exclusive jurisdiction over the Property that is property of this bankruptcy estate.

The Receiver's attorney stated that no such prohibition on contacting the Building Department and determining what permits would be required was made. It appears that there may have been some miscommunication between the attorneys.

Debtor must have in place a contractor and the scope of what needs to be done identified and a bid from the contractor to do the work. Debtor and her family must have the funding in place to pay for the work and to move promptly thereon. As each day passes and the real estate market cools (with interest rates rising), the potential sales price of the Property drops.

The court is mindful of the years of Debtor's failure to address these issues. The reported (by the Receiver) of failure to comply with the injunction concerning the use of the Property. The failure of Debtor (who blames her prior attorney) to assert her rights and address these problems in the multiple years

of the Receivership Action. Only now, with the Receipt seeking to get approval of his Plan to correct the problems and sell the Property is Debtor in this bankruptcy case.

This is the further final continuance to a final hearing on the Motion. Debtor must show the court that her practices have changed, she and her family have the funds in place to do the necessary work, and that she, working with her counsel, have the contractor ready to go, the scope of the work determined (to the extent that it can be by the final hearing date), and manifest the clear ability to act herself much like a receiver:

- ♦ Fix The Deficiencies In the Property so That It May Be Sold;
- ♦ Determine What Repairs and Improvements Enhance the Value of the Property For Sale AS Compared to Just Removing Non-Code Compliant Structures; and
- ♦ Debtor is Ready To Move Forward To Promptly Sell The Property in a Commercially Reasonable Manner. [Fn.1.]

FN. 1. In this Case Debtor's plan is to get the Property sold and maximize the recovery of the benefit of the Debtor and her bankruptcy estate, and not to rehabilitate the Property and retain it.

The City's Complaint relating to the assertion that Debtor's Property was a public nuisance and a danger to health and safety was filed in 2017. Debtor's default in that State Court Action was entered when she failed to response to the Complaint. Then, Debtor and the City entered in a Stipulation for a permanent injunction, requiring Debtor to cease and correct the Code violations. This Permanent Injunction was entered in October 2017. The terms of the Injunction are stated in the Minute Order filed as Exhibit filed with Exhibit A; Dckt. 91. The Receiver was then appointed May 3, 2021 by the Judge in the State Court Action. Order, Exhibit A; *Id*. In appointing the Receiver, the State Court Judge concluded that Debtor had not acted to abate the nuisance, that it would continue unless a receiver was appointed, and that the Receiver was to proceed with a plan correct the nuisance, whether such was rehabilitating or demolition of the violations that constituted the nuisance. (The forgoing is only a partial summary of the Receiver's powers and duties as ordered by the Superior Court Judge, which powers include the sale of the Property by the Receiver through the State Court Action.) [Fn.2.]

FN. 2. The April 7, 2021 Minute Order attached to the Order Appointing the Receiver contains an extensive review of the history of the State Court Action and the violations on the Property constituting the nuisance.

The court has added further discussion of the issues and shortcomings to date of Debtor with respect to her seeking to wrench control of the Property from the Receiver, correct the deficiencies constituting the nuisance, pay any monies owed in the State Court Action, and market and sell the Property in a prompt, speedy commercially reasonable sale of the Property.

The court has copied and pasted below the text added for the July 12, 2022 hearing from the Civil Minutes below for the convenience of the Parties and their counsel.

At the hearing, the Debtor and Debtor's counsel expressed confusion on moving forward. Believing that counsel for the Receiver had instructed Debtor's counsel and contractor not to contact the Building Department about the status of any permits and what would be required, no contractor is in place, has not inspected the property, and the scope of work to be done is not estimated. Debtor's counsel stated that $5,000 is being held in his trust account for having the contractor provide some initial work, but that would only begin after the court ordered that Debtor was in control of the Property.

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FN. 2. The April 7, 2021 Minute Order attached to the Order Appointing the Receiver contains an extensive review of the history of the State Court Action and the violations on the Property constituting the nuisance.

JUNE 30, 2022 HEARING

Debtor has filed a Status Report, asserting that communications with the City of Sacramento concerning this Property and what remains to be addressed has been impaired. Status Report; Dckt. 37. The Status Report does not address what Debtor and Debtor's family members have been doing to commit the monies necessary to address the asserted remaining cleanups and corrections, nor has the Debtor sought to obtain authorization to employ a real estate broker (which broker could advise the Debtor of what improvements enhance the prompt sale value of the Property and which would be "lost value" for potential purchasers.

At the hearing, counsel for the Debtor expressed frustration, stating that the Receiver was telling the City of Sacramento to not communicate with Debtor and Debtor's counsel. Counsel for the Receiver stated that he issued a letter Sunday (6/26/2022) stating that the City was to talk directly with Debtor and Debtor's counsel. Further, that he sent a copy of the letter and communicated with the Bankruptcy counsel for the City to insure that there was no confusion on this issue.

The court continues the hearing, as agreed by the Parties to allow for the Debtor's counsel to communicate with the City and the City to document for Debtor and Debtor's counsel the corrections that need to be made so that the Debtor may promptly sell the Property at issue.

JUNE 14, 2022 HEARING

The court, after substantial advocacy and interaction between the court and respective counsel, the court determined that continuation of the hearing to allow for constructive discussion between the parties and counsel to occur. While the grounds stated by the Receiver have merit, there is the question of whether a good faith Chapter 13 Plan can be prosecuted, with the court exercising the exclusive federal court jurisdiction over property of the Bankruptcy Estate. 28 U.S.C. § 1334(e).

In is clear that over the past several years that the Debtor and her family have not managed the Properties, the situation, or the State Court Action well. Debtor's daughter was at the hearing and indicated that she laid the blame (the court's characterization) on their state court counsel. However, from what has been presented to the court, it appears that Debtor and Debtor's family continued in the use of the Properties inconsistent with not only the City ordinances, but in a manner to increase the violations which led to the State Court Action and the Receiver being appointed. This is part of what often is the redemptive process of bankruptcy

Though if Debtor was appearing on her own the conclusion would likely be that the court allow the State Court Receiver to fulfill his duties and have the State Court Action Judge "run the show." However, there has been a significant change that may offer Debtor and her family a narrow opportunity to avoid a receivership sale of the Properties. Debtor has now engaged an experienced counsel who in the past has demonstrated an ability to get previously uncooperative, set in their way debtor clients in this type of situation to toe the line, follow the law, and properly address the issues and maximize their economic return in a bad situation.

The court discussed at the June 14, 2022 hearing, how Debtor and her family could comply with the law, address the violations on the Properties, and promptly market and sell the Properties through the federal bankruptcy process.

For the City of Sacramento and the people in Debtor's neighborhood, such would be done with tight federal court orders in place for prompt performance of the corrections and marketing and sale of the Properties. Rather than the bankruptcy process being a delay of the City having its ordinances enforced, the bankruptcy process would provide the City with tight orders to get things done or the Receiver will proceed in the State Court Action. As the court noted, Congress created the bankruptcy judgeships so that bankruptcy judges have only one focus – to address the bankruptcy and bankruptcy related matters in the cases before such judges. Bankruptcy judges are not distracted by other areas of the law (such as criminal, probate, family, immigration, and the like), but are there focused and ready to address any and all issues relating to the bankruptcy case.

It appearing that there may be the seed of a good faith, rapidly performed Chapter 13 Plan the court has continued the hearing. An orderly cleanup and sale though the bankruptcy process may allow Debtor to salvage more than if the property goes through a receivership sale.

Motion

Gerard F. Keena II ("Movant-Receiver") moves the court for an order confirming that the ongoing receivership for real properties commonly known as 1039 and 1049 Claire Ave, Sacramento, California (the "Properties") deemed a public nuisance is excused from the automatic stay in effect in this

case pursuant to 11 U.S.C. § 362(b)(4). Movant-Receiver also requests they should be excused from turnover under 11 U.S.C. § 543.

In the Motion, the grounds stated with particularity (Fed. R. Bankr. P. 9013) include the following (as summarized by the court unless shown in "quotation marks"):

A. The Receiver was appointed in the State Court Action based on the properties being a public nuisance.

B. The Properties were littered with trash and debris. There were numerous vehicles in various states of dismantling.

C. The Properties appeared to be an automotive scrap yard.

D. The Debtor was making hazardous, unpermitted construction and renovations on the Property.

E. Debtor had excessive animals on the Properties in violation of local law, and appears to have been attempting to run a breading business

F. The Receiver was appointed "over a year ago", but have been unable to "fully rehabilitate the Properties while the Properties are subject to the jurisdiction of the Bankruptcy Court.

G. The current Bankruptcy Case was filed one week after the abandonment and the day before the hearing on the Receiver's plan in the State Court Nuisance Action.

H. The Trustee seeks to proceed to fulfill his duties in the State Court Nuisance Action.

Motion; Dckt. 12

In Movant-Receiver's Memorandum of Points and Authorities (Dckt. 19), Movant-Receiver states the Properties will likely be sold subject to State Court approval to fund and carry about their abatement. Dckt. 19 at 14. Movant-Receiver can only abate the nuisances once they receive authorization from the State Court approving their proposed receivership plan, however, Movant-Receiver can only move forward with the State Court action if they are granted relief from the automatic stay. *Id.* at 15.

Prior Bankruptcy Case

On June 29, 2021, Debtor Nadia Zhiry commenced a Chapter 7 bankruptcy. Case No. 21-22759. There, Movant-Receiver filed a Motion for relief from the automatic stay from real properties. *Id.*, Dckt. 67. Movant-Receiver's Motion was made pursuant to 11 U.S.C. § 362(b)(4) to continue the enforcement of a receivership order and abatement of a nuisance on the Properties. The Motion was granted on September 16, 2021. *Id.*, Order, Dckt. 67. The Movant-Receiver's Order granting relief in the prior case was entered seven months prior to the commencement of the Current Chapter 13 case.

Debtor received a discharge in the prior the Chapter 7 case on April 20, 2022. *Id.*, Dckt. 85. In the prior

This Chapter 13 Case was filed on May 25,2022. The prior Chapter 7 Case has not yet been closed. A review of the Docket for the prior Chapter 7 Case discloses that on May 17, 2022 the court entered an order abandoning the Properties. *Id*.; Order, Dckt. 96. However, the Order does not state to whom the Properties have been abandoned.

Debtor's Opposition

Debtor filed an opposition to this motion on June 7, 2022 (Dckt. 24). Debtor states the following to be disputed material facts:

1. The subject property is not in the same condition as the time of Receivership/Court Order on May 3, 2021.

2. There are not 13-24 vehicles on either property.

3. There are no illegal apartments on either property.

4. There are no cages nor kennels on either property.

5. The Receiver has rejected any plan to address the deficiencies and has opposed correction by the debtor.

6. The Receiver's Motion to exercise control of subject property.

Debtor states there is substantial equity in the property to remedy the issues at hand and that there is more than enough equity to pay claims by the Receiver and the City. Debtor also states the Movant is a person and not a governmental unit and therefore cannot take advantage of the police and regulatory exception. In support of the proposition that a State Court appointed receiver to address a public nuisance is a person and the provisions of 11 U.S.C. § 362(b)(4), Debtor cites to *In re Commonwealth Oil Ref. Co*, 805 F.2d 1175 (5th Cir. 1986), (without quoting the decision or providing a pin cite) which states in relevant part:

> This case presents the question of whether a debtor, who has filed a petition under Chapter 11 of the Bankruptcy Code, can be forced to comply with federal and state environmental laws designed to protect the public health and safety, before that debtor has filed its plan of reorganization.
> . . .
> We agree with the conclusion of the bankruptcy court and the district court that the automatic stay does not apply to the EPA's actions in this case. The EPA has the authority to enforce its regulatory power, that is, to require CORCO to comply with the federal and state environmental laws and regulations at issue in this case. The enforcement actions of the EPA in this case do not come within the ambit of § 362(a)(1) because they are actions to enforce police and regulatory powers, thus falling within the § 362(b)(4) exception to the automatic stay. The EPA's actions are not an attempt to enforce a money judgment, proscribed by § 362(b)(5), notwithstanding the fact that CORCO will be forced to expend funds in order to comply.

> The exception from the automatic stay for proceedings to enforce police and regulatory powers is not, as appellants suggest, limited to those situations where "imminent and identifiable harm" to the public health and safety or "urgent public necessity" is shown. The words of §§ 362(b)(4) and 362(b)(5) allow for no such reading. The language of these exceptions is unambiguous -- it does not limit the exercise of police or regulatory powers to instances where there can be shown imminent and identifiable harm or urgent public necessity.
>
> . . .
>
> We turn now to the question of whether, under the facts of this case, the bankruptcy court abused its discretion in refusing to issue a stay of EPA proceedings under 11 U.S.C. § 105.
>
> . . .
>
> The district court agreed with the bankruptcy court's conclusion that CORCO had failed to establish the prerequisites for a § 105 stay, since "they concede they cannot prevail on the merits by their admissions that no Plan B has been filed and no groundwater monitoring system exists." 17Link to the text of the note Slip op. at 3.

In re Commonwealth Oil Refining Co., 805 F.2d 1175 at 1171, 1183-1184, 1188, 1189.

With respect to the Receiver being a person, in the State Court Action, the Plaintiff is the City of Sacramento. Exhibit A, Order Appointing Receiver; Dckt. 14. The City obtained the appointment of a receiver to, under court supervision and providing Debtor with a forum to enforce her rights, to undertake the acts necessary to address the asserted nuisance.

Also, Debtor disputes the fact that the public nuisance is no longer at issue they believe the action should be dismissed. Additionally, Debtor states that a Chapter 13 Plan has been filed which seeks to remedy all issues through a comprehensive review plan that will allow the family to repair the home. [Fn.1.]

FN. 1. Neither in the Opposition nor the Declaration in Support does Debtor address why Debtor is not in the State Court Action, demonstrating that there is no nuisance, that Debtor and Debtor's family has "seen the light," corrected some of the problems, and that the duties of a receiver to abate the nuisance will not be required, though the receiver could document Debtor and Debtor's family complying with the orders of the State Court to complete certain actions.

Evidence Presented in Opposition

Vera Zhiry, identified as the daughter of Debtor, provides her personal knowledge testimony (Fed. R. Evid. 601, 602) in a Declaration in Opposition to the Motion. Dec. Dckt. 25. In her Declaration, Vera Zhiry testifies (identified by paragraph number in the Declaration):

> 3. We have removed all the cars from the property.

The "we" is not identified, how this was accomplished is not explained, and where these cars have either been disposed of or relocated is not stated.

> 4. There are no illegal apartments on the property.

Vera Zhiry provides the court with her legal conclusion that there are no "illegal apartments" on the "property" (testifying in the singular). No information is provided as to what corrective acts were taken, whether they were done in compliance with a State Court order or violation notice from the City of Sacramento.

5. There are no Cages and there are no kennels on the property.

No explanation is given as to what happened to cages, kennels, and dogs on the property. How they were re-homed, or merely "temporarily relocated" and likely to return in short order.

No other evidence is provided in Opposition to the Motion.

Statement of Disputed Facts

Debtor has also provided a Statement of Disputed Facts as part of the Opposition. In looking at these "Disputed Facts," they generally appear to be "Facts" within the province of the State Court Judge in whether that Judge's receivership order should continue in force and effect, as well as whether the Receiver's proposes plan in State Court should be ordered by the State Court Judge, of should Debtor's plan of action be ordered (Debtor and Debtor's family having demonstrated that they have corrected many of the "ills" that led to the appointment of the Receiver and that such "intervention" to complete the abatement of any nuisance is no longer necessary.

The fifth stated Material Disputed Fact is that, "The Receiver Has rejected any plan to address the Properties' deficiencies" with Debtor's Counsel, and has opposed ANY corrections by the Debtor." Dckt. 26. The Receiver is not operating as an omnipotent sovereign, but only to the extent as authorized by the State Court Judge in the State Court Receivership Action. Debtor does not offer any explanation as to why Debtor and her family do not have the "access to justice" in the State Court Action by presenting any such disputes to the State Court Judge.

APPLICABLE LAW

No Existence of Automatic Stay
Under 11 U.S.C. § 362(b)(4)

The court begins with considering the provisions of 11 U.S.C. § 362(b)(4) which excepts actions and proceedings from the automatic stay to enforce police or regulatory powers of a governmental unit. 3 COLLIER ON BANKRUPTCY ¶ 362.05[5] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). This includes the enforcement of certain judgments other than money judgments, except those pursuant to § 362(a)(2). *Id.* at [5][a].

Legislative history indicates enforcing environmental laws is a permissive use of a governmental unit's police or regulatory powers. 3 Collier on Bankruptcy P 362.05 (16th 2022) (citing S. Rep. No. 989, 95th Cong., 2d Sess. 52 (1978)). Collier on Bankruptcy goes in detail with this approach:

> In [*Penn Terra Ltd. v. Department of Environmental Resources*], the debtor had operated its coal mines in violation of state environmental protection laws. After the debtor commenced a bankruptcy case, the state Department of Environmental Resources sought an injunction directing the debtor to comply with a prebankruptcy

> consent order requiring it to clean up the environmental damage on its property. The debtor maintained that the action was stayed because it was in essence an attempt to enforce a money judgment. According to the debtor, because the action would require the debtor to spend money to remediate the environmental problems, the state was merely seeking to have the debtor finance the cleanup so the state would not have to do so. The court rejected that argument, finding that there is a difference between an equitable action to require or prevent particular behavior and a legal action to recover a money judgment. The court found that when the state sought an injunction requiring certain action, it was not seeking money, but rather was seeking performance.
>
> On the other hand, in *Ohio v. Kovacs* the Supreme Court held that an action by the State of Ohio to require an individual debtor to clean up environmental damage was a "claim" and the debtor's cleanup obligation was a "debt" that could be discharged in bankruptcy. The court found that the state did not expect the debtor to engage in the cleanup himself; rather it expected the debtor to expend funds to effect the cleanup. Since the debtor's obligation could be satisfied by the payment of funds, the state's action was a claim that could be discharged.
>
> At first blush, *Kovacs* seems at odds with *Penn Terra*. After all, *Kovacs* found that a debtor's cleanup obligation was a debt because the obligation could be satisfied by payment of money. *Penn Terra* found that an order requiring a cleanup was not a monetary judgment, even though presumably the order could be satisfied by the payment of money to finance a cleanup.
>
> Yet it is important to remember the different contexts in which the cases arose. Clearly, if the debtor's obligation can be satisfied by the payment of money, it is a claim under the definition of that term in section 101 and, therefore, is a dischargeable debt. Nevertheless, former section 362(b)(5), under which the case was decided, does not bar enforcement of a "claim"; instead, it bars enforcement of a money judgment. Thus, it would appear that the cases can be reconciled by recognizing that the state can enforce a judgment or order against the debtor requiring the expenditure of funds but that the debtor's obligation may be discharged in bankruptcy and, in any event, the state may not enforce the obligation by requiring the debtor to pay money damages for breach of the obligation.

3 Collier on Bankruptcy P 362.05 (16th 2022) (distinguishing *Penn Terra, Ltd. v. Dep't of Envtl. Res.*, 733 F.2d 267 (3d Cir. 1984) from *Ohio v. Kovacs*, 469 U.S. 274 (1985)).

Under the current provisions of 11 U.S.C. § 362(b)(4), the fact an action may have economic consequences on a debtor is not determinative. *In re Basinger*, No. 01-02386, 2002 Bankr. LEXIS 1925, at *12 (Bankr. D. Idaho Jan. 31, 2002). Rather, two tests have been developed to determine whether the judgment will be enforced: the pecuniary purpose test and the public policy test.

Under the pecuniary purpose test, the court asks whether the governmental unit is acting pursuant to a matter of public safety and welfare rather than a governmental pecuniary interest. *Id.*; *In re Berg,* 230 F.3d 1165 (9th Cir. 2000); *In re First All. Mortg. Co.*, 264 B.R. 634 (C.D. Cal. 2001); See *generally PBGC v. LTV Corp.*, 496 U.S. 633 (1990).

Under the public policy test, the court asks whether the government action is designed to effectuate public policy rather than to adjudicate private rights. *Id.*; *Lockyer v. Mirant Corp*., 398 F.3d 1098 (9th Cir. 2005); *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 942 (6th Cir. 1986). Actions that advantage a discrete and identifiable set of individuals would fail the public interest test. *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005); *City & Cty. of San Francisco v. PG & E Corp*., 433 F.3d 1115 (9th Cir. 2006).

Prior cases have recognized environmental enforcement actions do not interfere with pecuniary purpose or public policy tests. *Basinger*, 2002 Bankr. LEXIS 1925, at *29; *Dykes v. TD Dev., LLC,* No. HHD-CV206126173S, 2021 Conn. Super. LEXIS 2097, at *7 ([T]he purpose of the County's wetland permitting laws, as well as the injunctive and enforcement proceedings pursuant thereto, are for the purpose of deterring the Debtor's ongoing environmental misconduct.); *In re Fernandez*, 22 Fla. L. Weekly Fed. B 367 (U.S. Bankr. S.D. Fla. 2010) ([P]laintiff, acting in her official capacity as commissioner of a governmental unit, is exercising her duty to protect the environment and Connecticut's natural resources . . . and . . . the public safety and welfare . . . ."); *Diaz v. Tex. (In re Gandy)*, 327 B.R. 796, 805 (Bankr. S.D. Tex. 2005) ("The action meets the pecuniary interest test because the governmental units were pursuing a matter of public safety and welfare through injunctive relief rather than seeking a monetary award. . . . The action also satisfies the public policy test because the purpose of the proceeding is to further public policy instead of adjudicating private rights.").

The current enforcement action at issue was brought by the City of Sacramento under California Health and Safety Code. Memorandum of Points and Authorities, Dckt. 19 at 11:11-12. The Movant-Receiver was appointed to abate the nuisances in accordance with California Health and Safety Code § 17980.7. It is more than clear to this court that the city, as a governmental unit for purposes of 11 U.S.C. § 362(b)(4), is seeking to use enforce their police and regulatory power.

At the time the enforcement action commenced, Movant-Receiver describes the Properties in:

> [D]eplorable condition, littered with trash, junk, and debris. Numerous vehicles in various states of dismantling lay about the Properties, as Debtor appears to be using (or allowing her family members to use) the Properties as an unauthorized automotive scrap yard in violation of local zoning ordinances. Debtor has also continued with hazardous, unpermitted construction and renovations at the Properties. Finally, Debtor houses excessive animals in violation of local law in gross, inhumane conditions, in what appears to be attempts to breed them.

Motion, Dckt. 12 at 2:11-18. Movant-Receiver describes the Properties presently as continuing to deteriorate and become a greater hazard to the community. Additionally, Movant-Receiver states the action is to "abate the public nuisances for the health and safety of the community, not to preserve the private pecuniary interests of any creditors or government entity." *Id.* at 2-3.

Similar to the environmental enforcement actions, here, the purpose of the nuisance enforcement action is clearly for the purpose of public safety, welfare, and policy, rather than a pecuniary purpose or adjudicating private rights. The enforcement action falls squarely into a governmental unit's police and regulatory powers. The Properties as described are not only an eye sore, but were presented in the State Court Action to present grave public health and safety concerns that should be remedied. Therefore, the enforcement action is clearly excused from the automatic stay under 11 U.S.C. § 362(b)(4).

Movant-Receiver Not a Custodian
Under 11 U.S.C. § 543

Movant-Receiver additionally contends they are not a "custodian" under 11 U.S.C. § 543. 11 U.S.C. § 543 requires a custodian with knowledge of the commencement of a case to deliver to the trustee any property of the debtor held by or transferred to the custodian.

The Bankruptcy Code defines custodian as a receiver or trustee of any property of the debtor appointed in a case or proceeding not under this title, which Congress states as:

> (11) The term "custodian" means—
>
> (A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;
>
> (B) assignee under a general assignment for the benefit of the debtor's creditors; or
>
> (C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors.

11 U.S.C. § 101(11). On its face, the first description in § 101(11)(A) uses the simple word "receiver."

Congress provides in 11 U.S.C. § 543 for a "custodian" to turnover property of the bankruptcy estate in the custodian's possession to the trustee (which would include a Chapter 13 debtor exercising the powers, duties, and responsibilities of a trustee) unless such custodian was excused by the court as provided in 11 U.S.C. § 543(d).

In reviewing the cases, a "clear weight of authority" and legislative history establish a custodian under § 101(11) "must be primarily concerned with the prepetition liquidation of a debtor's property or the protection of creditor's rights." *MacMullin v. Poach*, No. CV-08-0768-PHX-FJM, 2009 U.S. Dist. LEXIS 19730, at *5 (D. Ariz. Mar. 4, 2009). The cases and Legislative History cited in *MacMullin v. Poach* include: (1) *Cash Currency Exchange v. Shine* (*In re Cash Currency Exchange*), 762 F.2d 542, 553 (7th Cir. 1985); (2) *In re Camdenton United Super, Inc.*, 140 B.R. 523, 525 (Bankr. W.D. Mo. 1992); (3) *In re Gold Leaf Corp.*, 73 B.R. 146, 148 (Bankr. N.D. Fla. 1987); (4) *In re Kennise Diversified Corp.*, 34 B.R. 237, 244-45 (Bankr. S.D.N.Y. 1983); and H.R. No. 95-595, 95th Cong. 1st Sess. 310 (1977),

> Paragraph (11) [enacted as (10)] defines "custodian." There is no similar definition in current law. It is defined to facilitate drafting, and means a prepetition liquidator of the debtor's property, such as an assignee for the benefit of creditors, a receiver of the debtor's property, or administrator of the debtor's property. The definition of custodian to include a receiver or trustee is descriptive, and not meant to be limited to court officers with those titles. The definition is intended to include other officers of the court if their functions are substantially similar to those of a receiver or trustee.

Here, Movant-Receiver's responsibilities are to correct the various violations of California's Health and Safety Codes. Movant-Receiver's actions are not aimed at pre-petition liquidation of debtor's

property nor preserving any creditors rights. *See In re Kennise Diversified Corp.*, 34 B.R. 237, 245 (Bankr. S.D.N.Y. 1983). It is clear to the court that Movant-Receiver is not a custodian under 11 U.S.C. § 543, and therefore, turnover of the Properties are not required.

Review of the Current Chapter 13 Bankruptcy Case

Debtor commenced this Chapter 13 Bankruptcy Case on May 25, 2022. On June 8, 2022, Debtor filed her Schedules and Statement of Financial Affairs. Dckt. 28. In reviewing the Schedules, the court notes the following:

A. The two Properties are stated to have values of $750,000 and $300,000. Schedule A/B, ¶¶ 1.1, 2.1; Dckt. 28.

B. Debtor's cash and bank account balances total $300. *Id*., ¶¶ 16, 17.

C. Debtor's total personal property value is stated to be $6,900. *Id*., ¶¶ 55-62.

D. On Schedule C, Debtor claims a homestead exemption pursuant to California Code of Civil Procedure § 704.730 in two different properties, the 1049 Claire Ave, Sacramento, CA property, and the 1039 Clair Ave, Sacramento, CA property. Schedule C, § 2; *Id*.

E. Debtor lists the two Properties as being cross-collateralized to secure two obligations to JPMorgan Chase Bank; the first in the amount of ($173,244.94) and the second in the amount of ($83,769.34), for total debt of ($257,014.28) being secured by the two Properties. Schedule D, ¶ 2.2, 2.3; *Id*.

F. On Schedule I Debtor states that she is disabled and her only income is Social Security benefits of $505.57 a month. For her Non-Debtor Spouse, while stating that he is employed, no wage or business income is shown for him. The only income for the Non-Debtor Spouse is identified as "SSI" of $1,000.00 a month.

Debtor's aggregate household gross income is $1,505.57 a month. Schedule I; *Id*. at 19-20.

G. On Schedule J, Debtor lists as reasonable and accurate monthly expenses of ($1,005.57) for Debtor and her Non-Debtor Spouse. Schedule J; *Id*. at 21-22. The court notes these monthly expenses include:

1. Mortgage/Rental Expense.....$0.00

2. Homeowner's Insurance.....$0.00

3. Property Taxes.....$0.00

4. Home maintenance and repair.....$0.00

5. Clothing/Laundry.....($10) per month for household

6. Personal care products/services.....($10) per month for household

7. Medical/dental.....($20) per month for household

8. Transportation.....($100) (Debtor listing one vehicle on Schedule A/B)

9. Vehicle Insurance.....($50)

Debtor then concludes that Debtor's household has $500.00 of monthly net income.

On the Statement of Financial Affairs Debtor states that neither Debtor nor Non-Debtor Spouse had any gross income from wages, commissions, or operating a business in 2022, 2021, and 2020. Statement of Financial Affairs, Question 4; *Id*.

Debtor lists having only Social Security income for both Debtor and Non-Debtor Spouse, which totals $7,500 in 2022, $18,200 in 2021, and $18,000 in 2020. *Id*., Question 5.

With respect to payments made within 90 days of filing bankruptcy, Debtor lists payments to JPMorgan Chase Bank, stating that the payments were made by her daughter. *Id*., Question 6.

Chapter 13 Plan Filed

On June 8, 2022, Debtor filed her Chapter 13 Plan. Dckt. 29. Debtor seeks to apply her $500 monthly net income to fund the Plan for 36 months. Plan, ¶¶ 2.01, 2.03. For Administrative Expenses, Debtor is to pay the Trustee's Fees and $2,500 for her attorney's fees. *Id*., ¶ 3.05.

The Plan provides for the following payments to creditors through the Chapter 13 Plan:

1. Class 1 Secured Claims.....$0.00

2. Class 2 Secured Claims.....$0.00

3. Class 3 Secured Claims Surrender.....None

4. Class 4 Secured Claims Paid Directly

    a. JPMorgan Chase Bank to be paid $1,500 and $250 a month by Debtor's daughter.

5. Unsecured Priority Claims.....$0.00

6. General Unsecured Claims, 100% Dividend.....$61,464

To fund the payment of the $61,464 in general unsecured claims, the Additional Provisions, § 7.01 and § 7.02 state that the Debtor's Adult Children shall purchase the "Subject Property" (not a defined

term) within eighteen months (of some non-specified date), or in the alternative sell the Property (singular) to a third party.

It further provides that Debtor's children will fund all of the cleanup of some property, intending to have it done within 60 days of filing of the bankruptcy case (July 24, 2022), then have City inspections done, Debtor will obtain permits within six months to do the work for which the inspections are to be done, and Debtor will have all of the corrective work done within twelve months.

Looking back to the prior Chapter 7 Case, Debtor stated having only $505.57 a month in Social Security income, and did not list any income information for her Non-Debtor Spouse. 21-22759; Schedule I; Dckt. 14 at 31-32. On the Statement of Financial Affairs Debtor stated that she was not married. *Id.*; Statement of Financial Affairs, Question 1; Dckt. 14 at 37. On Schedule J in the prior Chapter 7 Case, in 2021 Debtor stated under penalty of perjury that her household monthly expenses included:

1. Home maintenance.....($150)

2. Clothing/laundry.....($50)

3. Personal care products/services.....($75)

4. Transportation.....($150)

In the current Chapter 13 Case, Debtor states that now a year later, the above expenses are substantially lower. It is unclear how such conflicting statements under penalty of perjury can be made by Debtor.

It appears that a serious question exists as to whether Debtor has the financial, physical, and mental ability to engage in the property remediation, hiring the necessary construction professionals, obtaining permits, clearing inspections, and then marketing and selling the Properties in the an eighteen month period.

Debtor and her family has had the opportunity to address the problems with the Properties, deal with the City, then address them in the State Court Action, but could not do so. This raises concerns about the Debtor, her finances, and who has been (or has not been) looking out for Debtor. Debtor's current counsel likely has insights into that situation and any special needs his client may have, or which may need to be addressed.

2. 19-26029-E-13 RDW-2

DEBRA THOMPSON
Peter Macaluso

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION
12-22-22 [160]

PERITUS PORTFOLIO SERVICES II, 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.

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, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on December 22, 2022. By the court's calculation, 19 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). 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 for Relief from the Automatic Stay is granted.

Peritus Portfolio Services II, LLC as agent for Westlake Financial Services, ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2010 Mercedes-Benz C350, VIN ending in 8500 ("Vehicle"). The moving party has provided the Declaration of Louis Britt to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Debra LaChele Thompson ("Debtor").

Movant argues Debtor has not made twenty-five post-petition payments, with a total of $15,268.25 in post-petition payments past due. Movant's Information Sheet, Dckt. 163. Movant also provides evidence that there is one pre-petition payments in default, with a pre-petition arrearage of $610.73. *Id*.

Movant has also provided a copy of the NADA Valuation Report for the Vehicle. The Report has been properly authenticated and is accepted as a market report or commercial publication generally relied on by the public or by persons in the automobile sale business. FED. R. EVID. 803(17).

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $11.700.22 (Declaration, Dckt. 162), while the value of the Vehicle is determined to be $5,950, as stated in the NADA Valuation Report provided by Movant. Debtor did not schedule this vehicle. Schedules A/B and D, Dckt. 16.

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

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

11 U.S.C. § 362(d)(2)

A debtor has no equity in property when the liens against the property exceed the property's value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective rehabilitation. 11 U.S.C. § 362(g)(2); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988); 3 COLLIER ON BANKRUPTCY ¶ 362.07[4][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (stating that Chapter 13 debtors are rehabilitated, not reorganized). Based upon the evidence submitted, the court determines that there is no equity in the Vehicle for either Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the Vehicle is *per se* not necessary for an effective reorganization. *See Ramco Indus. v. Preuss (In re Preuss)*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

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

Request for Attorneys' Fees

Movant requests that it be allowed attorneys' fees. A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages. FED. R. CIV. P. 54(d)(2)(A); FED. R. BANKR. P. 7054, 9014.

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.

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 Peritus Portfolio Services II, LLC as agent for Westlake Financial Services ("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 2010 Mercedes-Benz C350, VIN ending in 8500 ("Vehicle"), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.
>
> **IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is 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.

3.	**21-22437-E-13 ALG-1**	**BRADLEY/BERNADETTE MARTIN Julius Cherry**	**MOTION TO APPROVE STIPULATION FOR RELIEF FROM THE AUTOMATIC STAY 11-10-22 [20]**

No Opposition Has Been Filed
The Court Has Posted This as a Tentative to Afford the Parties and Counsel the Opportunity to Address Any Corrections to be Made to the Proposed Order

Attendance at the Hearing is not Required

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, parties requesting special notice, and Office of the United States Trustee on November 10, 2022. By the court's calculation, 61 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Relief from the Automatic Stay 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.

Debtor Bradley Richard Martin and Bernadette Therese Martin and Creditor Sun West Mortgage Company, Inc. (collectively, "Joint-Movants") move the court for an order modifying the automatic stay so Creditor can record a corrective Deed of Trust.

Joint-Movants seek relief from the automatic stay with respect to Debtor's real property commonly known as 3332 Cayman Island St, West Sacramento, California ("Property"). Joint-Movants wish to record a deed of trust against the Property, which Joint-Movants meant to record prior to filing bankruptcy. The relevant facts are as follows:

November 13, 2020	Debtors executed a note and deed of trust ("First Deed of Trust") as part of a refinance with Creditor. The First Deed of Trust was recorded against the Property.
December 2, 2020	Debtors executed a second note and deed of trust ("Second Deed of Trust" or "Corrective Deed of Trust") with Creditor to reflect a lower principal balance. The Second Deed of Trust was not recorded against the Property.
December 24, 2020	The First Deed of Trust was inadvertently recorded against the Property instead of the Second Deed of Trust.
June 30, 2021	Debtor filed the current bankruptcy case.
October 18, 2021	Property revested to Debtor upon confirmation of the Plan.

Both Debtor and Creditor have agreed to modify the stay for the sole purpose of allowing Creditor to record the Second Deed of Trust against the Property and a reconveyance of the First Deed of Trust, pursuant to 11 U.S.C. § 362(d)(1).

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

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140)

The court shall issue an order terminating and vacating the automatic stay for them limited purpose of allowing Creditor to record the Second Deed of Trust and reconvey the First Deed of Trust.

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 Debtor Bradley Richard Martin and Bernadette Therese Martin and Creditor Sun West Mortgage Company, Inc. (collectively, "Joint-Movants") 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 modified to allow Creditor Sun West Mortgage to record the Second Deed of Trust, Exhibit 4, Dckt. 22, and reconvey the First Deed of Trust, Exhibit 2, Dckt. 22, recorded against the real property commonly known as 3332 Cayman Island St, West Sacramento, California.

No other or additional relief is granted.

4. 20-20250-E-13 APN-2 | **RICHARD/JOHNNA HOWARD** | **Jeffrey Ogilvie** | **MOTION FOR RELIEF FROM AUTOMATIC STAY** | **12-12-22 [60]**

THE MONEY SOURCE INC. 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, and Office of the United States Trustee on December 12, 2022. By the court's calculation, 29 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.

The Money Source Inc. ("Movant") seeks relief from the automatic stay with respect to Richard Lynn Howard and Johnna Faye Howard's ("Debtor") real property commonly known as 20545 Ontario Avenue., Burney, California ("Property"). Movant has provided the Declaration of Cindy Cowden to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor has not made five post-petition payments, with a total of $5,282.38 in post-petition payments past due. Declaration, Dckt. 62.

CHAPTER 13 TRUSTEE'S REPLY

David P. Cusick ("the Chapter 13 Trustee") a Reply on December 29, 2022. Dckt. 66. Trustee does not oppose the Motion.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $138,995.59 (Declaration, Dckt. 62), while the value of the Property is determined to be $156,000.00, as stated in Schedules A/B and D filed by Debtor.

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

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

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the 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 The Money Source Inc. ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the automatic stay provisions of 11 U.S.C. § 362(a) are 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 20545 Ontario Avenue., Burney, 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.

No other or additional relief is granted.

5. 22-22864-E-13 JHR-1

NATHANIEL SOBAYO
Pro Se

MOTION FOR RELIEF FROM AUTOMATIC STAY
12-12-22 [39]

GORDON PROPERTY MANAGEMENT SAN FRANCISCO VS.

5 thru 7

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 (*pro se*), Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on December 12, 2022. By the court's calculation, 29 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.~~

Gordon Property Management San Francisco ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 1608 Hollenbeck Avenue, Apartment #1, Sunnyvale,

California ("Property"). The moving party has provided the Declaration of Cathy Giblin to introduce evidence as a basis for Movant's contention that Nathaniel Basola Sobayo ("Debtor") does not have an ownership interest in or a right to maintain possession of the Property. Movant presents evidence that it is the owner of the Property. Based on the evidence presented, Debtor would be at best a tenant at sufferance. Movant is seeking to commence and prosecute an unlawful detainer action.

Movant provides as Exhibit A (Dckt. 45) the Residency Tenancy Agreement between Movant, Debtor Dorothy Lola Sobayo, Surulere Molawa, and Christopher Franz. The Residency Tenancy Agreement is signed by "Surulere Molawa Sobayo." In the caption of the Motion Surulere Sobayo and Surulere Molawa are listed as "aka's" for Debtor Nathaniel Sobayo. In other pleadings filed by Debtor, including the Complaint in Adversary Proceeding 23-2001, Debtor asserts rights against Movant arising from Debtor's rental of the Property.

Declaration of Cathy Giblin

The Declaration of Cathy Giblin, who is identified in the Declaration as "an authorized representative" of Movant and has access to and maintenance of Movant's books and records. Declaration, ¶¶ 1; Dckt. 43.

For non-expert witness testimony provided in Federal Court, Federal Rule of Evidence 602 requires that the witness have personal knowledge of the facts stated in the testimony. However, in Ms. Giblin's Declaration she states that she does not have personal knowledge of the facts:

> 1. I am an authorized representative of Gordon Property Management San Francisco, property manager for Poplar Plaza Apartments, Movant herein. I have personal knowledge of the matters contained in this Declaration, **except as to those matters alleged upon information and belief** and as to those matters, I believe them to be true.

Id., ¶ 1 (emphasis added). From the Declaration, testimony based on personal knowledge and that based on mere "information and belief" (the witness believing that the information provided allows Movant to win) is not identified in the Declaration. Thus, the court cannot tell what is personal knowledge testimony and what is merely information and belief parroting of something the declarant was told. [Fn.1.]

FN. 1. While pleading facts in a complaint or motion that the allegation is based on information and belief, the court is unaware of any rule that allows a non-expert witness to provide "information and belief testimony" under penalty of perjury.

Additionally, in the Declaration Ms. Giblin states that she is an "authorized representative" of Movant, but does not state that she an employee of Movant, contract service provider, or what she is authorized to do.

At the hearing, **xxxxxxx**

REQUEST FOR CONTINUANCE

On January 3, 2022, Debtor filed an Application for Continuance of this and other matters. Debtor does not believe that the notice period as provided under the Federal Rules of Bankruptcy Procedure and the Eastern District of California Local Bankruptcy Rules is sufficient for opposing the Motion. Dckt. 82. Some of the grounds identified by Debtor include:

A. Movant did not meet and confer with Debtor before scheduling the hearing on this Motion.

B. Debtor is seeking an appointment of legal counsel by the court, Debtor having been unable to find counsel who would zealously represent Debtor in this, and prior, bankruptcy cases.

C. Debtor seeks to have the hearing continued to thirty (30) days after the court orders the appointment of an attorney for Debtor.

D. Debtor has commenced an Adversary Proceeding, 23-2001,and having commenced such warrants continuance of the hearing. The Complaint names twenty-one (21) defendants, including Movant. Debtor alleges in the Complaint that this property has been Debtor's residence and the location from which Debtor operates his business.

Movant has filed an Opposition to the Request for Continuance. Dckt. 86. Movant cites to 11 U.S.C. § 362(e)(1) stating that the court may conduct a final hearing on a motion for relief at the same time as a preliminary hearing. The court may order a continuance if there appears to be a reasonable likelihood that the party opposing the motion for relief may prevail at a continued final hearing.

Movant states that it is seeking relief from the stay to prosecute an unlawful detainer action based on Debtor's default in rent payments, and that no adequate protection payments have been offered or post-petition rent payments made.. Movant states that it seeks to serve a three day notice to pay rent or quit or a thirty day notice to vacate as provided under California law to prosecute an unlawful detainer action.

In considering the Bankruptcy Laws as enacted by Congress, 11 U.S.C. § 362(3)(2) provides for the automatic termination of the automatic stay by operation of law sixty (60) days after the motion for relief is filed:

11 U.S.C. § 362(e)(2)

(2) Notwithstanding paragraph (1) [which allows the court to continue the motion for a final hearing], in a **case under chapter** 7, 11, or **13** in which the **debtor is an individual**, the **stay** under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless—

(A) a **final decision is rendered by the court during the 60-day period** beginning on the date of the request; or

(B) such **60-day period is extended**—

(i) by **agreement of all parties in interest**; or

(ii) by the **court for such specific period of time as the court finds is required for good cause**, as described in findings made by the court.

Local Bankruptcy Rule 9014-1(1) provides that for a motion for relief filed for which a written opposition is required, at least 28 days notice must be provided, but the hearing on the motion has to be set within 30 days of the filing of the motion:

(f) Amount of Notice.

1) Motions Set on 28 Days' Notice. Unless a different amount of time is required by the Federal Rules of Bankruptcy Procedure, these Local Rules, or by order of the Court, or the moving party elects to give the notice permitted by LBR 9014-1(f)(2), the moving party shall file and serve the motion at least twenty-eight (28) days prior to the hearing date.

A) If the motion is a motion for relief from the automatic stay, it shall be the duty of the moving party to set a hearing within thirty (30) days of the filing of the motion. The failure of the moving party to set the hearing within thirty (30) days shall be deemed a waiver of the time constraints of 11 U.S.C. § 362(e).

This longstanding Local Rule attempts honor what is required by law in 11 U.S.C. § 362(e)(2) and take into account the realities of matters being set to a court's calendar. Here, the Motion was filed on December 11, 2022. Due to the year-end absence of law and motion calendars (last two weeks of December and the first Chapter 13 law and motion calendar set for January 10, 2023).

Here, the initial hearing is set for January 10, 2023, which is exactly thirty (30) days after the December 11, 2022 filing of the Motion. Thus, the automatic termination provisions of 11 U.S.C. § 362(e)(2)(B) apply, subject to the court determining that good cause exists for extending the time beyond sixty (60) days from filing of the Motion. [Fn.2.]

FN. 2. As the United States Supreme Court in *United Student Air Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), federal judges have the duty to identify and apply the correct law in cases, and not merely apply with may be incorrect or incomplete legal authorities cited by the parties. This is contrasted to the presentation of evidence, where the court is wholly dependant on the evidence presented by the parties, and the court does not conduct its own investigation or discovery to uncover the facts that the court believes should be presented.

Cause Grounds For Continuance and Ruling

Debtor's first basis for a continuance is that he seeks to have the court appoint competent counsel for Debtor who will zealously represent Debtor in this case. Debtor refers to prior cases he has filed and attorneys who have failed to zealously represented him. Additionally, in the Motion for the court to appoint counsel for Debtor, that other lawyers he has contacted "mostly require huge amounts of money and

extremely and unreasonable burdensome retain fees in order to represent the Debtor. Motion to Appoint Counsel, p. 2, 2*; Dckt. 36.

Debtor does not cite any legal basis for the court appointing counsel for Debtor in this civil proceeding. While in State and Federal proceedings there Public Defendant and Federal Defender, as well as attorneys to volunteer to serve on panels funded by the State or Federal agencies to defend persons in criminal matters, no such mechanism exists for civil matters in Federal Court.

The court does not select attorneys, and generate business for such attorneys, to represent parties litigating before that court.

Failure to Set for Hearing Motion For Court Appointed Counsel and to Stay All Proceedings Until Such Counsel is Appointed by the Court

On December 12, 2022, Debtor filed a Motion For Court Appointed Counsel and To Stay All Bankruptcy Court Proceedings Until Such Counsel has been Appointed. Motion, Dckt. 36. On December 14, 2022, the Clerk of the Court notified Debtor that he needed to set the Motion for hearing. Dckt. 48. Debtor has not filed a Notice of Hearing and set the matter to the court's calendar.

As of this point in time, such Motion is not noticed on parties in interest and is not set to be determined by the court.

At the hearing, **xxxxxxx**

Summary Review of Law Relating to Court Appointed Counsel in Civil Proceedings

Though the Motion for Court Appointed Counsel and to Stay Bankruptcy Court Proceedings has not been set to the court's calendar for hearing, Debtor states it as a basis for not proceeding on the present Motion. The court's preliminary review of this request (though Debtor has not offered any legal authority for the court to appoint an attorney to represent Debtor in his Bankruptcy Court Proceedings) turns up the following.

In surveying precedent concerning right to counsel in civil cases concerning possible incarceration for civil contempt, the United States Supreme Court stated in *Turner v. Rogers*, 564 U.S. 431, 432 (2011):

> The Sixth Amendment grants an indigent criminal defendant the right to counsel, *see, e.g., United States v. Dixon*, 509 U.S. 688, 696, 113 S. Ct. 2849, 125 L. Ed. 2d 556, but does not govern civil cases. Civil and criminal contempt differ. . . Cases directly concerning a right to counsel in civil cases have found a presumption of such a right "only" in cases involving incarceration, but have not held that a right to counsel exists in all such cases. *See In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527; *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552; and *Lassiter v. Department of Social Servs. of Durham Cty.*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640. Pp. 441 - 443, 180 L. Ed. 2d, at 461-463.

The Eleventh Circuit Court of Appeals discussed the appointment of counsel in civil cases and the exceptional nature thereof, stating in *Fowler v. Jones*, 899 F.2d 1088 11th Cir. 1897):

> Appointment of counsel in a civil case is not a constitutional right. It is a privilege that is justified only by exceptional circumstances, such as where the facts and legal issues are so novel or complex as to require the assistance of a trained practitioner. *Poole v. Lambert*, 819 F.2d 1025, 1028 (11th Cir.1987); *Wahl v. McIver*, 773 F.2d 1169, 1174 (11th Cir.1985).

The Ninth Circuit Court of Appeals addressed the right to counsel in bankruptcy proceedings in *Hedges v. Resolution Trust Corp.*, 32 F.3d 1360, 1362 (9th Cir. 1994): [Fn.1.]

> Hedges urges us not to reach the merits of the bankruptcy court's section 524 determination. Rather, he says we should reverse outright because he had a constitutional right to counsel which the bankruptcy court violated by leaving him unrepresented at the section 524 hearing. But there is no absolute right to counsel in civil proceedings. *See Ivey v. Board of Regents*, 673 F.2d 266, 269 (9th Cir. 1982).

FN. 1. In *Ivey*, the court was presented with a statutory basis for appointment of counsel pursuant to then 28 U.S.C. § 1915(d) [now renumber as § 1915(e)] allowing the court to "request" an attorney to represent an indigent person proceeding *in forma pauperis* and who is unable to afford counsel; and 42 U.S.C. § 2000e-5 which applies in Equal Employment Opportunity Commission and employment law proceedings.

This was followed in 1995 by the Ninth Circuit Decision in United States v. $292,888.04 in United States Currency, 54 F.3d 564, 569 (9th Cir. 1995), holding:

> Under section 1915(d), counsel may be designated only in "exceptional circumstances." *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). The district court properly evaluated both the likelihood of Robinson's success on the merits and his ability "to articulate his claims *pro se* in light of the complexity of the legal issues involved." *Wilborn*, 789 F.2d at 1331 (internal quotation omitted). Robinson failed to offer any admissible evidence in support of his claim to the money, and was not hampered in articulating his claims by any complexity of the issues involved. He "demonstrated sufficient writing ability and legal knowledge to articulate his claim." *Terrell*, 935 F.2d at 1017. There was no abuse of discretion by the district court in concluding that appointment of counsel under section 1915(d) was not warranted.

More recently the Hon. Michael McManus, while serving as a judge in this Bankruptcy Court, addressed a request for appoint of counsel by a *pro se* debtor in *In re Samuel*, 2018 Bankr. LEXIS 2398, 2018 WL 3768422, *23-*24, (Bankr. E.D. Cal. 2018), holding:

> The court has not prevented Mrs. Samuel from participating in this case by not retaining an attorney for her. Mrs. Samuel was and is free to hire an attorney, just as she did when she briefly retained Patricia Miller, and just as her husband did. She does not need the court's permission to hire one. To the extent she wants a

court-appointed attorney (that is, one paid for by the court), the court addressed her request on February 13, 2017. Docket 629, 668, 694, 698. The court held:

> The court does not have the authority or means to appoint an attorney for Mrs. Samuel. In bankruptcy cases, there is no right to counsel such as it exists in criminal cases. Nothing entitles Mrs. Samuel to an attorney, just because she is unable to afford one. Many debtors seeking bankruptcy relief are unable to afford an attorney. This does not qualify them for free legal representation.
>
> Mrs. Samuel is not a debtor-in-possession. When the court appointed a trustee, the debtors were removed as administrators of the estate. Estate funds then are not available to fund Mrs. Samuel's legal representation.

Docket 694.

Here, Debtor states various asserted rights, claims, and defenses against others. He clearly states that he has founds attorneys to not be interested in zealously representing him, or that the attorneys seek to have their fees paid for advancing Debtor's various asserted rights, claims, and defenses. On Schedule A/B Debtor lists owning three real properties having a value of $3,300,000. Dckt. 19. Further, that he has claims of $12,000,000 for "Theft of Real estate property located in Richmond California" and $500,000 for "Theft of Motor Vehicle & Unpaid Real Estate rent." *Id*. On Schedule D Debtor lists there being two disputed secured claims regarding the real properties, which total ($985,000). *Id*. On Schedule I, Debtor lists combined monthly gross income of $9,551 of Debtor and non-filing spouse. *Id*.

At the hearing, **xxxxxxx**

Adversary Proceeding

Debtor has commenced an Adversary Proceeding asserting various claims against various defendants, including specific claims against Movant. Debtor alleges that there were various agreements with Movant for the payment of $10,000 for Debtor to give up possession, give Debtor a 40% reduction on rent, and that these monies are owed to Debtor.

The law is well established that relief from the stay are summary proceedings in which the underlying disputes and claims are not litigated.

> Relief from stay proceedings are primarily procedural. *Veal v. Am. Home Mortgage Serv., Inc. (In re Veal)*, 450 B.R. 897, 914 (9th Cir. BAP 2011). They typically determine whether the equities justify releasing the moving creditor from the legal effect of the automatic stay. *Id.* Because of the limited scope of inquiry, neither the movant's claim nor its security should be litigated in the relief from stay proceeding. *Id.* (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740-41 (9th Cir. 1985)); *see also Grella*

> *v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 33 (1st Cir. 1994) ("We find that a hearing on a motion for relief from stay is merely a summary proceeding of limited effect. . . ."). "Given the limited nature of the relief, . . . the expedited hearing schedule § 362(e) provides, and because final adjudication of the parties' rights and liabilities is yet to occur, . . . a party seeking stay relief need only establish that it has a colorable claim . . . ." *In re Veal*, 450 B.R. at 914-15 (emphasis added) (citing *United States v. Gould (In re Gould)*, 401 B.R. 415, 425 n.14 (9th Cir. BAP 2009)).

Harms v. Bank of N.Y. Mellon (In re Harms), 603 B.R. 19, 27 (B.A.P. 9th Cir. 2019).

Here, Movant asserts the right as a lessor to proceed with an unlawful detainer proceeding against Debtor. Debtor asserts that Movant has breached the lease and has claims against Movant that offset any claims of Movant. These claims by Debtor are properly litigated in a state court action or Adversary Proceeding. Then, based on the merits of the claims the court may issue a preliminary injunction, and the Debtor not use the automatic stay as a free injunction.

In some cases this court has allowed the automatic stay remain in effect when the debtor makes adequate protection payments to the creditor or to the Clerk of the Court, which then may be used by the court to compensate the creditor for damages cause by the stay (injunction) if the debtor loses. However, those are cases in which a Chapter 13 Plan is being diligently prosecuted and funded. The automatic stay is not a "for free" injunction and the prosecution of the bankruptcy case held in abeyance for years of adversary proceeding litigation.

At the hearing, **xxxxxxx**

~~**Granting of Motion**~~

~~The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, to exercise its rights to obtain possession and control of the Property, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.~~

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

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 Movant and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted Movant and other creditors represented by counsel, and upon conversion, any action taken by such creditor is a *per se* violation of the automatic stay.

No other or additional relief is granted by the court.

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

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

The Motion for Relief from the Automatic Stay filed by Gordon Property Management San Francisco ("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 and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 1608 Hollenbeck Avenue, Apartment #1, Sunnyvale, California.~~

~~**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.~~

~~No other or additional relief is granted.~~

6. 22-22864-E-13 JHR-2 | **NATHANIEL SOBAYO** Pro Se | **MOTION FOR RELIEF FROM CO-DEBTOR STAY** 12-12-22 [49]

GORDON PROPERTY MANAGEMENT SAN FRANCISCO 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 (*pro se*), Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 12, 2022. By the court's calculation, 29 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 Co-Debtor Stay is granted.

Granted simultaneously with this Motion is Gordon Property Management San Francisco's ("Movant") relief from the automatic stay with respect to the real property commonly known as 1608 Hollenbeck Avenue, Apartment #1, Sunnyvale, California ("Property"). Docket Control No. JHR-1. The moving party presented a colorable claim for title to and possession of this real property against the debtor, Nathaniel Basola Sobayo ("Debtor").

In the present Motion, Movant is requesting relief from the co-debtor stay with respect to the same property.

~~Movant has 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 because Dorothy Sobayo and Christopher Wuilleminm collectively, "Co-Debtors" and Debtor are in default under the terms of the tenancy agreement, no offer of adequate protection has been made to Movant, and neither Debtor nor Co-Debtors have equity in the Property.~~

~~The relief from the co-debtor stay is granted.~~

Request for Continuance by Debtor

Debtor has requested the court to continue the hearing on this Motion for relief from the co-debtor stay, as well as the separate Motion for Relief From the Stay as to the Debtor and Bankruptcy Estate. Dckt. 82. In the ruling on the request for the continuance on the Motion for Relief from the Stay as to the Debtor and Bankruptcy Estate (DCN: JHR-1), the court provides a detailed analysis and ruling, which is incorporated here by this reference.

The request for continuance is **XXXXXXX**

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

~~No other or additional relief is granted by the court.~~

~~The court shall issue 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 Dorothy Sobayo and Christopher Wuilleminm ("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 co-debtor automatic stay provisions of 11 U.S.C. §§ 362(a), 1301(a) are vacated to allow Movant and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 1608 Hollenbeck Avenue, Apartment #1, Sunnyvale, California.~~

~~**IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause.~~

~~No other or additional relief is granted.~~

7. **22-22864-E-13** **NATHANIEL SOBAYO** **ORDER FOR SPECIAL STATUS CONFERENCE REGARDING ANY TEMPORARY RESTRAINING ORDERS OR PRELIMINARY INJUNCTIONS THAT WILL BE SOUGHT BY PLAINTIFF-DEBTOR RE: COMPLAINT 1-5-23 [6]**
23-2001

SOBAYO V. THE BANK OF NEW YORK MELLON ET AL

Plaintiff's Atty: Pro Se
Defendant's Atty: unknown

Adv. Filed: 1/3/23
Answer: none

Nature of Action:
Recovery of money/property - turnover of property
Recovery of money/property - preference

Notes:
Set by special order filed 1/5/23 [Dckt 6]

The Status Conference is xxxxxxx

JANUARY 10, 2023 STATUS CONFERENCE

As addressed below, Plaintiff-Debtor has included a request for a temporary restraining order and a preliminary injunction in the Complaint. However, as a preliminary matter, the court addresses with the Parties Debtor's

On January 3, 2023, Plaintiff-Debtor Nathaniel Sobayo filed a Complaint to commence this Adversary Proceeding. Complaint; Dckt. 1. The Complaint names eighteen Defendants, and makes reference to Doe Defendants 1-100 (naming of "Doe Defendant" a procedure under California law but not under Federal law). The Complaint identifies fourteen (14) Causes of Action, which are stated by Plaintiff-Debtor as:

First Cause of Action - Negligence - Against All Defendants

Second Cause of Action - Breach of Fiduciary Duty - Against All Defendants

Third Cause of Action - Fraud - Against All Defendants

Fourth Cause of Action - Breach of Duty to be Honest and Trustful - Against All Defendants

> Fifth Cause of Action - Breach of Contract - Against All Defendants
>
> Sixth Cause of Action - Cancellation of Voidable Contract - Against All Defendants
>
> Seventh Cause of Action - Slander of Title - Against All Defendants
>
> Eighth Cause of Action - Cancellation of Assignment of Deed of Trust - Against All Defendants
>
> Ninth Cause of Action - Quiet Title - Against All Defendants
>
> Tenth Cause of Action - Violation of Civil Code Section 2924 - Against All Defendants
>
> Eleventh Cause of Action - Violation of California Business * Professions Codes Section 17200 Et. Seq. - Against All Defendants
>
> Twelfth Cause of Action - Specific Performance - Against All Defendants
>
> Thirteenth Cause of Action - Declaratory Relief - Against All Defendants
>
> Fourteenth Cause of Action - Preliminary and Permanent Injunction - Against All Defendants

Dckt. 1. Additionally, in the prayer for relief, Plaintiff-Debtor requests for relief from the court include:

> 5. For an order requiring defendants to show cause why defendants should not be enjoined as set forth below, during the pendency of this action;
>
> 6. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendants and all persons acting under, for, or in concert with that defendants, from selling the property or attempting to sell it or causing it to be sold, either under the power of sale in the trust deed or by foreclosure action.

Id., p. 31.

Though the judge does not review complaints when filed, the Deputy Clerk Case Manager who entered this Complaint on the Docket noted that requests were being made for a temporary restraining order and preliminary injunction as part of the Complaint, and forwarded it to the undersigned judge to whom this Adversary Proceeding (and Plaintiff-Debtor's Bankruptcy Case) is assigned.

Requests for Temporary Restraining Order and Preliminary Injunction

The United States Supreme Court provides in the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure that for relief in the form of a temporary restraining order or preliminary injunction, so as to maintain the *status quo* pending the court entering a judgment for a permanent injunction, be made by motion to the court or in the Complaint, but that notice of such requested relief and

an opportunity to oppose such relief must be provided (except for extraordinary circumstances for a temporary restraining order).

Federal Rule of Civil Procedure 65 provides for the issuance of preliminary injunction orders and temporary restraining orders, stating in pertinent part (emphasis added):

> Rule 65. Injunctions and Restraining Orders
>
> (a) Preliminary Injunction.
>
> > (1) Notice. The court may issue a **preliminary injunction only on notice to the adverse party.**
> >
> > (2) Consolidating the Hearing with the Trial on the Merits. **Before or after beginning the hearing on a motion for a preliminary injunction**, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.
>
> (b) Temporary Restraining Order.
>
> > (1) Issuing Without Notice. **The court may issue a temporary restraining order without written or oral notice** to the adverse party or its attorney only if:
> >
> > > (A) **specific facts in an affidavit or a verified complaint** clearly show that **immediate and irreparable injury, loss**, or damage will result to the movant before the adverse party can be heard in opposition; and
> > >
> > > (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.
> >
> > (2) Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.
> >
> > (3) Expediting the Preliminary-Injunction Hearing. **If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time**, taking precedence over all other matters except hearings on older matters of the same character. At the

> hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order. . . .

Federal Rule of Civil Procedure 7(b) requires that a motion be filed to request an order from the court. These two Federal Rules of Civil Procedure are incorporated into Federal Rules of Bankruptcy Procedure 7065 and 7007.

Eastern District of California Local Bankruptcy Rule 7065-1 provides the following procedure for a party seeking a temporary restraining order or preliminary injunction:

> LOCAL RULE 7065-1
> Temporary Restraining Orders
>
> (a) Notice to Affected Parties. Any party seeking a temporary restraining order in the absence of actual notice to the affected parties and/or counsel shall comply with the requirements of Fed. R. Civ. P. 65(b). Appropriate notice would inform the affected parties and/or counsel of the intention to seek a temporary restraining order, the date and time for hearing to be requested of the Court, whether the judge will permit a counsel to appear by telephone, and the nature of the relief requested. Once a specific time and location has been set by the Court, additional notice of the time and location of the hearing shall be given.
>
> (b) Documents to Be Filed. **No hearing on a temporary restraining order will normally be set unless the following documents are filed with the Clerk and, unless impossible under the circumstances, served** on the affected parties and/or their counsel:
>
> 1) An adversary complaint;
>
> 2) A motion for temporary restraining order;
>
> 3) A brief on all relevant legal issues presented by the motion;
>
> 4) A declaration in support of the existence of an irreparable injury;
>
> 5) A declaration detailing the notice or efforts to effect notice to the affected parties and/or counsel or showing good cause why notice should not be given; and
>
> 6) A proof of service.
>
> (c) Contents and Service of Proposed Order. The party seeking the order shall deliver to the Court and, unless impossible under the circumstances, serve the affected parties and/or counsel with a proposed temporary restraining order with, if applicable under Fed. R. Bankr. P. 7065, a provision for a bond. In all circumstances in which a temporary restraining order is requested ex parte, the proposed order shall further notify the affected parties and/or counsel that they may apply to the Court for modification or dissolution on two (2) days' notice by personal service or such other notice as the Court may allow.

> (d) Modification or Dissolution. When a preliminary injunction or temporary restraining order has been issued, the affected parties may apply to the Court for modification or dissolution of the injunction or order. Such motion shall normally be accompanied by a brief on all relevant legal issues to be presented in support and declarations supporting modification or dissolution and detailing the notice or efforts to notify the other parties and/or counsel.

As addressed in 13 Moore's Federal Practice - Civil § 65.21, while a preliminary injunction may be requested as part of the complaint or by motion, such can only be issued only after the opposing party not only has notice but an opportunity to impose such relief.

Moore's Answer Guide: Federal Civil Motion Practice provides the following discussion of properly seeking a preliminary injunction order or temporary restraining order:

> [2] Seeking Preliminary Injunctive Relief; Procedural Requirements
>
> Notice and a hearing are required. Fed. R. Civ. P. 65 does not specify a required form of notice, but the party giving notice, whether by service of complaint and summons, motion, order to show cause, or otherwise, should ensure that the responding party be given a fair opportunity to oppose the application and to prepare for such an opportunity. See Fed. R. Civ. P. 65(a)(1); *Rosen v. Siegel*, 106 F.3d 28, 31–32 (2d Cir. 1997) (compliance with notice requirement mandatory; purpose of requirement is to provide opposing party fair opportunity to oppose motion for preliminary injunction); *see also Fryzel v. Mortgage Elec. Registration Sys., Inc.*, 719 F.3d 40, 43–44 (1st Cir. 2013) (district court's "stay" order was in fact an injunction, which was improper because no formal notice was given).
>
> [3] Preparing Documents Supporting Motion for Preliminary Injunction
> Motions for preliminary injunction should be filed with affidavits that support the need for injunctive relief. In addition, motions for preliminary injunction should be filed with documents supporting the need for injunctive relief. Such documents may include:
>
> 1. Discovery documents;
>
> 2. Documentary exhibits attached to declarations;
>
> 3. Charts summarizing exhibits;
>
> 4. Deposition testimony; and
>
> 5. Transcripts of prior hearings.
>
> A party should also include a memorandum of law and a draft order if required by local rule. See § 5.10 below. The motion, evidentiary support, and memorandum of law should address each factor that is required to obtain injunctive relief. *See* § 5.06[1] *above*.

1 Moore's AnswerGuide: Fed Civil Motion Practice § 5.06.

Special Status Conference

The court not seeing a motion for temporary restraining order, notice of hearing on motion for temporary restraining order or request for preliminary injunction, no declarations or points and authorities having been filed, and it not clear that such is being presented to the court, a Special Status Conference is proper to ensure that Plaintiff-Debtor, in *pro se*, appreciates how such requests must be prosecution and the court understand that they are being prosecuted.

In light of a request for a temporary retraining order, the court expedites the Special Status Conference and sets it for 1:30 p.m. on January 10, 2023.

At the January 10, 2023 Status Conference, **xxxxxxx**

8. 22-21985-E-13 JL-1

LINDA NOVOA HUF
Peter Macaluso

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR RELIEF FROM CO-DEBTOR STAY
12-12-22 [29]

YOSEMITE CAPITAL, 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, creditors, parties requesting special notice, and Office of the United States Trustee on December 12, 2022. By the court's calculation, 29 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 xxxxx.

Yosemite Capital, LLC ("Movant") seeks relief from the automatic stay with respect to Linda Louise Novoa Huf's ("Debtor") real property commonly known as 430 Justin Drive, San Francisco, California ("Property"). Movant has provided the Declaration of Tom Malgesini to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor has not made four post-petition payments and eight pre-petition payments in default. Movant's Information Sheet, Dckt. 29.

CHAPTER 13 TRUSTEE'S REPLY

David Cusick ("the Chapter 13 Trustee") filed a Reply on December 20, 2022. Dckt. 35. Trustee requests the Motion be granted.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on December 27, 2022. Dckt. 44. Debtor asserts they have filed a new plan are a motion to sell the Property. Debtor asserts the proposed plan should be "given a chance to confirm" and the motion to sell should be granted prior to the approval of this Motion.

From the court's review of the docket, Debtor has a Motion to Sell the Property scheduled for January 24, 2023. Dckt. 38. Additionally, a Motion to Confirm Debtor's Second Amended Plan is set for February 7, 2023. Motion to Confirm, Dckt. 55. The Plan calls for all liens and encumbrances on the Property to be paid in full on or before April 1, 2023.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $1,113,688.40 (Movant Information Sheet, Dckt. 33), while the value of the Property is determined to be $1,800,000.00, as stated in Schedules A/B and D filed by Debtor.

Although there may be cause to terminate the provisions of 11 U.S.C. § 362(d), Debtor appears to be actively prosecuting this case and making a good faith attempt to sell the Property in order to pay Movant in full.

The court continues the matter to **xxxx xx, 2023** allow adequate time for Debtor to sell the Property and confirm a Plan paying Movant in full.

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 Yosemite Capital, LLC ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion for Relief from the Automatic Stay is continued to **xxxxx xx, 2023.**

FINAL RULINGS

9. 22-21007-E-13 RPM-1 | **KELLEN JOHNSON** | **Mo Mokarram** | **MOTION FOR RELIEF FROM AUTOMATIC STAY** | **12-2-22 [22]**

NAVY FEDERAL CREDIT UNION
VS.

Final Ruling: No appearance at the January 10, 2023 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, creditors, parties requesting special notice, and Office of the United States Trustee on December 2, 2022. 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). 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.

Navy Federal Credit Union ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2019 Dodge Journey, VIN ending in 4508 ("Vehicle"). The moving party has provided the Declaration of Ashly Saucier to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Kellen Royal Johnson ("Debtor").

Movant argues Debtor has not made five post-petition payments, with a total of $2,957.88 in post-petition payments past due. Declaration, Dckt. 24.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $31,568.32 (Movant's Information Sheet, Dckt. 26), while the value of the Vehicle is determined to be $26,905.00, as stated in Amended Schedules A/B filed by Debtor. Dckt. 15.

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

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

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

Request for Waiver of Fourteen-Day Stay of Enforcement

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

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

No other or additional relief is granted by the court.

The court shall issue 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 Navy Federal Credit Union ("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 2019 Dodge Journey, VIN ending in 4508 ("Vehicle"), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.

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

No other or additional relief is granted.